

The EPA Administrator, Gina McCarthy, signed the following notice on 10/05/2016, and EPA is submitting it for publication in the Federal Register (FR). While we have taken steps to ensure the accuracy of this Internet version of the rule, it is not the official version of the rule for purposes of compliance. Please refer to the official version in a forthcoming FR publication, which will appear on the Government Printing Office's FDSys website (<http://gpo.gov/fdsys/search/home.action>) and on Regulations.gov (<http://www.regulations.gov>) in Docket No. EPA-HQOAR-2015-0090. Once the official version of this document is published in the FR, this version will be removed from the Internet and replaced with a link to the official version.

6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 51, 52, 55, 70, 71 and 124

[EPA-HQ-OAR-2015-0090; FRL-]

RIN 2060-AS59

Revisions to Public Notice Provisions in Clean Air Act Permitting Programs

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The U.S. Environmental Protection Agency (EPA) is revising the public notice rule provisions for the New Source Review (NSR), title V and Outer Continental Shelf (OCS) permit programs of the Clean Air Act (CAA or Act) and corresponding onshore area (COA) determinations for implementation of the OCS air quality regulations. This final rule removes the mandatory requirement to provide public notice of a draft air permit (as well as certain other program actions) through publication in a newspaper. Instead, this final rule requires electronic notice (e-notice) for EPA actions (and actions by permitting authorities implementing the federal permitting rules) and allows for e-notice as an option for actions by permitting authorities implementing EPA-approved programs. When e-notice is provided, the final rule requires, at a minimum, electronic access (e-access) to the draft permit. However, this final rule does not preclude a permitting authority from supplementing e-notice with newspaper notice and/or additional means of notification to the public. The EPA anticipates that e-notice, which is already being practiced by many permitting authorities, will enable permitting authorities to

communicate permitting and other affected actions to the public more quickly and efficiently and will provide cost savings over newspaper publication. The EPA further anticipates that e-access will expand access to permit-related documents.

DATES: The effective date of this final rule is **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA-HQ-OAR-2015-0090. All documents in the docket are listed on the <http://www.regulations.gov> Web site. Although listed in the index, some information is not publicly available, e.g., Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available electronically through <http://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: For further general information on this rulemaking, contact Mr. Peter Keller, U.S. EPA, Office of Air Quality Planning and Standards, Air Quality Policy Division (C504-03), Research Triangle Park, NC 27711, telephone (919) 541-2065, email keller.peter@epa.gov, or Mr. Ben Garwood, U.S. EPA, Office of Air Quality Planning and Standards, Air Quality Policy Division (C504-03), Research Triangle Park, NC 27711, telephone (919) 541-1358, email garwood.ben@epa.gov; or Ms. Grecia Castro, U.S. EPA, Office of Air Quality Planning and Standards, Air Quality Policy Division (C504-03), Research Triangle Park, NC 27711, telephone (919) 541-1351, email at castro.grecia@epa.gov.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this action apply to me?

Entities potentially affected by this final rule include permitting authorities responsible for the permitting of stationary and OCS sources of air pollution or for determining COA designation for implementation of the OCS air regulations. This includes the EPA Regions and both EPA-delegated and EPA-approved air permitting programs that are operated by state, local or tribal agencies. Entities also potentially affected by this final rule include owners and operators of stationary and OCS sources that are subject to air pollution permitting under the CAA, as well as members of the general public who would have an interest in knowing about permitting actions, public hearings and other agency actions.

B. Where can I obtain a copy of this document and other related information?

In addition to being available in the docket, an electronic copy of this document will be posted at: <http://www3.epa.gov/nsr/actions.html> and <http://www3.epa.gov/airquality/permits/actions.html>.

Upon its publication in the *Federal Register*, only the published version may be considered the final official version of the rule and will govern in the case of any discrepancies between the *Federal Register* published version and any other version.

C. How is this document organized?

The information presented in this document is organized as follows:

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II. Background for Final Rulemaking

The CAA requires stationary sources of air pollution to obtain permits and authorizes the EPA to administer and oversee the permitting of such sources. To implement the CAA, the EPA promulgated permitting regulations for construction of sources pursuant to the NSR program under title I of the CAA, for operation of major and certain other sources of air pollutants under title V of the CAA and for sources located on the OCS under CAA section 328. These regulations are contained in 40 Code of Federal Regulations (CFR) parts 51, 52, 55, 70, 71 and 124, and cover the requirements for federal permit actions (*i.e.*, when the EPA or a delegated air agency is the permitting authority¹) and the minimum requirements for EPA approval of state or

¹ In lieu of “permitting authority,” in this preamble and rule, we sometimes use the terms “permitting agency” and “reviewing authority.” These terms generally denote all forms of air permitting authorities, including EPA Regions, EPA-delegated air programs, and air agencies that are operated by state, local and tribal governments and permitting authorities that implement their own rules under an EPA-approved implementation plan. Furthermore, the rules for the federal permit programs sometimes use the terms “Administrator” and “Director” in referring to the permitting authority.

tribal implementation plans (SIPs)² and title V permitting programs.³ These rules contain, among other things, requirements for public notice and availability of supporting information to allow for informed public participation in permit actions. These regulatory requirements for public participation in permitting and other actions are the subject of this final rule. The final rule revisions apply to the following: (1) major source⁴ air permits and permits for certain minor sources subject to title V issued by the EPA or by state, local, or tribal air agencies exercising federal authority delegated by the EPA; (2) the requirements for obtaining EPA-approval of state, local, or tribal air permitting programs; and (3) OCS permits and COA determinations for implementation of the OCS air quality regulations.

While the CAA requires permitting authorities to offer the opportunity for public participation in the processing of air permits and other actions, it does not specify the best or preferred method for providing notice to the public. *See, e.g.*, CAA sections 165(a)(2) and 502(b)(6). In the late 1970s and early 1980s, when the EPA first developed air permitting regulations to provide public notice for the major NSR program, newspaper advertisement was the most commonly accepted method for providing notice to the public of permit actions under those programs and other agency actions. Over the years, however, the availability of and access

² SIPs, as used in this preamble, includes state and tribal implementation plans (SIPs and TIPs).

³ NSR includes the minor NSR, Prevention of Significant Deterioration (PSD) and Nonattainment NSR (NNSR) permitting programs. Requirements for the NSR programs are contained in 40 CFR part 51 for approved state/tribal permitting programs and in 40 CFR part 52 for federal PSD permit programs. 40 CFR part 52 references part 124 for additional requirements. Requirements for approved title V operating permit programs are contained in 40 CFR part 70 and for federal operating permit programs in 40 CFR part 71. Requirements for the permitting of OCS sources and COA determinations are contained in 40 CFR part 55.

⁴ The term “major source” in the title V program rules includes any “major stationary source” under the NSR program rules. *See, e.g.*, 40 CFR 52.21(b)(1)(i) and 40 CFR 71.2. In this preamble, we use the terms “major source” and “major stationary source” interchangeably.

to the Internet and other forms of electronic media have increased significantly in the United States. One effect of this development is that circulation of newspapers and other print media has declined, making printed newspaper notice less effective in providing widespread public notice of permit actions in many cases. Many permitting authorities electronically post permit notices on their agency Web sites. For example, many state title V programs regularly provide electronic postings to assure adequate public notice. 40 CFR 70.7(h)(1). Such electronic notice mechanisms provide an effective, convenient and cost-efficient way to communicate permitting-related information to the majority of the public.

Given these developments, the EPA has recognized that newspaper notice is no longer the only, or in many cases the most effective, method of communicating permitting actions to the public and has issued rules allowing alternate methods of communication. For example, in 2011, the EPA issued the Tribal NSR rules that contained, among other things, requirements for noticing of permits in Indian country that provided for options other than newspaper and print media. 76 FR 38748 (July 1, 2011). The July 2011 Tribal NSR rule provides options such as Web posting and email lists among the methods that the permitting authority may use to provide adequate public notice of such permits. *Id.* at 38764.

Based on the foregoing and the EPA's objective to modernize, enhance and improve consistency in the public noticing provisions applicable to air permit actions, in December 2015 the EPA issued a proposed rule. 80 FR 81234 (Dec. 29, 2015). In that proposed rule, the EPA proposed to remove the mandatory requirement that draft permits for sources subject to the major NSR, title V or OCS programs and certain other actions be noticed in a newspaper of general circulation and instead allow (or in some cases require) the use of Internet postings to provide

notice (*i.e.*, e-notice). We also proposed these same revisions for COA designations in the OCS program, permit rescissions under the federal PSD program and for giving notice of EPA part 71 program effectiveness or delegation. In the case of permits issued by the EPA or other permitting authorities implementing 40 CFR parts 52, 55 or 71, we proposed to require that the permitting authority provide e-notice for all draft permits.⁵ For permits issued by other permitting authorities—specifically, agencies that implement an approved program meeting the requirements of 40 CFR parts 51 or 70—we proposed that those permitting authorities would have the option to adopt either e-notice or retain the newspaper noticing method. We proposed that these permitting authorities must, however, select either e-notice or newspaper notice as their consistent noticing method. In addition, for all their draft permits, they must provide notice to the public through the noticing method selected and must indicate the consistent noticing method selected in their permitting rules. We also proposed to require that, when a permitting authority adopts e-notice, it also must provide e-access. In the context of this rule, e-access means that the permitting authority must make the draft permit available electronically (*i.e.*, on the agency's public Web site or on a public Web site identified by the permitting authority) for the duration of the public comment period. This final rulemaking notice does not repeat all of the discussion from the proposed rule, but refers interested readers to the preamble of the proposed rule for additional background.

⁵ We did not propose nor are we finalizing any changes to the public notice requirements for OCS permits issued by delegated permitting authorities pursuant to 40 CFR 55.11.

III. Summary of the Final Rule Requirements

This section provides a brief summary of the requirements of the final rule. Further discussion of these requirements, including implementation and summaries of our responses to significant comments received on the proposed rule, are provided in subsequent sections.

In this final action, the EPA is revising the public notice provisions for the NSR, title V and OCS programs to remove the mandatory requirement to provide public notice of a draft permit (and certain other program actions) through publication in a newspaper of general circulation. This final rule requires the use of e-notice to provide public notice of draft permits for federal permits while allowing e-notice as an option for permits issued under EPA-approved programs. More specifically, to implement the shift from mandatory newspaper noticing to e-notice, this final rule includes revisions to the public notice provisions in 40 CFR 51.161 (state/tribal plan requirements); 40 CFR 51.165 (state/local/tribal NNSR permits); 40 CFR section 51.166 (state/local/tribal PSD permits); 40 CFR section 52.21 (EPA/delegated agency-issued PSD permits); 40 CFR part 70 (state/local/tribal title V operating permits); 40 CFR part 71 (EPA/delegated agency-issued title V operating permits); 40 CFR part 55 (EPA-issued OCS permits and COA designations); and the portions of 40 CFR part 124 applicable to EPA-issued PSD and OCS permits. This final action also requires that a permitting authority provide e-access when it adopts the e-notice method to provide public notice of a draft permit.

A. *E-Notice Provisions*

In order to satisfy the provision for e-notice of a draft permit, the permitting authority shall electronically post, for the duration of the public comment period, the following information on a publicly accessible Web site identified by the permitting authority: (1) Notice

of availability of the draft permit for public comment; (2) Information on how to access the permit record (either electronically and/or physically); (3) Information on how to request and/or attend a public hearing on the draft permit; and (4) All other information currently required to be included in the public notice under the existing regulations. In addition, where already required by the current rules, the permitting authority shall maintain a mailing list of persons who request to be notified of the permitting activity and shall distribute (*e.g.*, by email, postal service) the notice to those persons. While this final rule expressly requires that the draft permit notice direct interested parties to information on how to request and/or attend a public hearing and how to access additional information relevant to the draft permit, it does not alter any existing requirements regarding the content of the public notice. Requirements regarding additional information in the notice vary across the different sections of the permitting rules and may further vary among different individual permitting authorities. This final rule does not amend or affect regulatory requirements pertaining to the provision of notice of final permit decisions. *See e.g.*, 40 CFR 124.15(a).⁶

⁶ The Environmental Appeals Board (EAB) has held that the notification requirements of 40 CFR 124.15(a) (and similar provisions) cannot be fulfilled by posting the final decision regarding a draft permit on a Web site. *See In Re Hillman Power Co., LLC*, 10 E.A.D. 673, 680 n. 4 (EAB 2002). Where there is an identified participant in the proceeding who has commented, the EPA reads section 124.15(a) to require that the permitting authority mail a copy of the final permit decision to the participant or provide some other form of personal notification. This may include email notification. For additional detail on the EAB's reasoning in the *Hillman Power* case, *see* Order Directing Service of PSD Permit Decision on Parties That Filed Written Comments on Draft PSD Permit, Denying Motions to Dismiss, and Directing Briefing on the Merits (May 24, 2002), available at: [https://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/0CCE572C43D92F218525706C0067DACA/\\$File/hillman.pdf](https://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/0CCE572C43D92F218525706C0067DACA/$File/hillman.pdf). While the EAB expressed concern in this order regarding the possibility that some parties may not see an Internet post immediately, this was in the context of providing identified persons with a right to appeal a permit decision. Further, the Board was contrasting the

B. E-Access Provision

In order to satisfy the requirement for e-access when e-notice is provided, the permitting authority shall electronically post, for the duration of the public comment period, the draft permit on a publicly accessible Web site identified by the permitting authority, which may include the permitting authority's public Web site, an online state permits register, or a publicly-available electronic document management Web site that allows for downloading documents. It is important to note that, while e-access in this final rule pertains to the availability of and access to the draft permit during the public comment period, nothing in this rule alters the requirement for a permitting authority to maintain a record of the permit action and to make it available to the public. Furthermore, nothing in this final rule affects a permitting authority's record retention policies and requirements. A permitting authority that is satisfying the rule requirements for e-access by posting the draft permit on a Web site must also provide the public with reasonable access to the other materials that support the permit decision (*e.g.*, the permit application, statement of basis, fact sheet, preliminary determination, final determination, and response to comments) as required by existing regulations. This final rule clarifies that access to the other materials comprising the permit record may be provided either electronically or at a physical location (such as a public library), or a combination of both methods, given that some documents (such as air quality modeling data) may be too large to post online on a Web site but may be made available as part of the permit record either as hardcopy or on a data storage device. The

merits of Internet posting and direct personal notification, rather than comparing the merits of Internet and newspaper notice. As discussed elsewhere in this rule, posting notices of draft permits on the Internet offers some benefits that are not provided from a one-time publication in a print newspaper. In addition, this rule retains and enhances the option for interested persons to be placed on a list to receive personal notification of draft permits.

electronic posting of draft and final permits, including information supporting the permit decisions (*e.g.*, permit applications), is subject to the applicable policies on CBI and requirements of the permitting authority. Consequently, some permit-related documents may be redacted or otherwise withheld from viewing on a Web site or public library if it is determined that the document contains CBI.

C. EPA and Delegated Permitting Authorities Subject to Mandatory E-Notice and E-Access Requirements

For permits that are issued by the EPA or by a permitting authority that implements the EPA's federal permitting rules (*i.e.*, 40 CFR parts 52, 55, 71 or 124) under delegated federal authority, this final rule removes the mandatory requirements to provide newspaper notice and access to the draft permit information at a physical address, and replaces those requirements with mandatory e-notice and mandatory e-access, as those terms are defined in this rule, as the consistent noticing method for draft permit actions⁷ under the federal rules for NSR and title V, and for all EPA-issued OCS permits. While this final rule requires e-notice as the primary form of public notice for such draft permit actions under the federal regulations, permitting authorities may, when appropriate, supplement the e-notice with an additional form (or forms) of notice (*e.g.*, newspaper publication, fliers, or social media postings). Nothing in this final rule precludes the use of supplemental notice mechanisms.

D. Permitting Authorities Not Subject to Mandatory E-Notice and E-Access Requirements

⁷ As used here and from this point forward in this final rule preamble, the term “permit” or “permit action” includes any major source or major modification preconstruction permit and title V permit actions subject to the public notice provisions affected by this final rule.

For the noticing of draft permits issued by permitting authorities with their own EPA-approved rules under 40 CFR part 51 or 70, this final rule removes the mandatory newspaper notice requirement for these programs and provides the option for the agency rules to require either: 1) e-notice and e-access as these terms are used in the context of this rule, or 2) newspaper notice with either electronic access (*e.g.*, Web site) and/or physical access (*e.g.*, a public library). A key aspect of this approach is that the permitting authority is required to adopt one noticing method—known as the “consistent noticing method”—to be used for all of its permit notices. Thus, if a permitting authority selects e-notice as its consistent noticing method, it must provide e-notice (along with e-access) for all of its draft permit notices in order to ensure that the public has a consistent and reliable resource to turn to for all draft permit notices. There is a requirement in 40 CFR part 51 to make available, in at least one location in each region in which the proposed source would be constructed, a copy of certain elements of the permit record. We are clarifying that this requirement may be met by making such materials available at a physical location or on a public Web site identified by the permitting authority. Consistent with the requirements for notices issued by the EPA and delegated permitting authorities implementing the federal regulations, as discussed previously, nothing in this final rule precludes permitting authorities operating under EPA-approved rules from using additional forms of notice. Thus, if a permitting authority elects to use e-notice as its consistent noticing method, it may provide additional means of notice as appropriate, including newspaper publication or any other mechanism. Similarly, a permitting authority providing e-access may elect to also provide access to the elements of the administrative record for which e-access was provided at a physical location. The EPA encourages all permitting authorities to consider facility-specific and permit-

specific facts such as expected public interest and environmental justice considerations in determining the appropriate method(s) for public notice and access to the administrative record for draft permits.

E. Mailing Lists

Some of the regulatory sections affected by this final rule have a mailing list requirement and some do not. This rule includes regulatory revisions to amend the EPA's solicitation obligations associated with required mailing lists, but otherwise keeps the mailing list requirements in place. With respect to the EPA's mailing list obligations for the federal title V program, we are removing the specific language within 40 CFR 71.11(d)(3)(i)(E) and 71.27(d)(3)(i)(E) that requires the EPA to solicit mailing list membership through area lists and periodic publication in the public press.⁸ We are making similar changes to 40 CFR 124.10(c), which contains public notice method requirements applicable to PSD and OCS permits. The rules now say that the permitting authority may use generally accepted methods (*e.g.*, hyperlink sign-up function or radio button on an agency Web site or a sign-up sheet at a public hearing) that enable parties to subscribe to a mailing list.

F. Updated Information Regarding E-Notice and E-Access for Minor NSR Permits

Through guidance to permitting authorities issued in 2012, the EPA clarified its view on what constitutes public notice for minor NSR permit programs and what is considered adequate to meet the requirement of notice by prominent advertisement in 40 CFR 51.161(b)(3). *See*

⁸ The proposed rule had a minor typographical error stating that it was revising 40 CFR 71.27(d)(4)(i)(G). In the final rule, the EPA is adding 40 CFR 71.27(d)(4)(i)(H) with the text that was proposed in 40 CFR 71.27(d)(4)(i)(G).

“EPA’s 2012 Memorandum.”⁹ Specifically, the EPA’s 2012 Memorandum clarified that the regulatory requirement for notice by prominent advertisement was media neutral and thus sufficiently broad to allow for e-notice. In the proposed rule, the EPA stated that it intended to clarify that the EPA’s interpretation of 40 CFR 51.161(b)(3) also applies to the requirement in 40 CFR 51.161(b)(1) to make available for public inspection, in at least one location in the affected area, the information submitted by the owner or operator and the state or local agency’s analysis of the proposed source’s effect on air quality. Specifically, we proposed to clarify that allowing e-access to this information by way of a Web site identified by the permitting authority satisfies the 40 CFR 51.161(b)(1) public inspection requirement. The EPA received no adverse comments regarding this proposed clarification. Therefore, in this final rule the EPA is revising 40 CFR 51.161(b)(1) to add the following: “This requirement may be met by making these materials available at a physical location or on a public Web site identified by the State or local agency.”

In addition, the EPA has determined that the limitation in Footnote 1 in the EPA’s 2012 Memorandum, excluding synthetic minor permits, is no longer appropriate.¹⁰ The EPA will attach a notification to the electronic version of the EPA’s 2012 Memorandum indicating that the media neutral interpretation also applies to synthetic minor permits.

G. Other Final Rule Provisions

⁹ Memorandum from Janet McCabe, Principal Deputy Assistant Administrator, Office of Air and Radiation, “Minor New Source Review Program Public Notice Requirements under 40 CFR 51.161(b)(3)” (April 17, 2012). See <http://www2.epa.gov/sites/production/files/2015-07/documents/pubnot.pdf>. The EPA’s rules generally require less extensive public participation procedures for the permitting of minor sources and minor modifications.

¹⁰ A synthetic minor permit is a permit that contains restrictions to avoid applicability of major NSR requirements. Under the NSR program, such restrictions must be legally and practically enforceable. See, e.g., 67 FR 80186, 80191 (December 31, 2002).

As proposed, the EPA is extending the use of e-notice methods to three non-permitting actions in this final rule. In each of the following cases, the regulatory provisions have previously required notice of the action by way of newspaper publication:

- The OCS air regulations in 40 CFR part 55 apply to more than just OCS permitting actions. Specifically, when the EPA makes a COA designation determination, it must do so by way of a process that allows for public comment on the draft determination. Through this final action, we are requiring e-notice of the COA designation determination.
- The existing federal PSD regulations contain a provision for permit rescission that only refers to newspaper notification. Specifically, paragraph 40 CFR 52.21(w)(4) requires that, if an agency rescinds a permit, it shall give adequate notice of the rescission, and that newspaper publication shall be considered adequate notice. In this final rule, the EPA is replacing the requirement for newspaper publication with a requirement that the Administrator notify the public of a permit rescission by e-notice.
- When the EPA takes action to administer and enforce an operating permits program in accordance with 40 CFR 71.4(g), it will publish a notice in the *Federal Register* and, to the extent practicable, publish notice in a newspaper of general circulation within the area subject to the part 71 program effectiveness or delegation. In this final rule, the EPA is replacing the newspaper publication provision with the provision for e-notice.

As proposed, the EPA is not in this final rule revising the public participation requirements in the plantwide applicability limitation regulations, which reference the public participation procedures in 40 CFR 51.161; 40 CFR 51.165(f)(5); 40 CFR 51.166(w)(5);

Appendix S to part 51 section IV.K.5; and 40 CFR 52.21(aa)(5). Additionally, this final rule does not change the requirements for NNSR, minor NSR, and synthetic minor NSR permits in Indian country that are contained in 40 CFR part 49 and already provide means of public noticing other than newspaper publication. *See* 40 CFR 49.157 (minor NSR and synthetic minor NSR permits) and 40 CFR 49.171 (NNSR permits).

The EPA is not finalizing certain proposed revisions to paragraphs in 40 CFR parts 55, 51 and 71 that sought to clarify that the terms “send,” “mail” and “in writing” and variants of those terms may include email. Specifically, the EPA proposed to revise 40 CFR 51.166(q)(2)(iv), 40 CFR 55.5(f)(2) and (f)(4), 40 CFR 71.11(d)(3)(i) introductory text and 40 CFR 71.27(d)(3)(i) introductory text by adding a parenthetical indicating that those terms may include email.

Without necessarily commenting on these specific provisions, one commenter generally urged EPA to avoid language in the rules that might limit the use of new communications tools and require subsequent revisions to enable permitting authorities to use them. With this idea in mind, upon further consideration, the EPA determined that the existing rule language in the subject paragraphs can reasonably be interpreted to include email and other forms of communication. The EPA also determined that adding the proposed parentheticals could unintentionally limit flexibility to apply additional communications tools or imply a different meaning elsewhere in the regulations where those same terms are used and EPA did not propose adding the parenthetical. Therefore, we are not finalizing those proposed revisions.

IV. Implementation of E-Notice and E-Access

This section addresses implementation of this final rule and also recommends “best practices” for e-notice and e-access. As discussed in our responses to comments in Section V of

this document, the EPA has expanded the list of best practices included in the proposed rule to address e-notice and e-access documentation and certification and measures to address periods of Web site unavailability (*e.g.*, outages and emergencies), including the use of temporary alternative noticing methods. These best practices are not requirements under this final rule. Instead, they comprise recommendations intended to foster improved communication and outreach of permit notices beyond the minimum requirements.

A. Permitting Authorities Implementing Federal Preconstruction Permit Program Rules

Air permitting programs that implement the amended federal public notice provisions under 40 CFR parts 52, 55 and 124 are required to implement e-notice and e-access by the effective date of this final rule on **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. This includes EPA Regions, air agencies that are delegated federal authority by the EPA to issue permits on behalf of the EPA (via a delegation agreement)¹¹ and any air agencies that have their own rules approved by the EPA in a SIP and the SIP incorporates by reference the federal program rules amended in this action and automatically updates when these EPA rules are amended. However, in the case of SIP rules that incorporate by reference the federal noticing provisions, the agency may instead select newspaper notice as their consistent noticing method by revising their SIP rules consistent with the part 51 provisions promulgated here.

As described in our responses to comments in Section V of this document, the EPA did not receive any comments that identified specific details about technical issues that affected

¹¹ With the exception of permitting authorities that are delegated authority to issue permits under 40 CFR part 55.

permitting authorities are facing that would likely impede their ability to implement e-notice and e-access by the effective date of this rule. While we acknowledge that certain air agencies may need time to change their respective statutes, rules, programs or policies to fully implement e-notice (*i.e.*, to remove mandatory newspaper publication from their own program requirements), we believe that these agencies are in a position to comply with the requirements for e-notice and e-access on or before the date this final rule becomes effective. Since many of the affected programs already use e-notice and e-access as part of their public notice practices, little or no change would be necessary for those programs to comply with this final rule. Therefore, in order to avoid delay in implementation, we are not extending the effective date of this final rule for the EPA and other air agencies that implement the federal program rules.

B. Permitting Authorities Implementing EPA-Approved Preconstruction Permit Program Rules

To the extent a permitting authority with an approved program, meeting the requirements of 40 CFR part 51, is using a consistent noticing method and wants to retain the same noticing method, there is no need to revise the applicable program rules. A permitting authority with an approved program that chooses e-notice and e-access as its consistent noticing method may need to revise its applicable program rules and seek the EPA's approval of the revision in order to begin to implement e-notice. Similarly, a permitting authority that implements rules that incorporate by reference the procedural requirements in the EPA's federal program regulations (40 CFR part 52), but does not provide that its rules automatically update upon the EPA amending its rules, will need to amend its regulations and seek the EPA's approval of those revisions in order to implement e-notice and e-access in lieu of newspaper notice. However,

permitting authorities with NNSR programs approved under 40 CFR 51.165 have been subject to the public participation requirements at 40 CFR 51.161 and thus may be able to interpret their existing rules to currently allow for implementing e-notice in lieu of newspaper notice.¹²

Under this final rule, it is voluntary for these permitting authorities to move to e-notice and e-access. Likewise, nothing in the final 40 CFR part 51 rules prevents a permitting authority from continuing or beginning to implement e-notice and e-access methods. However, depending on the permitting authority's rules, there may be ongoing obligations to continue with newspaper notices until the agency revises its permitting rules.

C. Permitting Authorities Implementing EPA-Approved Operating Permit Programs

In accordance with 40 CFR 70.4(i), a program revision may be necessary when the relevant federal regulations are modified or supplemented. When 40 CFR part 70 is revised after the permitting authority program is approved, the EPA determines the need for conforming revisions. However, the approved program may initiate a program revision on its own initiative if the program revision is required to implement the revised 40 CFR part 70 rules. *See, e.g.,* 40 CFR 70.4(a) and (i). The EPA is not soliciting program revisions for any approved programs in response to this final rule. Under this final rule, permitting authorities implementing part 70 have a choice as to whether or not to adopt e-notice as their consistent method of public notice of air permits. If a permitting authority chooses the e-notice approach and a program revision is

¹² Although this rule adds public participation requirements to section 51.165 in new paragraph (i), this additional paragraph does not require a revision to a state NNSR program that already provides for a consistent noticing method by either newspaper or internet posting. Since section 51.161 does not address public hearings, this final rule does not include the language that was in the proposed version of 40 CFR 51.165(i) about providing information on requesting and/or attending a public hearing.

necessary (*e.g.*, additional authority is needed), then the permitting authority must initiate a program revision by undergoing a state rule change and submitting a program revision package to the EPA for review and approval as per 40 CFR 70.4(i)(2). Consistent with the duty to keep the EPA apprised of such proposed changes, if the permitting authority plans to change its implementation practice from newspaper to e-notice and e-access based on its analysis that its approved rules allow for e-notice and e-access without any changes, the permitting authority must forward the appropriate language to the Regional office prior to changing its practice. Upon review, the Regional office may request a formal submittal for a program revision.

In this final rule, the EPA supports the position that program revisions for converting part 70 programs to e-notice will generally be nonsubstantial given that the permitting authority needs only to revise its permitting rules to clarify its implementation of e-notice and e-access. It does not need to seek additional authority for giving notice by “other means.” In many cases, the permitting authority’s current practice includes electronic posting of public notices and the draft permit, showing that it has adequate resources for implementing the revised 40 CFR part 70 notice requirements. Accordingly, we note that EPA Regional offices would generally expect to process approvals of these program revisions using procedures for nonsubstantial program revisions.¹³

With regard to 40 CFR part 70, these final rule revisions remove only the mandatory aspect of newspaper noticing, allowing for the use of that method as a consistent method for general public notice, but also allowing e-notice as an alternative consistent method. All other obligations, such as the requirement to have or maintain a mailing list and provide notice by

¹³ See 40 CFR 70.4(i)(2)(iv).

other means, as appropriate, remain unchanged. The EPA interprets the existing mailing list obligations to include either electronic or hardcopy mailing list or both.

D. Permitting Authorities with EPA-Delegated Authority to Administer the Federal Operating Permit Program

With regard to the 40 CFR part 71 program revisions, a permitting authority that has delegated federal authority to administer the 40 CFR part 71 program will likely need to update its delegation agreement to update its notice procedures consistent with the e-notice requirement in the federal rules.

E. Implementation in an Affected Indian Country

This final rule changes the requirements for PSD permits that the EPA issues in Indian country, as well as PSD permits that are issued by a tribe through a delegation agreement or by any tribe that has an approved TIP that incorporates by reference the public noticing requirements for PSD permits in the federal rules in 40 CFR part 124 (through incorporation of 40 CFR section 52.21(q)). Since this final rule revises the noticing requirements in 40 CFR part 71, which applies to Indian country absent an approved 40 CFR part 70 program, the revisions would affect the public notice procedures for the majority of title V operating permits in tribal lands.¹⁴ A tribal agency with an approved 40 CFR part 70 program will have the option to implement e-notice under the same terms that apply to other approved 40 CFR part 70 programs

¹⁴ All states, certain local permitting agencies and currently one tribe have approved part 70 programs. The EPA administers the 40 CFR part 71 federal program in most areas of Indian country (one tribe has been delegated implementation authority) and on the OCS (where there is no delegated state permitting authority).

(i.e., when a conforming revision clarifying the consistent method becomes effective for the program).

F. Best Practices for E-Notice and E-Access

This section contains EPA-recommended best practices for e-notice and e-access. These best practices are not required to satisfy the e-notice and e-access provisions in this final rule, but may be helpful in the course of providing communication to the public about permitting actions.

The recommended best practices for e-notice and e-access include:

- Providing notice of the final permit issuance on the Web site.¹⁵
- Soliciting for the mailing list on the Web site (e.g., Web site equipped with radio button, hyperlink of “click here” function to subscribe).
- Providing options for email notification that enable subscribers to tailor the types of notifications they receive (e.g., a person may request notification of only draft permit notices for major source actions rather than receiving notice of all permitting activity by the permitting authority).
- Providing, where practicable, hyperlinks on the Web site that refers users to e-notice postings and/or newspaper postings, access to draft permit Web postings and postings of other permitting actions.

¹⁵ Noticing a final permit decision on the Web site is not a substitute for complying with the regulatory requirements for the provision of notice on final permit decisions. See footnote 6, *supra*, referencing the EAB’s decision in *In Re Hillman Power Co., LLC*.

- Continued posting of the draft permit on the Web site beyond the date of the end of the public comment period (*e.g.*, until the issuance of the final permit or until the permit application has been denied or withdrawn).
- Posting the final permit on the Web site for a specific period of time after the issuance of the permit (*e.g.*, through the permit appeal period or petition period).¹⁶
- Posting (or hyperlinking to) other key permit support documents on the agency Web site or on a publicly-available online document management site (*e.g.*, Federal Docket Management System (FDMS¹⁷)), such as the permit application, statement of basis, fact sheet, preliminary determination, final determination, and response to comments.¹⁸
- Providing evidence or a certification of the posting of the e-notice and draft permit to the Web site in the permit record indicating the date(s) of the availability of the notice and draft permit on the Web site pursuant to applicable permitting authority regulations or policies. One example of such certification would be providing a printout of the applicable Web site pages and a “Memorandum to the File” by the permit writer

¹⁶ Noticing a final permit decision on the Web site is not a substitute for complying with the regulatory requirements for the provision of notice on final permit decisions. *See* footnote 6, *supra*, referencing the EAB’s decision in *In Re Hillman Power Co., LLC*.

¹⁷ The FDMS at <http://www.regulations.gov> is a web-based docket system used for, among other things, federal permitting actions that require public notice and comment. This searchable docket system allows for public access and downloading of the draft permit and permit-related documents. The Web site also allows the public to register to receive email alerts to track activity on selected dockets. Similar online data management systems exist in a number of states and allow permitting agencies to provide electronic access to permits and other records.

¹⁸ While the EPA believes it is a best practice to electronically post as many of the key permit decision related documents and information as possible, we recognize that air quality modeling runs and other permit data files may not be compatible with e-access. These documents typically cannot be uploaded to an electronic format due to the size and storage requirements in the electronic posting. In some cases, permitting authorities may choose to upload a description of these documents with directions on how to access the files.

documenting the date the e-notice was posted, the Web site address where the e-notice was posted and the date through which the posting remained available.

- Providing for alternative notice methods or public comment period extension in the event of prolonged Web site unavailability (*e.g.*, due to malfunctions, transitions to a different Web site platform, or emergency situations that result in prolonged e-notice and e-access system outages) during the public comment period.

Since mid-2015, the EPA has been developing a National Public Notices Web site for publishing public notices for all EPA actions subject to such notice requirements. This project is expected to be completed and implemented by the end of 2016, providing a single location for all EPA public notices (<https://www.epa.gov/publicnotices>). Each individual public notice web page will be listed on the EPA National Public Notices Web site's dynamic list throughout the public comment period, and the list will be searchable and filterable. The public notice web pages will be designed to contain all related documents or a link to such documents and may include a sign-up option for the public to receive email notifications. We welcome other permitting authorities to explore the forthcoming EPA National Public Notices Web site when it is deployed and to use it as a guide to designing and implementing, or improving, their own e-notice and e-access platforms.

In addition, permitting authorities may wish to consider the recommendations provided by the National Environmental Justice Advisory Council (NEJAC) in a 2011 report¹⁹ for improving noticing methods for reaching underserved and environmental justice (EJ) communities. These

¹⁹ “*Enhancing Environmental Justice in EPA Permitting Programs*,” National Environmental Justice Advisory Council (April, 2011), pages 20-21, available at <https://www.epa.gov/sites/production/files/2015-02/documents/ej-in-permitting-report-2011.pdf>.

recommendations emphasize direct communication in appropriate languages and include many of the practices identified above, as well as press releases, radio announcements and posting of signs.

V. Responses to Significant Comments on the Proposed Rule

The EPA received 29 comments on the proposed rule. In this section, we summarize the major comments and our responses. For details of all the significant comments and our responses, please refer to the Response to Comments document in the docket for this rulemaking.

A. General Comments on the EPA's Proposal to Remove the Mandatory Newspaper Publication Requirement from Certain Regulations and Instead Provide for E-Notice

1. Summary of Proposal

The EPA proposed to revise the public notice rule provisions for the NSR, title V and OCS permit programs of the CAA and the corresponding COA determinations for implementation of the OCS air quality regulations by removing the mandatory requirement to provide public notice of a draft air permit, as well as certain other program actions, through publication in a newspaper and instead provide for e-notice of these actions.

2. Brief Summary of Comments

The EPA received numerous comments supporting the transition from newspaper publication to e-notice and the vast majority of commenters supported the proposal in general. All state and local agency commenters generally supported the proposal, stating that e-notice would: 1) significantly improve communication with the public on permit actions in comparison to a one-day newspaper notice; 2) result in broader and better informed public participation; 3) reduce costs and conserve air agency resources; 4) improve public access by making permit

actions immediately available through convenient and reliable electronic media outlets; 5) improve communication with EJ communities and other target audiences; 6) allow for information to be made available for an extended time period; and 7) provide flexibility for permitting authorities and sources by avoiding time delays associated with newspaper publication and allowing for faster correction of errors and rescheduling of events. Several of the state and local air agency commenters indicated that they currently provide e-notice and e-access for their draft permits and had realized many of the benefits cited. State agency commenters cited specific costs associated with newspaper publication of permit notices, ranging from \$13,500 to \$24,000 per year, and stated that they anticipated cost savings of similar magnitude after implementing e-notice.

Several commenters supported the EPA's conclusion that there have been substantial changes in technology, the media and the way the public accesses information. Commenters noted that electronic media, such as the Internet, have become the predominant means of communicating, generally making such media a more effective means of public notification than newspaper publication. Commenters noted that this conclusion applied not only to the public in general, but also for EJ communities. One commenter noted that EJ communities today obtain and share more information through the Internet than through newspaper circulation. One state commenter noted that they have been e-noticing draft PSD and title V permits in the same manner the EPA proposed for more than 10 years, and that they found e-notice to be a highly effective mechanism for communicating actions to the general public. Another commenter noted that they believe e-notices have been an effective and convenient way to communicate permitting-related information to the public, enabling broader and faster dissemination of

information to the public as compared to newspaper notices. Another commenter noted that their district had already been encouraged to provide e-notice by EJ advocates, noting that such notices improve the level of available information and customer service offered to the public, including disadvantaged communities, by allowing the district to immediately make available bilingual copies of permitting action notices. Further, the commenter noted that public outreach initiatives cannot be nearly as effective with just newspaper notification.

Several commenters urged the EPA not to require permitting authorities that implement the federal permitting regulations to use solely e-notice, and rather to allow such agencies to retain the ability to provide alternative forms of notice, such as newspaper, in addition to the mandatory e-notice provisions. One commenter indicated that it was not entirely clear in the proposed language in 40 CFR 124.10 that such supplemental noticing methods were not precluded.

Three commenters, including a newspaper industry association (newspaper group), opposed the proposal to remove the mandatory newspaper publication requirements from the regulations and instead allow for e-notice. The newspaper group, while supporting the EPA's intention to provide e-notice of draft permits and certain other actions under the CAA, objected to the removal of mandatory newspaper publication requirements for public notices on several grounds. The commenter did not believe that e-notice constitutes sufficient notice and felt that the proposal would result in less public awareness of permits issued under the CAA. The commenter opined that the newspaper industry specialized in noticing and would generally provide a better method for noticing due to a much broader readership and ability to reach certain audiences. The commenter stated that relying solely on the Internet to provide public notice

would disadvantage significant numbers of rural, elderly, low-income and/or less-educated Americans without Internet access. The commenter also contended that the proposal runs counter to over 200 years of tradition, suggesting that a public notice should be published by an independent third party, provide archiving ability, be accessible and be verifiable. The commenter further thought that the government's Web sites will not be as user-friendly as some newspapers that provide print and Internet notification. Finally, the commenter thought that the cost savings from eliminating newspaper notices is most likely illusory. Another commenter, representing a neighborhood organization, believed that e-notice would result in less notification and less citizen engagement in the decision process and that e-notice has not been shown to meet or exceed the standards established by newspaper publication.

3. EPA Response

We agree with the majority of commenters that e-notice meets the public notice requirements and that, compared to newspaper notice, e-notice is at least as effective and, in most cases, more effective, to provide notice to the public about draft air permits and other subject actions. E-notice is more efficient and will result in cost savings to permitting authorities. Therefore, the EPA is finalizing the e-notice rule provisions substantially as proposed. We found the comments from air agencies particularly compelling. These air agencies (who serve as permitting authorities) found that e-notice and e-access have been an effective and convenient way to communicate permitting-related information to the public, enabling broader and faster dissemination of information to the public as compared to newspaper notices. In particular, air agencies found that e-notices improve the level of available information and customer service offered to the public, including EJ communities. In response to commenter concerns that the

proposed rule would preclude the use of supplemental noticing methods for any affected permitting authorities, we would like to clarify that this is not the case. The EPA indicated in the proposed rule and reiterates in this final rule that all affected permitting authorities, including those that implement the federal program regulations (*i.e.*, the EPA, delegated programs and programs that incorporate by reference the federal regulations), will continue to have the authority to use additional means of public notice as appropriate, including newspaper publication or any other communication means. Nothing in this final rule precludes such supplemental notice measures when appropriate and the EPA encourages it. In response to the request for more clarity that 40 CFR 124.10 provides discretion for supplemental notice, we note that 40 CFR 124.10(c)(4) already provides for the use of any other noticing method.

With regard to the comments received opposing our proposal to remove the mandatory newspaper notice requirement for permit actions, we disagree that this shift will diminish the public notice process and its effectiveness. To the contrary, as noted previously, the majority of comments received support the shift to e-notice to meet the public notice regulatory requirements. Many of those commenters were state and local air agencies that cited specific experience in implementing e-notice that resulted in significant benefits in the public notice process, including reaching target communities such as EJ communities. The newspaper group alleges that e-notices are insufficient and cite to several studies that they claim support the effectiveness of newspaper advertisement. The EPA does not dispute the fact that newspaper advertisements, including public notices, may be effective in some cases, and this final rule does not preclude the use of newspaper public notices under any circumstances. However, recent studies strongly support the EPA's position that newspaper circulation has declined, and

continues to decline, and that the Internet has become the predominant medium by which the public obtains information. The Pew Research Center estimates that daily circulation of printed newspapers declined 30 percent, from 62.3 million in 1990 to 43.4 million in 2010.²⁰ More recent data from the Pew Research Center show that this trend has continued through 2015, with average weekday newspaper circulation, print and digital combined, falling 7 percent in 2015, the greatest decline since 2010.²¹ While digital circulation crept up 2 percent in 2015, it accounted for only 22 percent of total newspaper circulation.²² Conversely, Internet use among the public in the United States has expanded tremendously and continues to penetrate all demographic groups. The Department of Commerce reports that as of July 2015, about 75 percent of all adults and children aged 3 years and older use the Internet.²³ Internet use through libraries provides the most widespread availability of free regular Internet access to the general public. The American Library Association's (ALA) "Public Library Funds & Technology Access Study (2010-2011)" reports that 99.3 percent of public libraries offer public access to computers and the Internet.²⁴

²⁰ Pew Research Center, *The State of the News Media 2011*, available at <http://www.stateofthemedias.org/2011/newspapers-essay/data-page-6>.

²¹ Pew Research Center, *The State of the News Media 2016*, page 4, available at <http://www.journalism.org/2016/06/15/state-of-the-news-media-2016/>.

²² *Id.*

²³ U.S. Department of Commerce, National Telecommunications & Information Administration, *Digital National Data Explorer*, available at <https://www.ntia.doc.gov/other-publication/2016/digital-nation-data-explorer>.

²⁴ See Executive Summary of the ALA study, page 7, available at http://www.ala.org/research/sites/ala.org.research/files/content/initiatives/plftas/2010_2011/plftas11-execsummary.pdf.

During the last decade, the federal government and many state governments have been gravitating toward Internet publishing of notices, announcements and other information, further supporting the adequacy of Internet publication of such notices. In the federal sphere, this trend is exemplified by: 1) the E-Government Act of 2002,²⁵ which generally requires and encourages federal agencies to better manage and promote Internet and information technology use to bring about improvements in government operations and customer service; 2) Executive Order 13563 (January 18, 2011), *Improving Regulation and Regulatory Review*, which directs the federal government to modify and streamline outmoded and burdensome regulations and specifically states that each agency shall afford the public a meaningful opportunity to comment through the Internet on any proposed regulation; and 3) Executive Order 13576 (June 13, 2011), *Delivering an Efficient, Effective, and Accountable Government*, which encourages federal agencies to cut waste, streamline structure and operations, and reinforce performance and management reform. With these actions, Congress and the President have demonstrated their interest in making government more efficient and effective through information technology, and several federal agencies (including the EPA) have promulgated rules that provide for publishing public notices

²⁵ Public Law 107–347, 116 Stat. 2899. The E-Government Act of 2002 establishes in the Office of Management and Budget (OMB), an Office of Electronic Government and imposes responsibilities on various high-level government officials including heads of Federal Government agencies. The Act defines “electronic Government” as “the use by the Government of web-based Internet applications and other information technologies, combined with processes that implement these technologies, to: (A) enhance the access to and delivery of Government information and services to the public, other agencies, and other Government entities; or (B) bring about improvements in Government operations that may include effectiveness, efficiency, service quality, or transformation.” 44 U.S.C. 3601(3). While the Act does not mandate Internet publication of the EPA’s or other agencies’ public notices, it evidences the inexorable movement to broader Internet use by the federal government under congressional direction.

on a government Web site in lieu of newspaper publication.²⁶ As mentioned previously, the EPA issued a tribal minor NSR rule in 2011 that provided for e-notice.²⁷ Each of these rules, consistent with this rule, was justified based on the effectiveness and efficiency of Internet publication and associated cost savings.

The EPA believes that in those instances when Internet posting is the sole notice provided, it will be fully adequate to meet the purpose for which notice is intended—to provide, to as many of the public at large as can reasonably be expected to be interested, access to important information regarding draft permits. In addition, Internet publishing provides the potential to reach unknown interested parties. Residents in a local jurisdiction may not subscribe to a local paper or happen to see a one-day posting in the legal notices section of the newspaper. At any given time, residents may be out of town and/or relying on the Internet for news. The fact that e-notices will remain on the Internet for the duration of the public comment period vastly increases the likelihood that interested parties will receive notice about draft permits. In addition, interested parties would not have the burden of traveling to a physical location to review a copy of the draft permit since that document would also be posted on the Internet. Given the widespread use of the Internet in our mobile society, the EPA believes that e-notice's reach will

²⁶ See, e.g., Consolidation of Seizure and Forfeiture Regulations, Department of Justice, Drug Enforcement Administration, 77 FR 56093 (September 12, 2012); Internet Publication of Administrative Seizure and Forfeiture Notices, Department of Homeland Security, U.S. Customs and Border Protection, 78 FR 6027 (January 29, 2013); National Oil and Hazardous Substances Pollution Contingency Plan (NCP): Amending the NCP for Public Notices for Specific Superfund Activities, Environmental Protection Agency, 80 FR 17703 (April 2, 2015); and Medicaid Program; Methods for Assuring Access to Covered Medicaid Programs, Department of Health and Human Services, Centers for Medicare and Medicaid Services, 80 FR 67576 (November 2, 2015).

²⁷ 76 FR 38748 (July 1, 2011).

improve the public notice process and yield positive results. In addition, the EPA believes that e-access to draft permits will expand access to permit-related documents.

With regard to the comment that relying solely on the Internet to provide public notice would disadvantage significant numbers of rural, elderly, low-income and/or less-educated Americans without Internet access, the EPA is sensitive to this concern but does not agree that using the Internet to provide public notice of draft permits will adversely affect these groups. As previously noted, Internet access is widely available even for those who do not own a computer. According to a 2010 University of Washington study, those living below the poverty line had the highest use of library computers, with 44 percent having reported using public library computers and Internet access during the previous year.²⁸ We do not dispute that some individuals may continue to rely on newspapers rather than the Internet to obtain information and that there may be greater concentrations of such persons in some communities. However, even if newspapers remain an effective means for reaching some individuals, this does not take away the added benefits cited by other commenters of reaching additional individuals through the Internet and providing notice continuously during the public comment period. Furthermore, this rule does not preclude supplemental means of public notice to reach populations that do not have access to or use the Internet. Permitting authorities that are required to provide e-notice and e-access may continue to employ newspaper notice routinely as a parallel mechanism with e-notice or to supplement e-notice on a permit-by-permit basis. The same is true for permitting authorities that are not required to, but may select, e-notice as their consistent noticing method.

²⁸ Samantha Becker, et al., *Opportunity for All: How the American Public Benefits From Internet Access at U.S. Libraries*, at pages 1-2, available at http://impact.ischool.washington.edu/documents/OPP4ALL_FinalReport.pdf.

The newspaper group claims that government Internet posting of public notices does not comport with a “long tradition” that a public notice must include four elements: the notice must be published by an independent third party, the publication must be capable of being archived at a reasonable cost, the notice must be accessible, and the notice must be verifiable. The newspaper group does not reference any statutory authority or case law to support the proposition that a public notice must include these four elements. The EPA notes that the applicable requirements for notice are encompassed in the constitutional due process standard governing public notice. The Supreme Court has held that, in providing public notice of governmental action, due process requires only that “the Government’s effort be ‘reasonably calculated’ to apprise a party of the pendency of the action.” *Dusenbery v. United States*, 534 U.S. 161, 170-71 (2002) (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950)). Although *Dusenbery* involved direct notice of an administrative forfeiture, the same due process standard applies to published notices as well. *See, e.g., United States v. Young*, 421 Fed. Appx. 229, 230-31, 2011 U.S. App. LEXIS 6741, at *4 (3d Cir. Apr. 1, 2011). The CAA does not specify the means by which public notice shall be provided under the programs affected by this final rule.²⁹ However, the CAA permitting provisions do reflect a goal to provide adequate opportunities for informed public participation.³⁰ Publication of draft permit notices via the Internet, with its widespread and broad availability within and well beyond the limits of the local jurisdiction, is clearly in compliance with this standard. The Internet’s ability to provide unlimited access to public notices throughout the duration of the public comment period is, in

²⁹ *See, e.g.,* CAA sections 165(a)(2) and 502(b)(6).

³⁰ *See, e.g.,* CAA section 160(5).

this Internet era, much less limiting than a single day's posting in a local newspaper, which has been found to meet due process requirements.

The element referenced in the newspaper group's comment requiring that notice be published by an independent third party presumes that newspapers, being independent of the government, provide the public with "an extra layer of confidence" in the notice compared to the government publishing the notice itself. But this argument mistakes why newspapers were used in the past and the role they serve in the notice process. Newspapers were historically used to provide public notice because, until the Internet, there was no comparable alternative method that was "reasonably calculated" to apprise a party of the pendency of a draft permit or other subject action. It had nothing to do with their status as an "independent and neutral third party." In fact, for these purposes, there is nothing inherently beneficial about newspapers being independent from the government given that they merely act as a vehicle for publishing notices prepared and provided by the permitting authority. The commenter has not demonstrated that newspapers generally exercise independent editorial control over the content of legal notices or classified advertisements or that newspaper staff otherwise seek to check the veracity of what the newspaper company is paid to print in these sections of its publication.

In response to newspaper group's comments about the preservation of e-notices for future reference and verification of the e-notice posting, we note that permitting authorities have been required to keep and retain permit records (including, for example, a copy of the newspaper notice), and are required to continue to do so, in accordance with applicable record retention requirements. Therefore, we have included a best practice suggestion of evidence to include in the permit record, when e-notice and e-access are provided, to certify the date(s) of availability

of the e-notice and draft permit postings on the Web site. In addition, in response to the newspaper group's claim that the EPA's Web site does not include hyperlinks to refer users to public notices, we have included a best practice suggestion that, where practicable, permitting authorities include hyperlinks on their Web site to e-notice and/or newspaper postings, postings of draft permits and other permitting actions. We also identified, in Section IV of this document, a forthcoming National Public Notices Web site that the EPA will utilize for all EPA public notices and stated that we welcome other permitting authorities to review that platform for these and other best practices. The EPA notes that the process of providing legal verification of Internet notice is dramatically streamlined when it is the government that can retrieve the required data from its own Web site, as opposed to seeking such verification from newspapers. Finally, the EPA notes that this regulatory change should correspondingly decrease the burden on newspapers of having to provide such information.

The newspaper group claims that many newspapers have adopted a marketing strategy to publish print issues on the newspaper's Internet site. They believe the government's Internet sites will not be as user-friendly as the newspaper's dual method of print and Internet notification. They also claim that state press associations aggregate printed notices and post them on statewide public-notice Web sites. The EPA does not agree that posting draft permit notices on newspaper Web sites or press association Web sites is superior to posting them on a permitting authority's Web site. Online posting is not part of the EPA's contracts for publication of draft permit notices, so newspapers are under no obligation to make them freely available to the public online. Newspapers are likewise under no obligation to contract with state press associations for online posting of draft permit notices. Moreover, some newspaper Web sites restrict access to the

full online version of the newspaper to print subscribers or those who pay for full online access. A potential interested party searching for a draft permit notice on such a Web site would either need a subscription to the newspaper that is publishing the Internet notice or would have to pay a daily access fee. The EPA believes it is unrealistic to assume that such a process would provide more effective notice than a freely available Web site that posts the desired notice as well as a copy of the draft permit, 24 hours a day, for the duration of the public comment period, in a searchable database.

The EPA disagrees with the newspaper group's claim that the cost savings to eliminate mandatory newspaper notices is illusory. The commenter makes a valid point that there are also costs involved in maintaining a Web site and posting information on the Internet. However, the commenter did not quantify the costs or show that they are greater than the costs of newspaper advertisements. Many state regulatory agencies have established Web sites for the purpose of serving broader communication objectives. So an appropriate cost comparison for purposes of this rule is the cost of adding e-notices for specific actions to a Web site infrastructure that an agency already maintains or might create for other reasons. State regulatory agencies with Web sites have budgets to cover the costs of running a Web site for various reasons (not just permitting). To the extent that there could be some additional cost to add permit notices to a Web site, those marginal costs would be offset by the savings realized by eliminating newspaper notices. As noted previously in the summary of comments in this section, air agency commenters cited specific costs associated with newspaper notices and anticipated cost-savings after implementing e-notice. In addition, most permitting authorities commented positively about the cost and other efficiencies that e-notice provides. The EPA believes it has demonstrated earlier

how providing public notice through the Internet can—and indeed already does—reach more people, more easily, and more directly, than newspaper notice. Data from permitting authorities with real-world experience implementing public notice requirements under the current regulations (in many cases also including e-notice) supports the EPA’s conclusion that e-notice will be at least as effective, and in most cases more effective, and cheaper overall than notice by newspaper.³¹

B. Comments on Requirement that Permitting Authorities use a Consistent Noticing Method

1. Summary of Proposal

In lieu of newspaper publication, we proposed to require e-notice for the noticing of air permits issued by the EPA and other permitting authorities that implement the federal air permitting rules. For permits issued by permitting authorities that implement their own rules approved by the EPA, the proposed rule provided the option for permitting authorities to use either e-notice or traditional newspaper notice. However, those permitting authorities must adopt a single, consistent noticing method for all of their affected permit actions in their air rules. Thus, we proposed that where a permit agency opts to post notices of draft permits on a Web site in lieu of newspaper publication, it must post all notices to that Web site in order to ensure that the public has a consistent and reliable location for all permit notices.

2. Brief Summary of Comments

³¹ A survey of EPA Regional offices indicated an average newspaper advertising cost per permit (not including indirect costs) of approximately \$1,034. *See* Memorandum: “U.S. EPA Regional Office NSR, title V and OCS Newspaper Public Notice Cost Estimates: FY 2013, 2014 and 2015” contained in this rulemaking docket. To the extent any additional costs are incurred as a result of implementing e-notice and e-access, such costs would be *de minimis* in comparison.

The majority of commenters supported the EPA's proposal to require a consistent noticing method. Several commenters indicated that it was critical for permitting authorities to use a consistent noticing method to avoid inconsistency in implementation and confusion on the part of the public in understanding how to access permit information. Several commenters also noted that it is important for permitting authorities to be allowed to use supplementary noticing methods when appropriate. Although two of these commenters indicated that they understood that the rule language, as proposed, would not preclude the use of additional, supplemental means of public notice, others seemed to be confused on this point and therefore objected to the proposed consistent noticing method requirement on the same grounds.

Some commenters did not support the proposed requirement to use a consistent noticing method and instead favored alternative approaches or increased flexibility. One of these commenters indicated that, in some cases, traditional newspaper publication may be appropriate or necessary, and that some permitting authorities may have technical or budgetary constraints affecting their ability to provide e-notice and e-access while some may also have a statutory requirement for newspaper notice. That commenter urged the EPA to provide flexibility for a permitting authority to choose the type of notice that is appropriate for the location and circumstances of a project. Another commenter stated that forcing a state to make a formal commitment to a single form of public notice, whether electronic or print, defeats the purpose of public notice and also questioned how a state would "adopt" a "consistent noticing method." Two commenters supported media neutral, flexible approaches based on a "method reasonably likely to provide routine and ready access to the public" as opposed to only one "consistent noticing method." Finally, one commenter favoring a flexible approach indicated that a

consistent noticing method does not work in states with diverse populations that benefit from different noticing methods, and that restrictions may inhibit effectively communicating important information to diverse communities. Further, the commenter indicated that a consistent notice approach does not allow the flexibility to transition from newspaper to e-notice.

3. EPA Response

The EPA is finalizing the requirement for authorities to use a consistent noticing method as proposed. We agree with commenters that believe that the random use of alternative notice methods for different permit actions could confuse the public in their efforts to access air permit public notices. In response to the negative comments received that seem to have interpreted the requirement for using a consistent noticing method for public notice of permit actions as precluding the use of additional noticing mechanisms, we would like to clarify that, consistent with the proposed rule, nothing in this final rule prohibits or precludes a permitting authority from using additional, supplemental forms of notice, including newspaper publication. Indeed, several state and local permitting agency commenters indicated that they already practice multiple forms of public notice on such permit actions, including both e-notice and newspaper publication and in some cases additional parallel forms of notice. Such permitting authorities that implement EPA-approved permitting rules would be required to adopt a consistent noticing method (*i.e.*, e-notice or newspaper publication), but could continue to use any and all additional forms of notice, either consistently or on a permit-by-permit basis, as appropriate. Additionally, we would like to clarify that for permitting authorities that implement EPA-approved permitting rules, adopting rule changes and submitting a plan or program revision incorporating the final e-notice rule provisions is optional. Such air agencies may choose to continue to operate under

their existing EPA-approved rules and regulations that require newspaper notification in all cases. This would qualify as a “consistent noticing method” under the revised regulations.

Those commenters who argued for flexibility to choose the noticing method on a permit-by-permit basis have not shown how the “consistent noticing method” requirement frustrates the goals they seek to achieve through this flexibility. As discussed previously, the rule does not preclude using multiple methods of public notice, as long as the continuous method is still one of the methods used. These commenters have not shown any detrimental effect that would result to the commenters or the public from requiring permitting authorities to use one consistent method of notice for all draft permits. The benefits derived from the flexibility sought by these commenters does not eliminate the benefits that result from a consistent noticing method—ensuring that interested parties can rely on one form of notice in all cases and will not miss notices because of continuous changes in noticing methods.

The EPA does not intend for the rule to preclude a permitting authority from subsequently changing its “consistent noticing method” on a programmatic basis. For example, if a state permitting authority follows a particular noticing method and then decides that a different form of notice would be more effective going forward, the state may revise its regulations to change its consistent method. Regarding the concern about how a state would “adopt” a consistent method, this rule makes clear that such method should be specified in EPA-approved permitting regulations for the appropriate jurisdiction.

C. Comments on Requirement to Make E-Notice Mandatory for Federal Permit Actions

1. Summary of Proposal

The EPA proposed that permitting authorities that implement the federal permitting rules, including the EPA and other permitting authorities that have been delegated the authority to implement the federal permitting rules, would be required to adopt e-notice as the consistent noticing method. We proposed this approach because we believe that e-notice represents the best current practice for noticing major source air permit actions. Accordingly, while the proposed rule made e-notice optional for permitting authorities implementing EPA-approved permitting rules, we did not extend the same flexibility to the EPA and other air agencies that implement the federal permitting rules.

2. Brief Summary of Comments

We received one comment opposing the requirement that permitting authorities implementing the federal permitting rules be required to adopt e-notice as the consistent noticing method. The commenter believed that such programs should have the same option as EPA-approved programs to choose e-notice or newspaper on a programmatic basis, allowing the permitting agency to determine the best method for communicating with the public. The same commenter further indicated that providing this option would allow for transition to e-notice at a pace consistent with available resources.

3. EPA Response

We are maintaining the requirement that permitting authorities implementing the federal permitting rules use e-notice as their consistent noticing method consistent with the proposal and our stated objective to implement these best practices. As discussed further in Section V of this document, the EPA did not receive any comments demonstrating that one or more affected permitting authorities have infrastructure and/or resource constraints that would render them

unable to implement e-notice and e-access as of the effective date of the final rule or that implementation would cause a significant additional burden. With regard to the equity point raised by the commenter, delegated permitting authorities are, by definition, not the same as EPA-approved permitting authorities. A permitting authority that elects to administer the federal program under a delegation agreement accepts the obligation to apply the EPA's regulations.

D. Comments on Mandatory E-Access for Programs that use E-Notice

1. Summary of Proposal

The EPA proposed to require that, when a permitting authority adopts the e-notice approach, it also must provide e-access. In the context of this rule, e-access means that the permitting authority must make the draft permit available electronically (i.e., on the agency's public Web site or on a public Web site identified by the permitting authority) for the duration of the public comment period.

2. Brief Summary of Comments

Several commenters supported e-notice with e-access and further recommended that e-access be provided using commonly available, free software. One commenter noted that e-access was important to increasing overall project awareness and providing for more effective public review and comment. Another commenter agreed with the EPA's proposed approach to limit e-access to the draft permit, and agreed that the method of making available other elements of the permit record should be left to the permitting authority to avoid potential resource constraints.

Commenters opposed to the proposed mandatory e-access requirement generally cited resource and information technology infrastructure constraints, stating that the requirement should be for e-notice only due to the added burden associated with posting additional records without sufficient time, infrastructure or economic capability to do so. Two commenters noted that the addition of e-access makes the rule more stringent than existing law.

3. EPA Response

The EPA is finalizing the requirement that permitting authorities that adopt e-notice also adopt e-access consistent with the proposed rule. The EPA believes that coupling e-notice and e-

access provides the affected public with ready and efficient access to both the notice and the draft permit, and that such access supports informed public participation in the permitting process. Further, the EPA believes that the additional scanning or uploading of the draft permit to meet the e-access requirement would be minimally burdensome. We agree with the commenters that recommended that e-access be provided using commonly available, free software, and our assessment indicates that this is the current practice of permitting authorities that provide e-access to elements of their draft permit records. Therefore, we do not believe that rule language requiring the use of commonly available, free software for providing e-access is necessary and the final rule does not contain such a requirement.

We disagree with the comments that the requirement to provide e-access makes the noticing rules more stringent in a way with which permitting authorities are not readily capable of complying or that is contrary to law. The CAA does not prescribe the means or content of a public notice under the permitting programs addressed in the final rule. Comments received from state and local air agencies confirm that many of these agencies already provide e-access, and in some cases provide e-access to significantly more elements of the permit record than just the draft permit. Thus, we see the requirement for e-access as a logical and appropriate extension of the current requirement to make elements of the permit record available at a location. In addition, the EPA notes that the rule provides that access to documents supporting a draft permit may be provided at a physical location such as a public library. Based on comments received, the EPA believes that the e-access requirement for simply providing, at a minimum, e-access to the draft permit can be readily met by permitting authorities.

E. Comments on Final E-Notice Rule Implementation Timeframe/Transition

1. Summary of Proposal

The EPA did not propose a transition period for technological or other reasons, and proposed instead that once the e-notice rule becomes effective, e-notice and e-access would be required for covered actions by permitting authorities that implement the federal program rules under 40 CFR parts 52, 55, 71 and 124. This includes EPA Regions, permitting authorities that are delegated authority by the EPA to issue permits on behalf of the EPA (via a delegation agreement), and permitting authorities that have their own rules approved by the EPA in a SIP where the SIP incorporates by reference the federal program procedures and automatically updates when the EPA's rules are amended. Under this rule, these programs will be required to implement e-notice and e-access, with the exception of states that are delegated authority to issue permits under part 55.

2. Brief Summary of Comments

The EPA received three comments expressing concern about the proposed effective date of the final rule and the need for additional transition time for implementation. One industry association commenter stated that establishing electronic notification systems and Web sites for e-access requires careful planning, development and testing, and recommended a one year implementation timeframe. Another industry association commenter noted that the support of e-access capabilities typically necessitates substantive changes to an agency's Web site which will stretch far past the effective date of the rule. Another commenter indicated that a local air agency

has several rules that mandate newspaper notice and requested a six month transition to allow for amendment of its rules.

3. EPA Response

The EPA is retaining the proposed effective date of the final rule. As discussed previously, the EPA did not receive any comments demonstrating that one or more affected permitting authorities have infrastructure and/or resource constraints that would render them unable to implement e-notice and e-access as of the effective date of the final rule or that implementation would cause a significant additional burden. Industry commenters only conveyed a general concern and did not identify any specific affected permitting authorities that would be unable to meet the final rule requirements in accordance with the proposed effective date. The other commenter, a local air agency with a partially-delegated permitting program, said a transition is necessary to allow for agency rule changes. However, that same commenter indicated that the agency already practices e-notice and e-access on its own Web site. Therefore, it seems this air agency would not be required to implement any changes to its rules to comply with its obligations as a delegated permitting program after the final rule becomes effective. To the extent that a delegated permitting authority must separately comply with a state requirement to provide notice via a newspaper, nothing in this rule precludes a permitting authority from continuing to comply with such a state requirement while at the same time satisfying the federal requirement for e-notice under this regulation. This rule does not preclude delegated permitting authorities from continuing to provide newspaper notice, either on a discretionary basis or as required separately by state law and/or rule. Under the amended rules, such a permitting

authority should be able to transition away from mandatory newspaper noticing over a period of time without any need for a delay in realizing the benefits of e-notice for EPA-issued permits or permits issued by other air agencies that administer delegated programs.

With regard to permitting authorities that administer EPA-approved permitting programs, this rule does not necessarily require any changes to those programs, and air agencies that wish to make changes have discretion to do so. An approved state whose rules currently require newspaper publication for all draft permits is not required by the rule to make any changes to its public notice requirements. To the extent such a state elects to replace newspaper notice with e-notice, this rule establishes no timetable for the state to make this transition. The state may continue providing newspaper notices until it can complete changes to its regulations to remove a mandatory newspaper publication requirement. Thus, with respect to rule changes by air agencies with EPA-approved programs that elect to implement e-notice alone (*i.e.*, to no longer be required by state or local rules to publish notices in a newspaper), such agencies are free to pursue such changes on their own schedule. A delay in the effective date in this final rule is not necessary to accommodate air agencies with EPA-approved programs that may need time to adopt e-notice into their rules. The fact that a state may need time to move to e-notice if they choose that as their consistent noticing method does not justify delaying the effective date of this rule for other air agencies with EPA-approved programs that may be able to adopt e-notice more quickly.

F. Comments on Temporary Use of Alternative Noticing Methods

1. Summary of Proposal

In the proposed rule, the EPA noted that there may be temporary instances of Web site failure or failure in the availability for public review of the posted e-notice and the draft permit (e-access). This raises the question about what constitutes a significant interruption in time sufficient to require an extension of the public comment period or other measure(s) to cover the period of interruption. The EPA stated in the proposal that the requirement that e-notice and e-access postings be maintained “for the duration of the comment period” should not be interpreted as a requirement for uninterrupted access. However, we sought comment on the EPA’s proposed approach for the phrase “for the duration of the comment period.” The EPA also solicited comments regarding whether we should include a provision in the regulations that allows a permitting authority to use an alternative noticing (and/or access) method to reach the affected public when the Web site is unavailable.

2. Brief Summary of Comments

Several commenters indicated that they felt temporary alternative notice methods were unnecessary. Some of these commenters recommended that the notice be extended for the duration of the downtime of the Web site. Several commenters noted that having the draft permit and public notice available on the Web site during the comment period, compared to the single day publication in the newspaper, results in a significant increase in public access to the proposed permitting action, even if Web site outages occur, and thus temporary alternative notice/access methods should not be required. Commenters also believed that any inability to provide e-notice would likely be resolved quickly and the public would have sufficient access to a draft permit during the comment period despite temporary Web site outages. Several commenters supported the EPA’s position that “for the duration of the comment period” should

not be interpreted as a requirement for uninterrupted access. One commenter suggested that the requirement for 30-day notice is satisfied when the notice first appears and noted that there is nothing in the statute or current regulations that requires continuous notice.

Several commenters also favored rule requirements for temporary alternative noticing. One commenter suggested that alternative noticing criteria should be built into the rules to ensure that Web site interruptions do not have a significant impact on public's ability to review and comment or on the permitting schedule, and that it was critical that agencies have the flexibility to choose their own approach and not be left with the sole option of extending the public notice period when there is a significant Web site interruption. Two commenters suggested that a definition of "the duration of the public comment period" should be added to the rule.

3. EPA Response

The EPA is not finalizing any specific requirements regarding temporary alternative noticing of permit actions to address the temporary unavailability of the notice and/or draft permit due to Web site outages, nor are we specifically defining "the duration of the public comment period." We do not believe that, in general, there are, or will be, significant issues with e-notice and e-access availability on Web sites used by permitting authorities, and we believe that permitting authorities are in the best position to determine the appropriate methods to address any situations that may arise on specific permitting actions. In addition, we agree that there is no statutory requirement for continuous notice of a draft permit during the entire duration of the comment period. While there is significant added value in posting a notice throughout the comment period, we do not see a need for the EPA to define "the duration of the public comment period" as a requirement for uninterrupted access. We support the flexibility for the permitting

authority to enact measures to address Web site unavailability, including possibly extending the public comment period. We have addressed this in the “best practices” in Section IV of this document.

G. Comments on Documentation/Certification of E-Notices

1. Summary of Proposal

The proposed rule did not specifically address documenting and/or certifying the posting of an e-notice to a Web site for the duration of the comment period. However, the EPA received comments on this topic.

2. Brief Summary of Comments

Several commenters supported the need for documentation and/or certification of the e-notice in the administrative record for the draft permit, further stating that it is critical that states document this information in the event the decision is challenged. Two commenters suggested that the EPA could address this issue in “best practices” and provided specific examples.

3. EPA Response

We agree with commenters that it is important for permitting authorities to establish a record that they have provided notice of a draft permit and the opportunity for public comment, but we do not believe a specific certification requirement is necessary. EPA rules have not required a certification of public notice and nothing in the CAA requires it. The EPA has

addressed documentation of e-notices in the “best practices” in Section IV of this document. We support flexibility for permitting authorities to comply with their specific statutory, policy or regulatory provisions for e-notice and e-access and to ensure that there is adequate documentation of the notice in the administrative record for the draft permit.

H. Additional Guidance on E-Notice and E-Access for Minor NSR Permit Actions

1. Summary of Proposal

In the proposed rule, we indicated our intent to clarify that the EPA’s 2012 Memorandum’s interpretation of prominent advertisement in 40 CFR 51.161(b)(3) as media neutral also applies to 40 CFR 51.161(b)(1). More specifically, we proposed that allowing e-access (*i.e.*, Web site access) to the information submitted by the owner or operator and access to the agency’s analysis of the effect on air quality would satisfy the requirement that this information be available for public inspection in at least one location in the area affected. We believe this approach is consistent with the EPA’s 2012 Memorandum with respect to allowing the use of electronic and other methods to provide notice of minor NSR actions, and it is reasonable, for reasons discussed in this preamble, to allow e-access to permit documents for major NSR permits.

In addition, in issuing the EPA’s 2012 Memorandum, the EPA indicated that our interpretation of the term prominent advertisement in 40 CFR 51.161(b)(3) applies only to minor sources and not to synthetic minor sources.³² Given the statement in the memorandum, which raised uncertainty about the flexibility to use media neutral methods for synthetic minor NSR

³² Synthetic minor sources are those sources that have the potential to emit regulated NSR pollutants at or above the major source thresholds, but that have taken enforceable limitations to restrict their potential to emit below such thresholds.

permits, the EPA has now determined that it is not appropriate to exclude such synthetic minor permits in this regard, and the Agency proposal clarified that the limitation established in Footnote 1 of the EPA's 2012 Memorandum is no longer appropriate.

2. Brief Summary of Comments

All commenters supported the extension of the interpretation in the EPA's 2012 Memorandum to synthetic minor NSR permits. One commenter recommended that the EPA either propose changes to 40 CFR 51.161(b)(1) similar to what was proposed for the other sections of the CFR in the rule proposal or expand the EPA's existing interpretation of "media neutral" notification for minor NSR programs to specifically indicate that information available electronically meets the requirements of 40 CFR 51.161(b)(1).

3. EPA Response

The EPA agrees that we should revise the text of 40 CFR 51.161(b)(1) similar to what was proposed for other sections of the CFR. This better communicates our view that Internet posting of this information is sufficient to meet the subject records availability requirements under the existing rule language. The EPA does not agree, however, that it needs to propose the revised text before adopting it in this final rule. The proposed rule provided adequate notice of the EPA's intent to clarify that the requirements of 40 CFR 51.161(b)(1) are satisfied by making the information available electronically. We received no adverse comments on this point. The text the EPA is adding to 40 CFR 51.161(b)(1) is similar to the text the EPA proposed to add to 40 CFR 51.166(q)(2)(ii). We received no adverse comments regarding that text. Therefore, in this final rule, the EPA is revising 40 CFR 51.161(b)(1) to add the following: "This requirement

may be met by making these materials available at a physical location or on a public Web site identified by the State or local agency.”

This final rule preamble also serves to extend the EPA’s media neutral interpretation of prominent advertisement under 40 CFR 51.161 to synthetic minor permits. The EPA will attach a notification to the electronic version of the EPA’s 2012 Memorandum indicating that the media neutral interpretation also applies to synthetic minor permits.

VI. Environmental Justice Considerations

The 1990 CAA Amendments generally require that the EPA or the permitting authority provide adequate procedural opportunities for the general public to have informed participation in the air permitting process in the areas affected by a proposed permit. These areas include EJ communities.

The effectiveness of noticing methods for reaching underserved and EJ communities is a substantial concern to the EPA. A 2011 report issued by the NEJAC found that publication in the legal section of a regional newspaper is antiquated and ineffective, and is not ideal for providing notice to affected EJ communities. Regarding public participation, the report recommends the following to the EPA: “To ensure meaningful public participation, the public notice and outreach process must include direct communication in appropriate languages through telephone calls and mailings to EJ and tribal communities, press releases, radio announcements, electronic and regular mail, Web site postings and the posting of signs.”³³ Thus, the NEJAC specifically listed Web site postings as a method to ensure meaningful public participation. Furthermore, several

³³ “*Enhancing Environmental Justice in EPA Permitting Programs*,” National Environmental Justice Advisory Council (April, 2011), pages 20-21, available at <https://www.epa.gov/sites/production/files/2015-02/documents/ej-in-permitting-report-2011.pdf>.

comments received on the proposed rule, including comments from air agencies with practical experience implementing e-notice and e-access, strongly supported these mechanisms as more effective in providing public notice of permitting actions to EJ communities. However, notwithstanding our conclusion that e-notice and e-access are a viable and effective means of making information widely available to the public, including EJ communities, we strongly encourage permitting authorities to provide additional notice and access to the draft permit (and other elements of the administrative records for which they choose to provide e-access) where they determine that a specific jurisdiction or population would be better served with supplemental notice in the newspaper and/or another noticing method, such as those suggested by the NEJAC, and access to elements of the administrative record (for which e-access was provided) at a physical location.

VII. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

This action is not a significant action and was, therefore, not submitted to the OMB for review.

B. Paperwork Reduction Act (PRA)

This action does not impose any new information collection burden under the PRA. This final rule revises regulations to address public noticing method requirements for draft permits for certain sources of air pollution. It is important to note that the final rule revisions do not require air agencies that implement the permitting program through an EPA-approved title V program or SIP to use e-notice. These agencies may continue to provide notice by newspaper publication or

they may adopt e-notice as their consistent notification method. Only in the latter case would an air agency be required to revise the title V program rules or undertake a SIP revision. For EPA-delegated agencies, and for agencies that incorporate by reference the federal rules and their rules automatically update, no rulemaking action is required by the agency to adopt the e-notice requirements. However, if any of these agencies decides to retain newspaper publication as their consistent notification method, they could request removal of delegation, revise their program rules consistent with the rules for state programs (*e.g.*, 40 CFR 51.166), and undertake a SIP revision. In addition, an agency delegated a 40 CFR part 71 program may need to update its delegation agreement. An air agency delegated the 40 CFR part 71 program may have to choose between implementing e-notice, obtaining approval for implementing a 40 CFR part 70 program, or relinquishing their title V program. To the extent that a SIP revision or a title V program revision is necessary to effect the changes being proposed, we believe that the burden to revise SIPs is already accounted for under the PSD and NNSR information collection request (ICR) No. 1230.29 (OMB Control No. 2060-0003) and the burden to revise title V programs is included in ICR Nos. 1587.13 and 1713.11 (OMB Control Nos. 2060-0243 and 2060-0336).

This action has no burden on industry sources since permitting authorities are responsible for the noticing of permits. Therefore, the final rule revisions do not contain any information collection activities.

C. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. This action will not impose any requirements directly

on small entities. This final rule revises regulations to address public noticing method requirements for draft permits for certain sources of air pollution.

D. Unfunded Mandates Reform Act (UMRA)

This action does not contain any unfunded federal mandate as described in UMRA, 2 U.S.C. 1531-1538, and does not significantly affect small governments. This final action imposes no enforceable duty on any state, local or tribal governments, or the private sector.

E. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.

F. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments

This final action does not have tribal implications, as specified in Executive Order 13175. It will not have substantial direct effect on tribal governments, on the relationship between the federal government and Indian tribes, or on the distribution of power and responsibilities between the federal government and Indian tribes, as specified in Executive Order 13175. Thus, Executive Order 13175 does not apply to this action.

G. Executive Order 13045: Protection of Children from Environmental Health and Safety Risks

The EPA interprets Executive Order 13045 as applying to those regulatory actions that concern environmental health or safety risks that the EPA has reason to believe may

disproportionately affect children, per the definition of “covered regulatory action” in section 2-202 of the Executive Order. This action is not subject to Executive Order 13045 because it does not concern an environmental health risk or safety risk.

H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This action is not subject to Executive Order 13211 because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act

The final rulemaking does not involve technical standards.

J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations

The EPA believes the human health or environmental risk addressed by this action will not have potential disproportionately high and adverse human health or environmental effects on minority, low-income or indigenous populations. The results of this evaluation are contained in Section VI of this document titled “Environmental Justice Considerations.”

K. Congressional Review Act (CRA)

This action is subject to the CRA, and the EPA will submit a rule report to each House of Congress and to the Comptroller General of the United States. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

L. Judicial Review

Under section 307(b)(1) of the CAA, petitions for judicial review of any nationally applicable regulation, or any action the Administrator “finds and publishes” as based on a determination of nationwide scope or effect must be filed in the United States Court of Appeals for the District of

Columbia Circuit within 60 days of the date the promulgation, approval, or action appears in the *Federal Register*. This final rule is nationally applicable, as it revises the rules for public notice under the minor NSR, PSD, NNSR, title V and OCS permitting programs in 40 CFR 51.161, 40 CFR 51.166, 40 CFR 51.165, 40 CFR 52.21, 40 CFR part 124, 40 CFR part 70, 40 CFR part 71 and 40 CFR part 55. As a result, petitions for review of this rule must be filed in the United States Court of Appeals for the District of Columbia Circuit within **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. CAA section 307(d)(7)(B) further provides that “[o]nly an objection to a rule or procedure that was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review.” This section also provides a mechanism for the EPA to reconsider the rule “[i]f the person raising an objection can demonstrate to the Administrator that it was impracticable to raise such objection within [the period for public comment] or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule.” Any person seeking to make such a demonstration should submit a Petition for Reconsideration to the Office of the Administrator, U.S. EPA, Room 3000, EPA WJC, 1200 Pennsylvania Ave. NW., Washington, DC 20460, with a copy to all person(s) listed in the preceding **FOR FURTHER INFORMATION CONTACT** section of this final rule, and the Associate General Counsel for the Air and Radiation Law Office, Office of General Counsel (Mail Code 2344A), U.S. EPA, 1200 Pennsylvania Ave. NW., Washington, D.C. 20460. Filing a petition for reconsideration by the Administrator of this final action does not affect the finality of this action for the purposes of judicial review, nor does it extend the time within which a petition for judicial review must be filed, and shall not postpone the effectiveness of this action.

VIII. Statutory Authority

The statutory authority for this action is provided by 23 U.S.C. 101; 42 U.S.C. 6901, *et seq.*; 42 U.S.C. 300f, *et seq.* 33 U.S.C. 1251, *et seq.*; 42 U.S.C. 7401, *et seq.*

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List of Subjects

40 CFR Part 51

Environmental protection, Administrative practice and procedure, Air pollution control.

40 CFR Part 52

Environmental protection, Administrative practice and procedure, Air pollution control.

40 CFR Part 55

Environmental protection, Administrative practice and procedure, Air pollution control.

40 CFR Part 70

Environmental protection, Administrative practice and procedure, Air pollution control.

40 CFR Part 71

Environmental protection, Administrative practice and procedure, Air pollution control.

40 CFR Part 124

Environmental protection, Administrative practice and procedure, Air pollution control.

Dated:

Gina McCarthy,
Administrator.

For the reasons stated in the preamble, title 40, chapter I of the Code of Federal Regulations is amended as follows:

PART 51 – REQUIREMENTS FOR PREPARATION, ADOPTION, AND SUBMITTAL OF IMPLEMENTATION PLANS

1. The authority citation for part 51 continues to read as follows:

Authority: 23 U.S.C. 101; 42 U.S.C. 7401 - 7671q.

Subpart I – Review of New Sources and Modifications

2. Section 51.161 is amended by revising paragraph (b)(1) to read as follows:

§ 51.161 Public availability of information.

* * * * *

(b) * * *

(1) Availability for public inspection in at least one location in the area affected of the information submitted by the owner or operator and of the State or local agency's analysis of the effect on air quality. This requirement may be met by making these materials available at a physical location or on a public Web site identified by the State or local agency;

* * * * *

3. Section 51.165 is amended by adding paragraph (i) to read as follows:

§ 51.165 Permit requirements.

* * * * *

(i) *Public participation requirements.* The reviewing authority shall notify the public of a draft permit by a method described in either paragraph (i)(1) or (2) of this section. The selected method, known as the “consistent noticing method,” shall comply with the public participation

procedural requirements of § 51.161 of this chapter and be used for all permits issued under this section and may, when appropriate, be supplemented by other noticing methods on individual permits.

(1) Post the information in paragraphs (i)(1)(i) through (iii) of this section, for the duration of the public comment period, on a public Web site identified by the reviewing authority.

(i) A notice of availability of the draft permit for public comment;

(ii) The draft permit; and

(iii) Information on how to access the administrative record for the draft permit.

(2) Publish a notice of availability of the draft permit for public comment in a newspaper of general circulation in the area where the source is located. The notice shall include information on how to access the draft permit and the administrative record for the draft permit.

4. Section 51.166 is amended by revising paragraphs (q)(2)(ii), (iii), (vi), and (viii) to read as follows:

§ 51.166 Prevention of significant deterioration of air quality.

* * * * *

(q) * * *

(2) * * *

(ii) Make available in at least one location in each region in which the proposed source would be constructed, a copy of all materials the applicant submitted, a copy of the preliminary determination, and a copy or summary of other materials, if any, considered in making the

preliminary determination. This requirement may be met by making these materials available at a physical location or on a public Web site identified by the reviewing authority.

(iii) Notify the public, by advertisement in a newspaper of general circulation in each region in which the proposed source would be constructed, of the application, the preliminary determination, the degree of increment consumption that is expected from the source or modification, and of the opportunity for comment at a public hearing as well as through written public comment. Alternatively, these notifications may be made on a public Web site identified by the reviewing authority. However, the reviewing authority's selected notification method (*i.e.*, either newspaper or Web site), known as the "consistent noticing method," shall be used for all permits subject to notice under this section and may, when appropriate, be supplemented by other noticing methods on individual permits. If the reviewing authority selects Web site notice as its consistent noticing method, the notice shall be available for the duration of the public comment period and shall include the notice of public comment, the draft permit, information on how to access the administrative record for the draft permit and how to request and/or attend a public hearing on the draft permit.

* * * * *

(vi) Consider all written comments submitted within a time specified in the notice of public comment and all comments received at any public hearing in making a final decision on the approvability of the application. The reviewing authority shall make all comments available for public inspection at the same physical location or on the same Web site where the reviewing authority made available preconstruction information relating to the proposed source or modification.

* * * * *

(viii) Notify the applicant in writing of the final determination and make such notification available for public inspection at the same location or on the same Web site where the reviewing authority made available preconstruction information and public comments relating to the proposed source or modification.

* * * * *

PART 52 – APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

5. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401, *et seq.*

Subpart A – General Provisions

6. Section 52.21 is amended by revising paragraphs (q) and (w)(4) to read as follows:

§ 52.21 Prevention of significant deterioration of air quality.

* * * * *

(q) Public participation. The administrator shall follow the applicable procedures of 40 CFR part 124 in processing applications under this section.

* * * * *

(w) * * *

(4) If the Administrator rescinds a permit under this paragraph, the Administrator shall post a notice of the rescission determination on a public Web site identified by the Administrator within 60 days of the rescission.

* * * * *

PART 55 – OUTER CONTINENTAL SHELF AIR REGULATIONS

7. The authority citation for part 55 continues to read as follows:

Authority: Section 328 of the Clean Air Act (42 U.S.C. 7401, *et seq.*) as amended by Public Law 101-549.

8. Section 55.5 is amended by revising paragraphs (f)(1)(i) and (ii) to read as follows:

§ 55.5 Corresponding onshore area designation.

* * * * *

(f) * * *

(1) * * *

(i) Make available, in at least one location in the NOA and in the area requesting COA designation, which may be a public Web site identified by the Administrator, a copy of all materials submitted by the requester, a copy of the Administrator's preliminary determination, and a copy or summary of other materials, if any, considered by the Administrator in making the preliminary determination; and

(ii) Notify the public, by prominent advertisement in a newspaper of general circulation in the NOA and the area requesting COA designation or on a public Web site identified by the Administrator, of a 30-day opportunity for written public comment on the available information and the Administrator's preliminary COA designation.

* * * * *

9. Section 55.6 is amended by revising paragraph (a)(3) to read as follows:

§ 55.6 Permit requirements.

(a) * * *

(3) *Administrative procedures and public participation.* The Administrator will follow the applicable procedures of 40 CFR part 71 or 40 CFR part 124 in processing applications under this part. When using 40 CFR part 124, the Administrator will follow the procedures used to issue Prevention of Significant Deterioration (“PSD”) permits.

* * * * *

10. Section 55.7 is amended by revising paragraphs (f)(4)(ii) and (iii) to read as follows:

§ 55.7 Exemptions.

* * * * *

(f) * * *

(4) * * *

(ii) Make available, in at least one location in the COA and NOA, which may be a public Web site identified by the Administrator or delegated agency, a copy of all materials submitted by the requester, a copy of the preliminary determination, and a copy or summary of other materials, if any, considered in making the preliminary determination.

(iii) Notify the public, by prominent advertisement in a newspaper of general circulation in the COA and NOA or on a public Web site identified by the Administrator or delegated agency, of a 30-day opportunity for written public comment on the information submitted by the owner or operator and on the preliminary determination.

* * * * *

PART 70 – STATE OPERATING PERMIT PROGRAMS

11. The authority citation for part 70 continues to read as follows:

Authority: 42 U.S.C. 7401, *et seq.*

12. Section 70.7 is amended by revising paragraphs (h)(1) and (2) to read as follows:

§ 70.7 Permit issuance, renewal, reopenings, and revisions.

* * * * *

(h) * * *

(1) Notice shall be given by one of the following methods: by publishing the notice in a newspaper of general circulation in the area where the source is located (or in a State publication designed to give general public notice) or by posting the notice, for the duration of the public comment period, on a public Web site identified by the permitting authority, if the permitting authority has selected Web site noticing as its “consistent noticing method.” The consistent noticing method shall be used for all draft permits subject to notice under this paragraph. If Web site noticing is selected as the consistent noticing method, the draft permit shall also be posted, for the duration of the public comment period, on a public Web site identified by the permitting authority. In addition, notice shall be given to persons on a mailing list developed by the permitting authority using generally accepted methods (*e.g.*, hyperlink sign-up function or radio button on an agency Web site, sign-up sheet at a public hearing, etc.) that enable interested parties to subscribe to the mailing list. The permitting authority may update the mailing list from time to time by requesting written indication of continued interest from those listed. The permitting authority may delete from the list the name of any person who fails to respond to such a request within a reasonable timeframe. The permitting authority may use other means to provide adequate notice to the affected public;

(2) The notice shall identify the affected facility; the name and address of the permittee; the name and address of the permitting authority processing the permit; the activity or activities

involved in the permit action; the emissions change involved in any permit modification; the name, address, and telephone number of a person (or an email or Web site address) from whom interested persons may obtain additional information, including copies of the permit draft, the application, all relevant supporting materials, including those set forth in §70.4(b)(3)(viii) of this part, and all other materials available to the permitting authority (except for publicly-available materials and publications) that are relevant to the permit decision; a brief description of the comment procedures required by this part; and the time and place of any hearing that may be held, including a statement of procedures to request a hearing (unless a hearing has already been scheduled);

* * * * *

PART 71 – FEDERAL OPERATING PERMIT PROGRAMS

13. The authority citation for part 71 continues to read as follows:

Authority: 42 U.S.C. 7401, *et seq.*

Subpart A – Operating Permits

14. Section 71.4 is amended by revising paragraph (g) to read as follows:

§ 71.4 Program implementation.

* * * * *

(g) *Public notice of part 71 programs.* In taking action to administer and enforce an operating permits program under this part, the Administrator will publish a notice in the *Federal Register* informing the public of such action and the effective date of any part 71 program as set forth in §71.4 (a), (b), (c), or (d)(1)(ii). The publication of this part in the *Federal Register* on July 1, 1996 serves as the notice for the part 71 permit programs described in §71.4(d)(1) (i) and

(e). The EPA will also publish a notice in the *Federal Register* of any delegation of a portion of the part 71 program to a State, eligible Tribe, or local agency pursuant to the provisions of §71.10. In addition to notices published in the *Federal Register* under this paragraph (g), the Administrator will, to the extent practicable, post a notice on a public Web site identified by the Administrator of the part 71 program effectiveness or delegation, and will send a letter to the Tribal governing body for an Indian Tribe or the Governor (or his or her designee) of the affected area to provide notice of such effectiveness or delegation.

* * * * *

15. Section 71.11 is amended by:

- a. Revising paragraph (d)(3)(i)(E);
- b. Revising paragraph (d)(3)(ii); and
- c. Revising paragraph (d)(4)(i)(G).

These revisions read as follows:

§ 71.11 Administrative record, public participation, and administrative review.

* * * * *

(d) * * *

(3) * * *

(i) * * *

(E) Persons on a mailing list, including those who request in writing to be on the list. As part of this requirement, the permitting authority shall notify the public of the opportunity to be put on the mailing list by way of generally accepted methods (*e.g.*, hyperlink sign-up function or radio button on an agency Web site, sign-up sheet at a public hearing, etc.) that enable interested

parties to subscribe to the mailing list. The permitting authority may update the mailing list from time to time by requesting written indication of continued interest from those listed. The permitting authority may delete from the list the name of any person who fails to respond to such a request within a reasonable timeframe.

(ii) By posting a notice on a public Web site identified by the permitting authority for the duration of the public comment period. The notice shall be consistent with paragraph (d)(4)(i) of this section and be accompanied by a copy of the draft permit.

* * * * *

(4) * * *

(i) * * *

(G) The physical location and/or Web site address of the administrative record, the times at which the record will be open for public inspection, and a statement that all data submitted by the applicant are available as part of the administrative record; and

* * * * *

Subpart B – Permits for Early Reductions Sources

16. Section 71.27 is amended by:

- a. Revising paragraph (d)(3)(i)(E);
- b. Revising paragraph (d)(3)(ii);
- c. Revising paragraphs (d)(4)(i)(F) and (G); and
- d. Adding new paragraph (d)(4)(i)(H).

These revisions read as follows:

§ 71.27 Public participation and appeal.

* * * * *

(d) * * *

(3) * * *

(i) * * *

(E) Persons on a mailing list, including those who request in writing to be on the list. As part of this requirement, the Administrator shall notify the public of the opportunity to be put on the mailing list by way of generally accepted methods (*e.g.*, hyperlink sign-up function or radio button on an agency Web site, sign-up sheet at a public hearing, etc.) that enable interested parties to subscribe to the mailing list. The Administrator may update the mailing list from time to time by requesting written indication of continued interest from those listed. The Administrator may delete from the list the name of any person who fails to respond to such a request within a reasonable timeframe;

* * * * *

(ii) By posting a notice on a public Web site identified by the Administrator for the duration of the public comment period. The notice shall be consistent with paragraph (d)(4)(i) of this section and be accompanied by a copy of the draft permit.

* * * * *

(4) * * *

(i) * * *

(F) A brief description of the comment procedures required by paragraphs (e) and (f) of this section and the time and place of any hearing that will be held, including a statement of

procedures to request a hearing (unless a hearing has already been scheduled) and other procedures by which the public may participate in the final permit decision;

(G) Any additional information considered necessary or proper; and

(H) The physical location and/or Web site address of the administrative record, the times at which the record will be open for public inspection and a statement that all data submitted by the applicant are available as part of the administrative record.

* * * * *

PART 124 – PROCEDURES FOR DECISIONMAKING

17. The authority citation for part 124 continues to read as follows:

Authority: Resource Conservation and Recovery Act, 42 U.S.C. 6901 *et seq.*; Safe Drinking Water Act, 42 U.S.C. 300f *et seq.*; Clean Water Act, 33 U.S.C. 1251 *et seq.*; Clean Air Act, 42 U.S.C. 7401 *et seq.*

Subpart A – General Program Requirements

18. Section 124.10 is amended by adding paragraph (c)(2)(iii) to read as follows:

§ 124.10 Public notice of permit actions and public comment period.

* * * * *

(c) * * *

(2) * * *

(iii) For PSD permits:

(A) In lieu of the requirement in paragraphs (c)(1)(ix)(B) and (C) of this section regarding soliciting persons for “area lists” and notifying the public of the opportunity to be on a mailing list, the Director may use generally accepted methods (*e.g.*, hyperlink sign-up function

or radio button on an agency Web site, sign-up sheet at a public hearing, etc.) that enable interested parties to subscribe to a mailing list. The Director may update the mailing list from time to time by requesting written indication of continued interest from those listed. The Director may delete from the list the name of any person who fails to respond to such a request within a reasonable timeframe.

(B) In lieu of the requirement in paragraph (c)(2)(i) of this section to publish a notice in a daily or weekly newspaper, the Director shall notify the public by posting the following information, for the duration of the public comment period, on a public Web site identified by the Director: a notice of availability of the draft permit for public comment (or the denial of the permit application), the draft permit, information on how to access the administrative record, and information on how to request and/or attend a public hearing on the draft permit.

(C) In lieu of the requirement in paragraph (d)(1)(vi) of this section to specify a location of the administrative record for the draft permit, the Director may post the administrative record on an identified public Web site.

* * * * *