

The Texas Commission on Environmental Quality (TCEQ or commission) adopts new §116.20 and §116.178.

Sections 116.20 and 116.178 are adopted *with changes* to the proposed text as published in the September 11, 2009 issue of the *Texas Register* (34 TexReg 6281).

The commission will submit these new rules to the United States Environmental Protection Agency (EPA) as revisions to the state implementation plan (SIP).

#### BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The adopted amendments to Chapter 116 revise Subchapter A, Definitions, to add new §116.20, Portable Facilities Definitions, and revise Subchapter B, New Source Review Permits, to add new §116.178, Relocations and Changes of Location of Portable Facilities.

House Bill (HB) 555 of the 78th Legislature, 2003, modified Texas Health and Safety Code (THSC), §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.

The Air Permits Division originally provided guidance regarding the proper procedures for movement of portable facilities in 2000, and updated the guidance in September 2001, May 2004, October 2006, and in September 2008. This rule package incorporates the previously issued guidance into the TCEQ's rules.

THSC, §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. However, without a specific definition of a "portable facility" and specific public notice requirements for a site, it is possible to gain authorization for several portable facilities on a site without the benefit of public participation in the process. This rulemaking defines a "portable facility" and allows it to relocate, with approval from the executive director, to a site that has undergone public notice.

The primary affected types of facilities that use portable permit conditions are concrete batch plants, rock crushing plants, and hot mix asphalt plants. These types of facilities are often of interest to citizens who are affected by the relocation and change of location of these facilities and the accompanying public notice requirements. In some specific cases, permit holders have relocated a portable facility to a site for which the public was never provided any notification or opportunity for comment. In these instances, the permit holder provided the required public notice in a location where there was little expected interest from the public, and therefore, received no objections. Within a very short period of time, the permit holder relocated to an area of much greater public interest; however, because the permit holder had already provided public notice at the prior site, the permit holder was not required to provide public notice in the greater expected public interest area.

Therefore, the commission adopts these modifications to Chapter 116 to place the existing guidance into rules that would define the public notice requirements for movement of portable facilities, to ensure that affected citizens are provided the opportunity to comment on a particular site, when notice is required by

TCEQ rules.

In addition to specifying public notice requirements, the commission defines several terms to clarify concepts and processes relating to the relocations and changes of location of portable facilities. These definitions will assist permit holders in understanding when public notice is required for movement of facilities, what the public notice requirements are, how the commission distinguishes a portable facility from other types of facilities, and the period of time in which a facility can be considered temporary. In addition, the definitions will help to ensure that permit holders understand terms that are related to public works projects, which can be exempted from some of the rule requirements.

The TCEQ is conducting this rulemaking pursuant to its authority found in the Texas Clean Air Act (TCAA) and Texas Water Code (TWC). The purpose of the rulemaking is to ensure that public notice is consistently applied according to THSC, §382.056 and 30 TAC Chapter 39, Public Notice. The definitions are consistent with the TCAA, TCEQ guidance, and past agency practice.

#### SECTION BY SECTION DISCUSSION

The commission adopts new §116.20, Portable Facilities Definitions, which defines terms used in new §116.178 regarding the movement of portable facilities. The terms defined are: change of location, portable facility, project, related project segments, relocation, right-of-way of a public works project, site, and temporary facility. As noted in this preamble, these definitions specifically relate to the movement of portable facilities. In response to comment the commission added a requirement to the definition of portable facility found in §116.20(2) that a facility could not exceed the major source thresholds to be considered portable, which is a change from the proposed text.

The commission adopts new §116.178, Relocations and Changes of Location of Portable Facilities. This new section and new §116.20, replace the guidance documents provided by the Air Permits Division in 2000 and as updated in 2001, 2004, 2006, and 2008.

In response to comment, the commission removed language published in the proposed text for §116.178(b) - (d) that allowed a local air pollution control agency to approve or deny a relocation request; changed references published in the proposed text for §116.178(b)(2) and (c)(11) as Chapter 39, Subchapters H and K to Chapter 39; and added to §116.178(f) a reference to the minor source requirement for best available control technology (BACT).

Subsection (a) includes the requirements that apply to portable facilities. In paragraph (1), the commission specifies that a portable permit must be authorized by the executive director and designated with the appropriate portable permit, portable registration, or portable account number. A portable permit or registration number is typically a five-digit number followed by an "L" and additional digits (e.g., 50000L001). A portable account number begins with a "9" (e.g., 94-1234-X). Any facility that does not have one of these types of identification is not considered a portable facility by the Air Permits Division and THSC, §382.056(r)(1) does not apply.

Paragraph (2) specifies that an applicant shall not use a permit by rule or standard permit authorization as a waiver of public notice. The reason for this provision is that most commission standard permits and permits by rule either do not require public notice or require public notice that is unique to those types of authorizations, rather than meeting the agency's air quality permit public notice requirements, which are

located in Chapter 39. Because the Air Quality Standard Permit for Concrete Batch Plants and the concrete batch plant permits by rule require the same notice as is contained in Chapter 39, permit holders who authorize under either of these two mechanisms have provided the required public notice, and are exempted under paragraph (2). The concrete batch plant permit by rule notice requirements were previously located in 30 TAC §106.5, Public Notice. This section and the underlying permits by rule in 30 TAC §§106.201 - 106.203 were repealed in 2004 due to the creation of the Air Quality Standard Permit for Concrete Batch Plants.

Paragraph (3) states the conditions upon which the executive director will convert a permanent facility permit number to a portable designation, upon request of the permit holder. Specifically, the permit holder must request a change of location as defined in §116.20, and therefore, meet the public notice requirements in Chapter 39. Paragraph (3) also includes the requirement that the permit holder publish notice for any change in an existing permit number, and that the notice include the new permit number and proposed location. This provision will help to ensure that affected citizens are provided notice regarding these facilities so that they will be aware of changes in permit numbers for facilities that may affect them.

Subsection (b) outlines the conditions that would qualify an applicant for relocation. The subsection states that the appropriate regional office may approve the relocation of a facility if the applicant's permit contains current special conditions that define the approval process to move. The applicant must request approval before starting construction and must also operate according to the terms of the permit. The subsection also states that a relocation application cannot include a modification. The reason for this provision is that modifications require a separate application and approval process by the TCEQ Central

Office in Austin, Air Permits Division.

Paragraphs (1) and (2) provide the conditions under which the appropriate regional office will approve the applicant's relocation request. Specifically, either: 1) the portable facility is moving to a site in support of a public works project and is located in or contiguous to the right of way to the public works project; or 2) the portable facility is moving to a site where a portable facility was previously located and went through public notice under TCEQ rules in Chapter 39 at that site.

Subsection (c) contains 11 paragraphs that detail the information that the permit holder must provide to the commission's affected regional office to receive approval for relocation. The subsection states that the permit holder shall submit the written relocation request and obtain written approval before the start of construction and commencement of operations at the new site. The subsection also states that the permit holder is responsible for providing proof of submittal for all relocation requests. Examples of proof of submittal include regional office date stamps on hand-delivered applications, receipts from "return receipt requested" correspondence, or certified mail receipts from the United States Postal Service.

Proof of public notice may come in several forms: a copy of the notice, a copy of the publisher's affidavit, or a New Source Review (NSR) permit issuance letter for a permit. The applicant may use the public files of the TCEQ to obtain proof of public notice; however, the responsibility for obtaining the proof of publication rests with the applicant.

The required information in paragraphs (1) - (11) will allow staff to quickly identify the permit holder, review pertinent information concerning the permit holder's current permit conditions, and confirm that

the permit holder has met agency Chapter 39 public notice requirements. The commission's intent is that all information required in paragraphs (1) - (11) would be fully addressed in the permit holder's submittal, and that a complete submittal would enable the regional office to approve or deny it and notify the permit holder of that decision within 12 business days. Relocation requests may be disapproved based on insufficient information in the application.

The permit holder's request for relocation would be considered approved if the appropriate regional office does not provide approval or denial of a complete submittal within 12 business days; however, the presumed approval does not exempt the applicant from ensuring that public notice was accomplished at the new site as required under Chapter 39.

Subsection (d) states that the appropriate regional office shall deny a permit holder's relocation request if that permit holder cannot meet the conditions of subsection (c). The subsection specifies that, if the permit holder cannot qualify for relocation then the permit holder may apply instead for a change of location. The subsection references the definition in §116.20 for change of location. According to the definitions in §116.20, relocation does not require that public notice be provided under the provisions of Chapter 39; however, a change of location does require Chapter 39 public notice.

Subsection (e) provides that a permit holder shall request a permit alteration, as discussed in §116.116(c)(1)(B), Changes to Facilities, to update relocation instructions and that an applicant may, if desired, submit a relocation application simultaneously with the alteration request. Staff in the TCEQ Central Office in Austin, Air Permits Division, process relocation applications that are combined with alteration requests, and the permit holder shall not assume that approval of these actions will occur within

12 business days, as with relocation requests that are submitted alone.

Paragraphs (1) and (2) specify that, along with the alteration request and relocation application, the permit holder shall include the required form and attachments and a copy of the current permit. The required form and attachments consist of a completed PI-1 Form, the existing permit special conditions and maximum allowable emission rates table, and all associated information, including a detailed plot plan and area map. The executive director does not require a fee for these types of applications. If the executive director approves the request, Air Permits Division staff will notify the permit holder in writing that the permit has been altered, including new special conditions, along with the approval to relocate. Alterations, like relocations, do not require public notice.

Subsection (f) concerns changes of location, and this subsection states that the permit holder must submit the required form and attachments to the TCEQ Central Office in Austin, Air Permits Division, along with an evaluation of BACT as described in §116.111(a)(2)(C) and protection of public health and welfare. A change of location requires public notice, in compliance with Chapter 39, and a permitted facility must meet all state and federal emission requirements. The permit holder shall include a completed PI-1 Form and the applicable documents required by the PI-1. The executive director does not require a fee for these types of applications, unless the permit holder also requests an amendment to the permit along with the change of location. Once the permit holder completes public notice, and the executive director determines that the permit holder has met all state and federal regulations, Air Permits Division staff will send the permit holder an authorization letter and a new permit.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission invited public comment regarding the draft regulatory impact analysis determination during the public comment period. No comments were received on the draft analysis.

The commission reviewed the rules in light of the regulatory analysis requirements of the Texas Government Code, §2001.0225, and determined that the rules do not meet the criteria for a major environmental rule. A "major environmental rule" is a rule that is specifically intended to protect the environment or reduce risks to human health from environmental exposure, and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

The rulemaking is not a major environmental rule because it is procedural in nature. The intent of the rules is to require public notice for a change of location or relocation of a portable facility if public notice has not been accomplished at that site. In addition to clarifying public notice requirements, this rulemaking defines terms to further explain the process of relocating and changing locations of portable facilities. Therefore, the specific intent of the rules is not to protect the environment or reduce risks to human health from environmental exposure.

The new rules do not affect in a material way the economy, a sector of the economy, productivity, jobs, the environment, or the public health and safety of the state or a sector of the state. Under the new rules, public notice will be accomplished when a portable facility is moved to a site at which no notice has been provided. Requiring applicants to comply with the public notice procedural requirements specified by the rules will not have an adverse effect on the economy, the environment, or public health and safety.

Additionally, this rulemaking does not meet the definition of a major environmental rule because it does not meet any of the four applicability requirements listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225, only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. This rulemaking action, which is designed to ensure that public notice requirements are applied consistently, does not exceed an express requirement under state or federal law. There is no contract or delegation agreement that covers the topic that is the subject of this action. Furthermore, the rulemaking is not adopted solely under the general powers of the agency, but is authorized by specific sections of the THSC, Chapter 382 and the TWC, as cited to in the STATUTORY AUTHORITY portion of this preamble, including THSC, §382.051, Permitting Authority of Commission; Rules, and THSC, §382.056, Notice of Intent to Obtain Permit or Permit Review; Hearing.

#### TAKINGS IMPACT ASSESSMENT

The commission evaluated the rulemaking and made an assessment determining that the Texas Government Code, Chapter 2007, Governmental Action Affecting Private Property Rights, is not applicable. Under Texas Government Code, §2007.002(5), "taking" means a governmental action that affects private real property in a manner that requires the governmental entity to compensate the private real property owner as provided by the Fifth and Fourteenth Amendments to the United States Constitution or §17 or §19, Article I, Texas Constitution; or it means a governmental action that affects an

owner's private real property that is the subject of the governmental action in a manner that restricts or limits the owner's right to the property that would otherwise exist in the absence of the governmental action, and is the producing cause of a reduction of at least 25 percent in the market value of the affected private real property.

The intent of the new rules is to require public notice for a change of location or relocation of a portable facility if public notice has not been accomplished at that site. In addition to clarifying public notice requirements, this rulemaking defines terms to further explain the process of relocating and changing locations of portable facilities. Promulgation and enforcement of these rules will constitute neither a statutory nor constitutional taking of private real property. The rules do not restrict or limit a landowner's rights to the property or reduce the market value of the property by 25 percent. Therefore, the new rules do not constitute a taking under Texas Government Code, Chapter 2007.

#### CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission invited public comment regarding the consistency with the coastal management program (CMP) during the public comment period. No comments were received regarding the CMP.

The commission determined that this rulemaking action relates to an action or actions subject to the CMP in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code, §§33.201 *et seq.*), and commission rules in 30 TAC Chapter 281, Subchapter B, Consistency with the Texas Coastal Management Program. As required by 30 TAC §281.45(a)(3) and 31 TAC §505.11(b)(2), Actions and Rules Subject to the Coastal Management Program, commission rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission

reviewed this action for consistency with the CMP goals and policies in accordance with the rules of the Coastal Coordination Council and determined that the action is consistent with the applicable CMP goals and policies.

The CMP goal applicable to this rulemaking action is the goal to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (31 TAC §501.12(1), Goals). The new rules would indirectly benefit the environment because some entities would now be required to provide public notice and meet other permitting requirements in instances in which they have not done so in the past. The new rules allow TCEQ staff to consistently interpret and enforce the requirements regarding relocations or changes of location of a portable facility. Consistently enforced public notice and permitting requirements would help to ensure that portable facilities have fewer adverse impacts to public health and the environment. The CMP policy applicable to this rulemaking action is the policy that commission rules comply with federal regulations in 40 Code of Federal Regulations (CFR), to protect and enhance air quality in the coastal areas (31 TAC §501.32, Policies for Emission of Air Pollutants). Therefore, in accordance with 31 TAC §505.22(e), Consistency Required for New Rules and Rule Amendments Subject to the Coastal Management Program, the commission affirms that this rulemaking action is consistent with CMP goals and policies.

#### EFFECT ON SITES SUBJECT TO THE FEDERAL OPERATING PERMITS PROGRAM

Chapter 116 is an applicable requirement under 30 TAC Chapter 122, Federal Operating Permits Program. Owners or operators subject to the federal operating permit program must, consistent with the revision process in Chapter 122, revise their operating permit to include the new Chapter 116 requirements upon the effective date of the adopted rulemaking.

#### PUBLIC COMMENT

The commission held a public hearing on October 13, 2009. No comments were made at the public hearing. The comment period closed on October 14, 2009. The commission received comments from the Texas Chemical Council (TCC), Travis County's Transportation and Natural Resources Department (TNR), EPA, and Westward Environmental, Inc. (Westward). TCC and EPA recommended changes. TNR supported the rule and Westward opposed the rule. Some of EPA's comments resulted in a new requirement and rule reference within the rule.

#### RESPONSE TO COMMENTS

EPA commented that the rule makes no mention of its relevance to standard permits and should specify that standard permits for temporary facilities, issued under Chapter 116, Subchapter F, are not authorized under new §116.20.

**The commission respectfully disagrees with this comment. The definitions apply only when used in Subchapter B, Division 8, which specifies in §116.178(b)(2) that a portable facility authorized under the concrete batch plant standard permit may be relocated to a facility that has previously gone through public notice as required under Chapter 39. No changes were made in response to this comment.**

EPA suggested including relevant portions of the EPA federal definition of "portable plant."

**The commission respectfully disagrees with this comment. The EPA federal definition of "portable**

**plant" is specific to determining applicability under 40 CFR Part 63, Subpart OOO, which is applicable only to nonmetallic mineral processing plants. The State of Texas definition is specific to determining the applicability of portable plants to relocate and may include facilities that would not be categorized as a nonmetallic mineral processing plant. The state's definition does not negate potential applicability to 40 CFR Part 63, Subpart OOO. No changes were made in response to this comment.**

EPA expressed concern that the definitions of "change of location" and "relocation" in §116.20(1) and (5), and the relocation requirements found in §116.178(c) contain a cross-reference to the public participation provisions for construction or modification of sources under Chapter 39, Subchapters H and K, because EPA has not approved either one into the Texas SIP.

**The commission respectfully disagrees with this comment. The proposed rules included a reference to Chapter 39, Subchapters H and K, concerning public participation, because the public participation rules are consolidated, rather than in each part of the commission's NSR permitting rules. The notice requirements must have been met at the site for portable facilities that are relocating to that same site. For facilities seeking a change of location, the notice requirements are the same as for new facilities. Therefore, the commission has determined that it is appropriate to reference the notice requirements in Chapter 39 rather than specify detailed notice requirements in these rules. On December 9, 2009, the commission proposed changes to the public participation rules in Chapter 39 for certain air quality permit actions. Those changes are in response to the EPA's notice in the *Federal Register* on November 26, 2008, and are proposed to be submitted to EPA as a revision to the SIP. No changes were made in response to this comment.**

EPA suggested that the definitions of "project" and "right-of-way of a public works project" in §116.20(3) and (6) be worded consistently with federal definitions. Specifically, EPA suggested that even though the rule is intended to apply to minor sources, it would be helpful if the definitions could take the similarities and differences with federal definitions into consideration.

**The commission respectfully disagrees with this comment. As EPA indicated, the rules in Subchapter B, Division 8 apply to minor sources. As part of the application review process, the commission has always determined whether federal NSR, as well as state and other federal rules including relevant definitions, apply. Actions regarding portable facilities and changes of location do not ignore or circumvent federal NSR requirements. When conducting federal NSR permitting actions, federal definitions are complied with. The commission is aware that there are similarities and differences among some specific state and federal air permitting definitions and will work with EPA to minimize confusion and ensure proper use and applicability of those definitions. No changes were made in response to this comment.**

EPA asked whether the proposed public notice exemption in §116.178(b)(2) would apply if the area is redesignated to nonattainment, if the commission has information which indicates that the air quality has deteriorated since a facility last operated at a site, or if it demonstrates how the exclusion meets the requirements of 40 CFR §51.161. EPA suggested a provision be placed in the rules that would indicate that the permitting authority may either reopen or disapprove the application for relocation if it determines that the relocations do not comply with 40 CFR §51.160(a) after the deadline, and that the

rules clarify that any construction or operation that begins after the deadline is at the risk of the owner or operator of the facility.

**The commission agrees with this comment. In response to this and other comments, the commission is adding a requirement to the definition of "Portable facility" that, in order to be considered "portable," the facility should not exceed the major stationary source thresholds stated in 40 CFR §51.166(b)(1). Therefore, the notice requirements under the rules for relocating a portable facility would not be affected by the attainment status of the area or by whether there has been a deterioration in air quality.**

EPA cited §116.114(a)(1) as giving the agency 30 days to determine administrative completeness, and suggested that the regulations clarify that the 12-day default period begins at the determination of administrative completeness. EPA also suggested adding a provision for extending the 12-day deadline if the permit reviewer needs additional time in order to do a complete review and indicated that if TCEQ receives any adverse comments concerning the facility during the public comment period, then any work on the project must stop until TCEQ properly reviews and responds to all of the comments. EPA also suggested that the rule state that any construction or operation conducted by the owner or operator of the facility prior to all issues being addressed is the sole risk of that owner or operator.

**The commission respectfully disagrees with this comment. A request to relocate a portable facility, by definition, contemplates that the portable facility has *an existing permit* with special conditions allowing it to relocate. Therefore, the request to relocate is not a new permit and the owner or operator need only to obtain the approval of the regional office to relocate. The regional office**

**then has 12 days to approve or disapprove the relocation request; if the regional office does not act within 12 days, the request is considered approved. No changes were made in response to this comment.**

EPA expressed concern that provisions §116.178(c) and (d) allow a local air pollution control agency to approve or deny a relocation request and requested that TCEQ demonstrate that the delegation meets the requirements of 40 CFR §51.232. EPA requested that Texas identify which local air pollution control agencies have been delegated the authority to make such decisions and to provide the legal authority for this delegation.

**The commission agrees with this comment. A revision to the provisions in §116.178(c) and (d) would change the language so that a local air pollution control agency would not be put in a position to approve or deny a relocation request.**

EPA requested clarification as to how TCEQ defines BACT for purposes of §116.178(f), and stated that projects subject to prevention of significant deterioration (PSD) requirements should reference the federal BACT definition while minor sources could reference the minor source BACT under 30 TAC §116.111(a)(2)(C). EPA also expressed concern regarding public notice issues for major facilities that have previously received a PSD permit that could use this rule.

**The commission agrees with this comment. The sources that will use these portable rules are expected to be minor sources, but a requirement has been added to §116.178 to ensure that PSD-permitted facilities will meet the PSD requirements, and therefore, the federal definition of BACT**

**will not be an issue for these rules. The commission has proposed a revision to its PSD permitting rule to replace the missing reference to the definition of BACT. The commission has added a reference to the minor source requirement for BACT to §116.178(f).**

EPA commented that §116.178 must clearly provide that the relocation of a portable source with an existing PSD permit must comply with the requirements of 40 CFR §51.166(i)(1)(iii). This federal rule provides that certain permit requirements do not apply to portable stationary sources which have previously received a PSD permit if four criteria are met.

**In response to this and other comments, the commission is adding a requirement to the definition of "Portable facility" that, in order to be considered "portable", the facility should not exceed the major stationary source thresholds stated in 40 CFR §51.166(b)(1). Therefore, the requirements under 40 CFR §51.166(i)(1)(iii) would not apply.**

The TCC expressed concern that including the definition of "Temporary facility" could imply that portable temporary engines would be included in portable facility permitting.

**The commission respectfully disagrees with this comment. Portable engines at a site for less than 12 consecutive months are not classified as stationary sources by EPA. The definitions of "Temporary facility" and "Portable facility" also incorporate the definition for "Facility" that describes stationary sources. Therefore, since portable engines located at a site for less than 12 consecutive months are not defined as a "facility" or as a stationary source under EPA rules, a "temporary facility" or "portable facility" under state proposed rules would not affect engines on**

**site for less than 12 consecutive months. No changes were made in response to this comment.**

TCC commented that the TCEQ should delete the term "temporary facility" from proposed §116.20 as it did not appear elsewhere in the document and is, therefore, unnecessary.

**The commission respectfully disagrees with this comment. The term "temporary facility" may not be prevalent in Chapter 116, but has been used frequently since 1988 within TCEQ and with external customers. The agency added this definition to provide clarity. No changes were made in response to this comment.**

TCC suggested that the definition of "Temporary facility" should be changed to read, "a facility that will occupy a designated site for not more than 180 consecutive days and that will supply material (such as concrete, hot mix asphalt, crushed rock, etc.) for a single project (single contract or same contractor for related project segments), but no other unrelated projects."

**The commission respectfully disagrees with this comment. Making the suggested change would cause unacceptable consequences, such as disallowing construction projects lasting longer than 180 days from being completed. No changes were made in response to this comment.**

TNR expressed its support to the proposed amendments to Chapter 116.

**The commission appreciates the support.**

Westward commented that the intent of HB 555 does not match the intent of the proposed rulemaking regarding public notice. Westward stated that HB 555 exempted portable facilities from public notice if they relocated to a site where a portable facility had been located within the past two years, and the proposed rulemaking exempts portable facilities from public notice that relocated to a site where public notice has been given. Westward further noted that the proposed rulemaking seeks to codify existing staff policies that many in industry do not believe support the language of HB 555.

**The commission respectfully disagrees with this comment. HB 555, as it was written, does not require public notice for portable facilities. However, the proposed rulemaking formally incorporates the executive director's long-standing interpretation of the notice required for relocation of a portable facility and protection of public health. No changes were made in response to this comment.**

Westward noted that the Texas Air Control Board authorized many relocations without public notice. Westward also commented that the effect of facilities going through notice to construct in a location where not many public comments are expected and then relocating the facility to an area of greater public interest is the result of poor TCEQ rulemaking and guidance.

**The commission respectfully disagrees with this comment. The proposed rulemaking specifies, and will provide consistency with, the public notice requirements for portable facilities. Any future implementation of this rule would include updates to agency guidance and instructions as well. No changes were made in response to this comment.**

Westward noted that a statement TCEQ made regarding facilities that first go through notice to construct in a location where not many public comments are expected and then relocate the facility to an area of greater public interest inferred that environmental impacts are somehow different based on "the public's interest."

**The commission agrees with this comment. The Air Permits Division has corrected statements in the current related summary documents that give the impression of an automatic connection between public interest and environmental impacts.**

Westward stated that industry shuns the contested case hearing process because it does little for the environment, the public, or the applicant and leaves all participating parties relieved when it is over. Westward further stated that a movement away from contested case hearings and toward more notice and comment would increase public participation, assist in dialogue with EPA, and make better use of state resources.

**The commission appreciates the comments; however these comments are outside the scope of this rulemaking.**

Westward commented that the estimated costs associated with notice publication and BACT in the public benefits and costs portion of the summary document was underestimated.

**The commission does not agree with this comment. Although there are many factors that can cause newspaper publications and BACT costs to be greater than the amounts given in the summary, the**

**costs included in the summary document are intended to be an average amount for a range of situations found in applicable industries. No changes were made in response to this comment.**

## **SUBCHAPTER A: DEFINITIONS**

### **§116.20**

#### **STATUTORY AUTHORITY**

The new section is adopted under the authority of the following: Texas Water Code (TWC), §5.102, concerning General Powers; §5.103, concerning Rules; and §5.105, concerning General Policy, that authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC; and Texas Health and Safety Code (THSC), §382.017, concerning Rules, that authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act; THSC, §382.002, concerning Policy and Purpose, that establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, concerning General Powers and Duties, that authorizes the commission to control the quality of the state's air; THSC, §382.012, concerning State Air Control Plan, that authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; THSC, §382.051, concerning Permitting Authority of Commission; Rules, that authorizes the commission to issue a permit for numerous similar sources; and THSC, §382.056, concerning Notice of Intent to Obtain Permit or Permit Review; Hearing, that authorizes the commission to require public notice of certain permit applications and procedures for requesting hearings and responding to comments.

The new section implements THSC, §§382.002, 382.011, 382.012, 382.017, 382.051, and 382.056.

**§116.20. Portable Facilities Definitions.**

Unless specifically defined in the Texas Clean Air Act or in the rules of the commission, the terms used by the commission have the meanings commonly ascribed to them in the field of air pollution control. In addition to the terms that are defined by the Texas Clean Air Act, and in §101.1 of this title (relating to Definitions), the following words and terms, when used in Subchapter B, Division 8 of this chapter (relating to Portable Facilities), have the following meanings, unless the context clearly indicates otherwise.

(1) **Change of location**--The process of gaining approval and moving a permitted facility and associated sources to a new location in which public notice is required, in accordance with the requirements of Chapter 39 of this title (relating to Public Notice).

(2) **Portable facility**--A facility authorized by a permit containing special conditions that allow the facility to relocate. Portable facilities are authorized by the Texas Commission on Environmental Quality, Air Permits Division. To be a portable facility, the facility shall not exceed the major source thresholds stated in 40 Code of Federal Regulations (CFR) §51.166(b)(1) and the permit for that facility shall be is designated with a portable permit number, portable registration number, or portable account number. The portable facility cannot be located at an account that is subject to the requirements for Prevention of Significant Deterioration and Nonattainment permits under Chapter 116, Subchapter B, Divisions 5 and 6 of this title (relating to Nonattainment Review Permits and Prevention of Significant Deterioration Review). These portable designations are used to facilitate the relocation of these types of

facilities under specific criteria, and are not authorized under Chapter 106 of this title (relating to Permits by Rule).

(3) **Project**--A public works contract or series of contracts for segments of work within close proximity to each other.

(4) **Related project segments**--For facilities on a Texas Department of Transportation right-of-way, related project segments are one contract with multiple project locations or one contractor with multiple contracts in which separate project limits are in close proximity to each other. A facility that is sited on the right-of-way is usually within project limits. However, a facility located at an intersection or wider right-of-way outside project limits is acceptable if it can be easily associated with the project.

(5) **Relocation**--The process of gaining approval and moving a facility and associated sources to an approved site in which no public notice is required under Chapter 39 of this title (relating to Public Notice).

(6) **Right-of-way of a public works project**--Any public works project that is associated with a right-of-way. Examples of right-of-way public works projects are public highways and roads, water and sewer pipelines, electrical transmission lines, and other similar works. A facility must be in or contiguous to the right-of-way of the public works project to be exempt from the public notice requirements listed in Texas Health and Safety Code, §382.056.

(7) **Site**--As defined in §122.10 of this title (relating to General Definitions).

(8) **Temporary facility**--A facility that will occupy a designated site for not more than 180 consecutive days or that will supply material (such as concrete, hot mix asphalt, crushed rock, etc.) for a single project (single contract or same contractor for related project segments), but not other unrelated projects.

**SUBCHAPTER B: NEW SOURCE REVIEW PERMITS**

**DIVISION 8: PORTABLE FACILITIES**

**§116.178**

**STATUTORY AUTHORITY**

The new section is adopted under the authority of the following: Texas Water Code (TWC), §5.102, concerning General Powers; §5.103, concerning Rules; and §5.105, concerning General Policy, that authorize the commission to adopt rules necessary to carry out its powers and duties under the TWC; and Texas Health and Safety Code (THSC), §382.017, concerning Rules, that authorizes the commission to adopt rules consistent with the policy and purposes of the Texas Clean Air Act; THSC, §382.002, concerning Policy and Purpose, that establishes the commission's purpose to safeguard the state's air resources, consistent with the protection of public health, general welfare, and physical property; THSC, §382.011, concerning General Powers and Duties, that authorizes the commission to control the quality of the state's air; THSC, §382.012, concerning State Air Control Plan, that authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; THSC, §382.051, concerning Permitting Authority of Commission; Rules, that authorizes the commission to issue a permit for numerous similar sources; and THSC, §382.056, concerning Notice of Intent to Obtain Permit or Permit Review; Hearing, that authorizes the commission to require public notice of certain permit applications and procedures for requesting hearings and responding to comments.

The new section implements THSC, §§382.002, 382.011, 382.012, 382.017, 382.051, and 382.056.

**§116.178. Relocations and Changes of Location of Portable Facilities.**

(a) Portable facility requirements. The following requirements apply to portable facilities.

(1) A portable permit must be authorized by the executive director and designated with the appropriate portable permit, portable registration, or portable account number.

(2) An applicant shall not use a permit by rule or standard permit authorization as a waiver of public notice (public notice requirements as specified in subsection (b)(2) of this section) regardless of the registration number or account code assigned by the executive director. A facility authorized by the Air Quality Standard Permit for Concrete Batch Plants or concrete batch plant permits by rule for which an applicant provided public notice is an exception.

(3) The executive director will not convert a permanent facility permit number to a portable designation unless the owner or operator is requesting a change of location as defined in §116.20 of this title (relating to Portable Facilities Definitions) for the facility. The permit holder must publish notice for any change in an existing permit number. The notice must identify the new permit number and the proposed location.

(b) Relocation qualifications. The appropriate regional office may approve the relocation of a portable facility if the applicant's permit contains current special conditions defining the approval process to move. A relocation application cannot include a modification. Approval for relocation is based on one of the following conditions:

(1) a permitted portable facility and associated equipment are moving to a site for support of a public works project in which the proposed site is located in or contiguous to the right-of-way of the public works project; or

(2) a portable facility is moving to a site in which a portable facility has been located at the site at any time during the previous two years and the site was subject to public notice as required under Chapter 39 of this title (relating to Public Notice), the Air Quality Standard Permit for Concrete Batch Plants, or the concrete batch plant permits by rule.

(c) Relocation request requirements. The permit holder shall submit a complete written request to the appropriate commission regional office for the new location and obtain written approval before the start of construction and commencement of operations at the new site. The permit holder is responsible for providing proof of submittal for all relocation requests. Construction may begin after receipt of approval from the appropriate commission regional office or 12 business days after the date of postmark or the date of personal delivery of the request, whichever occurs first, unless disapproval is sent within the 12 business days. The permit holder's request is considered approved if the appropriate regional office does not provide approval or denial of a complete submittal within 12 business days; however, the presumed approval does not exempt the applicant from ensuring that public notice was accomplished at the new site as required under Chapter 39 of this title. The relocation request shall contain all of the following information:

(1) the company name, address, company contact, and telephone number;

(2) a copy of the existing permit conditions and the maximum allowable emission rates table that is in effect for the permitted facility;

(3) the regulated entity number (RN), customer reference number (CN), applicable permit or registration numbers, and, if available, the Texas Commission on Environmental Quality account number;

(4) the location from which the facility is moving (current location);

(5) a location description of the proposed site (city, county, and exact physical location description);

(6) a scaled plot plan that identifies the location of all equipment and stockpiles, and also indicates that the required distances to the property lines can be met;

(7) a scaled area map that identifies the distance and direction to the closest off-property receptor (if required) and clearly indicates how the proposed site is contiguous or adjacent to the right-of-way of a public works project (if required);

(8) the proposed date for start of construction and expected date for start of operation;

(9) the expected time period at the proposed site;

(10) the permit or registration number of the portable facility that was located at the proposed site any time during the last two years, and the date the facility was last located there. This information is not necessary if the relocation request is for a public works project that is contiguous or adjacent to the right-of-way of a public works project; and

(11) proof that the proposed site had accomplished public notice, as required by Chapter 39 of this title. This proof is not necessary if the relocation request is for a public works project that is contiguous or adjacent to the right-of-way of a public works project.

(d) Denial of relocation. If the permit holder cannot qualify for a relocation, as described in subsection (c) of this section, the appropriate regional office shall deny the relocation request and the applicant may request a change of location, as defined in §116.20 of this title.

(e) Requesting changes to relocation instructions. A permit holder shall request from the executive director a permit alteration, as defined in §116.116(c)(1)(B) of this title (relating to Changes to Facilities), to update relocation instructions. The permit holder may apply for a relocation simultaneously with the alteration. The permit holder shall obtain written approval before the start of construction and commencement of operations at the new site and shall not assume approval within 12 businesses days. The permit holder shall submit the following information for any alteration request and relocation application to the TCEQ Central Office in Austin, Air Permits Division:

(1) the required form and attachments, including a detailed plot plan and area map; and

(2) a copy of the current permit.

(f) Requesting changes of location. For a change of location application, the permit holder shall submit the required form and attachments to the TCEQ Central Office in Austin, Air Permits Division.

All applications must include an evaluation of best available control technology and protection of public health and welfare as described in §116.111(a)(2)(C) of this title (relating to General Application).