

Texas Commission on Environmental Quality

INTEROFFICE MEMORANDUM

To: Commissioners **Date:** August 7, 2009
Thru: LaDonna Castañuela, Chief Clerk
Mark R. Vickery, P.G., Executive Director
From: Richard A. Hyde, P.E., Deputy Director
Office of Permitting and Registration
Docket No.: 2008-1401-RUL
Subject: Commission Approval for Proposed Rulemaking
Chapter 116, Control of Air Pollution by Permits for New Construction or Modification
Relocations and Changes of Location of Portable Facilities
Rule Project No. 2008-031-116-PR

Reasons for the rule package:

House Bill 555, 78th Legislature, Regular Session, 2003, modified the Texas Clean Air Act (TCAA), §382.056(r), to state that the requirements for public notice do not apply to:

- (1) the relocation or change of location of a portable facility to a site where a portable facility has been located at the proposed site at any time during the previous two years; or
- (2) a facility located temporarily in the right-of-way, or contiguous to the right-of-way of a public works project.

In some cases, permit holders have relocated portable facilities to sites for which the public was never provided any notification or opportunity for comment on any facilities at the site.

The Air Permits Division (APD) originally provided guidance for the division, Field Operations Division, and interested applicants regarding the proper procedures for movement of portable facilities in 2000. This guidance was updated in 2001, 2004, and 2006. In the most recent revision, in September 2008, APD staff updated this existing guidance. This rulemaking would modify 30 Texas Administrative Code (30 TAC) Chapter 116 to ensure that the commission's rules are consistent with this guidance, which is currently on the APD's Web pages.

Under what authority are we proposing these changes? The new sections would be proposed under Texas Health and Safety Code, Texas Clean Air Act, §382.002, Policy and Purpose; §382.011, General Powers and Duties; §382.012, State Air Control Plan; §382.017, Rules; §382.051, Permitting Authority of Commission; Rules; and §382.056, Notice of Intent to Obtain Permit or Permit Review; Hearing. The new sections would also be proposed under the commission's general authority in Texas Water Code, §5.102, General Powers; §5.103, Rules; and §5.105, General Policy.

Is this rulemaking required by federal rule or state statute? Which ones? This rulemaking is not required by federal rule or state statute. The purpose of the rulemaking is to modify Chapter 116 to define the Texas Commission on Environmental Quality (TCEQ) public notice requirements for the relocation or change of location of a portable facility.

Are there any legal deadlines by which these rules must be proposed, adopted, or effective?
No.

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What issue(s) or problem(s) are we trying to solve? In some cases in the past, permit holders have relocated portable facilities to sites for which the public was never provided any notification or opportunity for comment. This rulemaking would specify that relocations to sites that have undergone public notice will be approved by the executive director. In addition, the rules would allow TCEQ staff to consistently interpret and enforce the requirements regarding relocation or change of location of a portable facility.

Why is it important that we do this rule package? The rules would clarify TCEQ portable facility public notice requirements for the regulated community, the affected public, and TCEQ staff.

Other important background or historical information. None.

Scope of the rulemaking:

The modifications to Chapter 116 would affect the public notice requirements for the relocation or change of location of a portable facility. The TCAA states that if a portable facility is moving to a site in which a portable facility has been located at any time during the previous two years, it has met public notice requirements. This rulemaking specifies that the executive director would approve a relocation to a site that has undergone public notice. In addition to revising the public notice requirements, staff recommends specifically defining the terms change of location, portable facility, project, related project segments, relocation, right-of-way of a public works project, site, and temporary facility.

Changes required by federal rule: N/A.

Changes required by state statute: N/A.

Staff recommendations that are not expressly required by federal rule or state statute: The rulemaking would ensure that public notice is consistently applied according to the TCAA, §382.056 and 30 TAC Chapter 39, Public Notice. Section 382.056(r) states that the requirements for public notice do not apply to the relocation or change of location of a portable facility to a site where a portable facility has been located at the proposed site at any time during the previous two years. This rulemaking would specify the requirements for relocations and changes of location of portable facilities. The rulemaking would also define "portable" and allow a facility to relocate, with approval from the executive director, to a site that has undergone public notice. The proposed definition is consistent with the TCAA, TCEQ guidance, and past agency practice.

Impact on the regulated community:

Who will be affected? Entities who wish to apply for a relocation or change of location of a portable facility with the TCEQ would be affected.

Does it create a group of affected persons who were not affected previously? How? No new entities would be affected by this rulemaking.

Will there be a fiscal impact? If so, estimate. The commission is not imposing any new costs under this proposed rulemaking that were not required of applicants in the past; it is simply codifying current practices into the TCEQ's rules.

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Impact on the public:

Who will be affected? Citizens who live in an area in which a portable facility is relocated may be affected. The proposed new rules would ensure that these citizens would be notified of relocations and changes of location of portable facilities in their vicinity, as required by the rules.

Does it create a group of affected persons who were not affected previously? How? No new affected persons are created by this rulemaking.

Will there be a fiscal impact? If so, estimate. There will be no fiscal impact for the general public.

Impact on agency programs:

The modifications to Chapter 116 should not result in significant additional workload for TCEQ staff in the Office of Compliance and Enforcement. However, the modifications would allow TCEQ staff to consistently interpret and enforce the requirements within the framework of TCEQ rules, rather than a guidance memo.

Stakeholder meetings:

Have any stakeholder meetings been held? No, because this rulemaking would codify into 30 TAC guidance that is currently in effect and was originally provided to the regulated community in 2000. APD staff received informal stakeholder comment regarding this guidance memo, which was updated in September 2008. The informal stakeholder notification and opportunity for comment was provided both to permit holders and consultants who would potentially be affected by the guidance memo, such as the Associated General Contractors of Texas and the Texas Aggregates and Concrete Association, and to a diverse group of stakeholders, which included TCEQ Field Operations Division staff, the Fort Worth Department of Environmental Management, environmental groups, and the United States Environmental Protection Agency.

APD staff received several comments regarding specific aspects of the guidance memo. The staff made several changes to the guidance memo in response to stakeholder comment. The proposed rules would reflect the requirements of the guidance memo.

With whom? N/A.

What were the general sentiments? N/A.

Were any changes made in response to stakeholder concerns? N/A.

Policy issues:

What policy issues are affected? Currently, the APD's practice regarding the movement of portable facilities is documented in a guidance memo, available on the APD's Web site.

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Are any policies that are not currently based on rule being made into a rule? The movement of portable facilities is currently addressed in a TCEQ guidance memo. This proposed rulemaking would place these requirements into 30 TAC and replace the current guidance memo.

What are the consequences if this rulemaking is not approved to go forward? The agency would continue with its existing practice as outlined in the guidance memo.

Are there alternatives? An alternative would be for TCEQ staff and permit holders to continue to rely solely on the TCAA, §382.056(r), for statutory guidance regarding the relocation or change of location of portable facilities, with assistance from the current APD guidance memo.

Potentially controversial matters:

The rulemaking would ensure that public notice is consistently applied according to the TCAA, §382.056 and 30 TAC Chapter 39. Section 382.056(r) states that the requirements for public notice do not apply to the relocation or change of location of a portable facility to a site where a portable facility has been located at the proposed site at any time during the previous two years. This rulemaking would define "portable" and allow a facility to relocate, with approval from the executive director, to a site that has undergone public notice. The proposed definition is consistent with the TCAA, TCEQ guidance, and past agency practice.

Also, three primary affected industries that use portable permit conditions are concrete batch plants, rock crushing plants, and hot mix asphalt plants. This rulemaking may be of interest to citizens affected by the relocation and change of location of these types of facilities and the accompanying public notice requirements.

Key points in proposed rulemaking schedule:

Anticipated proposal date: August 26, 2009
Anticipated *Texas Register* publication date: September 11, 2009
Public hearing date: October 13, 2009
Public comment period: September 11, 2009 - October 14, 2009
Anticipated adoption date: February 3, 2010

Agency contacts:

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Attachments

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cc: Chief Clerk, 5 copies
Executive Director's Office
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