

**COMMENTS ON THE ENVIRONMENTAL PROTECTION AGENCY'S NOTICE OF
PROPOSED RULEMAKING TO REVISE PUBLIC NOTICE PROVISIONS IN CLEAN
AIR ACT PERMITTING PROGRAMS**

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Docket ID# EPA-HQ-OAR-2015-0090

The Public Notice Resource Center ("PNRC") and the undersigned organizations respectfully submit these comments in response to the U.S. Environmental Protection Agency's December 29, 2015 Notice of Proposed Rulemaking ("NPRM") to revise the public notice rule provisions for the New Source Review, title V and Outer Continental Shelf ("OCS") permit programs of the Clean Air Act ("CAA") and the corresponding onshore area determinations for implementation of the OCS air quality regulations.

In its NPRM, the Agency seeks comments on a wide range of different proposals that would make changes to the public notice rules under the CAA and allow such notices to be published solely on EPA's website, EPA-delegated air agency websites, and EPA-approved air agency program websites ("EPA websites"). Our comments address only those proposals which would eliminate the requirement that such notices be published in newspapers of general circulation.

Although we support the Agency's intention to provide electronic noticing ("e-notice") of draft air permits and certain other actions under the CAA, we do not believe that it constitutes sufficient public notice. Therefore, we disagree with the proposal to eliminate the requirement that the public be notified of such actions through newspaper advertisements.

I. Introduction

PNRC is a nonprofit organization that provides research and public education materials on the use of public notice in newspapers. We are supported by contributions from newspaper and journalism organizations throughout the U.S., including members of the American Court and Commercial Newspapers and most state press associations. Joining PNRC in submitting these comments are the 43 organizations listed in the addendum.

We believe the Agency's proposal to eliminate newspaper notices and replace them with notices on EPA websites will result in less public awareness of permits issued under the CAA. Newspapers provide a better delivery system for such notices than EPA websites because they have a much broader readership. In addition, they are read by civically engaged citizens who live in geographical proximity to the potential sources of pollution that are the subject of the notices and whose local employment markets and communities may be affected by the activities underlying the notices. Relying solely on the Internet to provide public notice also disadvantages the still significant numbers of rural, elderly, low-income and/or less-educated Americans without Internet access.

The proposal runs counter to over 200 years of tradition suggesting that valid public notice requires an independent, third-party source of publication, and that it should be archivable and verifiable. Eliminating public notices from newspapers will also result in their removal from the digital versions of the same newspapers, most of which run notices there as well as print.

Finally, the cost savings the Agency assumes will result from its proposal are most likely illusory.

II. Newspaper notices are more effective than e-notices on EPA websites because they do a better job of reaching the people public notices are designed to serve

a. Newspapers have much broader readerships than EPA websites

The Agency's proposal to eliminate newspaper notices fails to address the fact that local newspapers still have a much broader regular readership than EPA websites. Over 44 million people subscribed to a daily newspaper in 2014.¹ Although the public conversation about newspapers tends to focus on the shift to digital – especially among elite communities in major metropolitan areas like Washington, D.C. – over 80 percent of those readers continued to read a print version of their newspaper². Moreover, newspaper readership in small communities is especially strong; two-thirds of the adults in such communities read a local newspaper at least once a week. More than four in 10 of those readers say newspapers and their websites are their primary source of information.³

The NPRM did not include any data about the traffic on EPA websites from non-government readers, but we will assume the Agency believes it is substantial. Nevertheless, we know that government websites like EPA.gov are primarily venues for transactional business, like permit applications, licenses, and tax payments, and for seeking information about government operations and facilities⁴. It is certainly true that few people use EPA websites to search for public notices. Since none of the 47 different hyperlinks in the navigation bar on EPA.gov refer users to its public notices, it is safe to assume that the Agency realizes few people come to its website for that purpose. (Perhaps it is also worth noting that among the dozens of hyperlinks EPA.gov features on its “[Learn about Air](#),” “[Air Science](#),” or “[Air Science Resources](#)” website pages, none refer users to public notices – not even in the “What You Can Do” section.)

Government websites like EPA.gov lack the dynamism that newspapers and their website and mobile versions use to draw regular readers, such as current sports, local news, weather and politics. Perhaps that is why only 5 percent of adults think the federal government is very effective at sharing data with the public.⁵

All of this is understandable. Government agencies are not in the business of generating readership. Newspapers are. Their primary product and marketing focus is to build an audience online and in print. Governments do not have expertise in bridge-building, so they outsource

¹ “State of the News Media 2015,” *Pew Research Center*, April 29, 2015, <http://www.journalism.org/media-indicators/newspaper-circulation/>

² Ibid. <http://www.journalism.org/2015/04/29/newspapers-fact-sheet/>

³ “Two-thirds of residents in small towns and cities read community newspapers,” National Newspaper Association, Feb. 3, 2014, <http://www.nnaweb.org/resources?articleTitle=two-thirds-of-residents-in-small-towns-and-cities-read-community-newspapers--1391441142--739--industry-research>

⁴ “Americans’ Views on Open Government Data,” *Pew Research Center*, April 21, 2015, <http://www.pewinternet.org/2015/04/21/open-government-data/>

⁵ Ibid. <http://www.pewinternet.org/2015/04/21/connecting-with-government-or-government-data/>

bridge construction to contractors. Since they do not have expertise in building audience, they should outsource public notices to newspapers.

b. Public notices in newspapers reach a civically engaged, influential audience that does not read EPA websites.

The Agency's proposal to publish its notices solely on EPA websites is based on an "if you publish them, the readers will come" notion of public notice. As long as public notices are published on the Internet, the Agency seems to be saying, there will be a group of people motivated to find them. This notion is predicated on the assumption that the sole purpose of public notices is to provide notification to a fixed group of individuals who have an interest in regularly seeking out information about government activity. In fact, the Agency is so certain of this assumption it provides no evidence in the NPRM that replacing newspaper publication with e-notices on EPA websites "results in a significant increase in public awareness of the proposed permitting action." The Agency just assumes it to be true or perhaps wishes away the obligation to actually inform the public.

The Agency's assumptions are based on a fundamental misunderstanding of the purpose of public notices and the process by which they inform citizens.

Few people actively seek out public notices. This fact helps to explain why, for over 200 years, they have been placed where people not necessarily looking for them are likely to find them. Newspapers are uniquely suited to inspire this serendipitous process of discovery because a wide range of people are drawn to the news and information they contain. Moreover, people who follow the activities of their government in the news are more likely to be civically engaged. Of those who always vote in local elections, 27 percent are more likely to read the daily newspaper than a typical adult⁶. Seven in 10 of those voters read newspaper media in print, online or on mobile devices in a typical week, and nearly eight in 10 contribute money to political organizations.⁷

Policy makers have long understood that newspapers attracted civically engaged readers. It is why they have passed laws limiting the publications that qualify to run public notices to those that report local or general news.

History is replete with examples of newspaper readers who have acted on public notices after finding them in their local paper. Perhaps most significant among those readers are the journalists who read the newspapers that employ them, since they have a professional incentive to learn more about the plans that public notices describe. Moreover, journalists can translate the brief, technical language of a public notice into a full story that provides the context and substance essential to ensuring that citizens who are potentially affected by the notice can understand what is at stake and make well-informed decisions.

⁶ Nielsen Scarborough 2014 Newspaper Penetration Report, Feb. 18, 2014, <http://www.scarborough.com/reports/scarborough-newspaper-penetration-report.html>

⁷ Ibid.

For the last three years, PNRC has recognized leading journalists for their work in calling the public's attention to important notices. Here are a few of the many recent examples we discovered of journalists who uncovered important news as a result of reporting they did that was inspired by the publication of a public notice:

- Three months ago in Tennessee, a public notice led to an award-winning story in the *Greeneville Sun* informing readers to avoid a local nursing home that had been cited by the Centers for Medicare and Medicaid Services for deficiencies that placed some residents in "immediate jeopardy."⁸
- In Scranton, Pennsylvania in 2014, citizens learned that a phone company was planning to erect a 12-foot cell tower in a public park because *The Times-Tribune* reporter Jim Lockwood followed up on a Federal Communications Commission notice published in his paper.⁹
- In Forsyth, Georgia in 2014, citizens forced the school district to abandon its plan to use eminent domain proceedings to seize a small business owner's property when a team of reporters for the *Monroe County Reporter* reported on the plan after learning about it from a public notice published in its paper.¹⁰
- In South Dakota in 2013, readers of the *Daily Republic* in Mitchell, learned about a secret employment settlement with an unsuccessful school superintendent because a sharp-eyed reader discovered the payment in a public notice.¹¹

Without newspaper notices, the citizens of Greeneville, Scranton, Forsyth and Mitchell would have remained in the dark about these important stories. If the Agency eliminates the requirement of newspaper notices, public heralds like the citizens and journalists described above will be highly unlikely to find e-notices buried in EPA websites. Both the public and the Agency will suffer.

The point of public notice is to encourage civic engagement. It is clear from the NPRM that the Agency wants to hear from citizens potentially affected by its permitting actions because it leads to increased public understanding of its mission and regulatory mandate. Our fear is that by removing its notices from newspapers, the Agency will diminish public engagement and appreciation for the important role government plays in protecting the public.

c. E-notices do not reach the local audience they are intended to serve

The Internet is a wondrous information-delivery machine that eliminates geographical boundaries. But there is no recognized public policy interest in providing public notice of government activity outside of the jurisdiction of its locus. The purpose of a public notice is to

⁸ "John M. Reed Facility Found Deficient," *Greeneville Sun*, Dec. 4, 2015, http://www.greenevillesun.com/news/local_news/john-m-reed-facility-found-deficient/article_f5294cfb-a9f5-5c7f-8575-0b912c1e6032.html

⁹ Pennsylvania Newspaper Association press release, Oct. 28, 2014, <http://panewsmedia.org/docs/default-source/contest-and-awards/2014-public-notice-award-press-release.pdf?sfvrsn=0>

¹⁰ "BOE Drops Ingram condemnation plan," *Monroe County Reporter*, Aug. 13, 2014 (article behind paywall, copies of this series of story are available on request)

¹¹ "Secretive Contract Ordered Public," *The Daily Republic*, March 30-31, 2013, <http://www.pnrc.net/wp-content/uploads/2014/02/March-30.pdf>

reach citizens potentially affected by its subject. In terms of the CAA, that means the people who live in geographical proximity to the potential sources of pollution the Agency plans to permit. But by eliminating public notices in local newspapers, the Agency reduces the likelihood that they will be seen by the very people they are intended to serve.

d. Relying solely on e-notices disadvantages a wide swath of Americans who still do not access the Internet

The Agency concedes that “in some instances, communities that are potentially affected by a proposed permitting action may have limited access to the Internet, and therefore may rely more on newspapers for receiving their information.” Although the Agency appears to be concerned only with specific communities, there remain significant pockets of population in every town and city in America that do not have access to the Internet.

The latest research indicates that as of July 2015, 15 percent of U.S. adults did not use the Internet.¹² That figure was significantly higher for older adults in rural areas, for most of whom newspapers remain the primary source of news and information about local events. Lack of Internet access is also higher among minority populations, and among adults with less education and income.¹³

The Agency minimizes these issues raised by e-notice, assuring us that “in many cases, these communities would have access to a public library with Internet access that would provide access to the online permit notices and draft permits.” But as we noted earlier, this is a fallacious assumption about how public notices inform. The overwhelming majority of citizens do not seek out public notices; in fact, the number who do is so infinitesimal it does not even register in surveys of the public use of government websites.¹⁴ And as small as that cohort is, the number of people without Internet access who travel to public libraries seeking e-notices is even tinier.

e. The NPRM includes many assumptions that are unsupported by evidence

The Agency sweeps aside these problems, predicting that “because many permitting authorities are now supplementing their newspaper notices with (e-notices) on their agency Web site, it seems unlikely that the public would continue to seek out permitting announcements in newspapers in the future.” This statement contains a profound misunderstanding of individual behavior (i.e., that citizens “seek out” public notices) and compounds the mistake by tacking on an assumption about newspaper notices that is completely unsupported by evidence in the NPRM. It also overlooks the fact that print newspapers and their digital versions have substantial readership.

¹² “15% of Americans don’t use the internet. Who are they?” *Pew Research Center*, July 28, 2015.

<http://www.pewresearch.org/fact-tank/2015/07/28/15-of-americans-dont-use-the-internet-who-are-they/>

¹³ *Ibid.*

¹⁴ “Americans’ Views on Open Government Data,” *Pew Research Center*, April 21, 2015, <http://www.pewinternet.org/2015/04/21/open-government-data/>

The Agency's proposal to eliminate the requirement of newspaper notices without providing any evidence to support its assumptions is particularly troubling since it clearly has access to data on the likely impact of its decision. As its NPRM notes, in 2012 the Agency eliminated newspaper notice for minor NSR actions under 40 CFR part 51.161. So the Agency has had three years of experience replacing newspapers with e-notices. Yet it shares no data from that trial that would persuasively demonstrate its assumption that such a change "results in a significant increase in public awareness of the proposed permitting action."

Such data was irrelevant for as long as the Agency continued to place public notices in newspapers; under those circumstances, anyone alerted by e-notices on EPA websites is additive. But now the Agency proposes to completely eliminate newspaper notices. Why would an agency seek less notice of its important work?

III. The Agency's proposal runs counter to over 200 years of tradition defining what constitutes valid public notice

In our review of the history of public notice in the U.S., we found four elements that define a valid public notice: It must be published by an independent party, and the publication must be archivable, accessible, and verifiable.¹⁵ If any of the elements are absent, the public suffers.

The Agency's proposal violates three of these traditions.

a. EPA and its delegates are not independent third parties and therefore are not proper publishers of their own public notices

Understanding intuitively that it is not a good idea to allow the "fox to guard the henhouse," lawmakers require public notices to be published in independent forums. For instance, laws in 48 states require banks and creditors to publish foreclosure notices in local newspapers. They are not allowed to fulfill the obligation by publishing the notices in their company newsletters or on their own websites. The reason is almost too obvious to state: Mortgage holders have an economic self-interest in limiting public notice of their own foreclosures. Therefore, policy makers require them to hire independent and neutral third parties to publish the notices – parties that have an economic and civic interest in ensuring that the notice law is followed.

There are many other examples in which lawmakers continue to require government entities or private organizations to publish public notices in newspapers. Sheriffs must notify the public before they sell seized property at auction. Public storage facilities are required to run public notices before selling delinquent renters' property. Estates are required to notify creditors before distributing assets. Local governing bodies are obliged to use newspaper notice to inform their communities about pending meetings. Like these other entities, federal agencies like EPA should engage third-party publishers to provide public notice about their proposals.

¹⁵ "Public Notice: An Examination of the Role of Newspapers in Public Notice," Public Notice Resource Center, 3rd Edition, 2009

In this time of heightened partisanship and suspicion, when significant segments of the population assume the worst about federal agencies and the people who work for them, the Agency should be especially careful before deciding to eliminate the long-standing tradition of independent publication of public notices. Allowing the government to publish the official record of its own activities removes an extra layer of confidence that having an independent publisher provides.

b. Notices published on EPA websites are not properly archivable

Public notices should be archived in a secure and publicly available format to be preserved for future reference. Yet the Agency does not address how it intends to ensure that its e-notices in connection with CAA permit actions will be preserved. As far as we can tell, once the notification is removed from an EPA website, or the platform on which it is published is changed, there will be no record that the public notice ever existed.

By contrast, notices published in newspapers are easily preserved. Newspapers are typically archived both by their publishers and by state and local libraries, where they can be easily retrieved for many years after their date of publication.

c. Notices published on EPA websites are not properly verifiable

Both the public and the source of a particular public notice must be able to verify that the notice was published and was not altered following publication. Verification is vital because notice is an element of due process, and when it is missing it often becomes the cause of action in a lawsuit months after the notice was originally given. Printed notices are self-authenticating in court. Digital information, on the other hand, has not yet matured to a point where common standards are recognized in evidence, and presumptions of authenticity are suborned by regular reports of hacking and other problems in public websites.

In its NPRM, the Agency fails to note how authentication will be accomplished when notice is provided solely via EPA websites. It goes without saying that such sites are frequently edited and that the notices will be removed once their usefulness has been exhausted. Presumably, the Agency believes that it is too difficult and costly to provide authentication of the sites, so it will be virtually impossible to prove after the fact that notices were published and that they were not revised. However, if the Agency does intend to provide a reliable archival and authentication capacity, any savings it may have envisioned from eliminating newspaper publication could vanish.

When a public notice is published in a newspaper, the publisher agrees to provide an affidavit that can be used in an evidentiary proceeding to prove that a true copy was published as well as the exact wording that was used. Under the Agency's proposal, the courts and the public will be forced to trust it and its delegates to provide such verification.

IV. Eliminating newspaper notices will remove them from newspapers' digital versions

Most newspapers now supplement their public notices by posting them on their online versions. In addition, the great majority of local newspapers, some working with their state press associations, also post the notices on statewide public-notice websites. (Lists of press associations that aggregate the printed notices for digital publication are available at the PNRC website, www.pnrc.net.) These collections are made available to the public at no cost to either the public or advertisers. There are also two national websites that index newspaper notices by state and allow for site-wide searches.

All of this aggregation of newspaper notices increases their accessibility via the tools most people use to find information on the Internet – search engines. In fact, the two national websites that index newspaper notices – mypublicnotices.com and publicnoticeads.com – are the first and fourth websites presented in the organic results of a Google search on the keyword “public notices.” Indeed, six of the 10 websites listed on the first page of results on a Google search of that term are newspaper-based sites.¹⁶

V. The cost savings of eliminating newspaper notices are most likely illusory

The Agency suggests its proposal to eliminate newspaper notices will reduce the costs associated with purchasing the space. However, without a thorough analysis of e-notice expenses, it is impossible to say whether those assumptions are correct or, if there is a cost savings, whether it justifies sacrificing the public's easy access to essential information. In order to fairly judge the alternative of relying only on EPA websites, the Agency would need to calculate the following expenses:

- Server and digital storage cost
- Administrative salaries and ancillary costs to develop, proof, and upload the notices, and to administer the site
- Development of archiving capacity or ongoing links to federal repositories
- Affidavits and/or human witnesses in court proceedings to attest to the accuracy and publication date of contested notices
- Marketing cost of informing the public that it must visit EPA websites to find e-notices

These expenses would have to more than offset the publication cost for newspaper notices to properly assess whether removing the notices from their most-accessible venue in the newspaper is worthwhile.

¹⁶ Google search, Feb. 18, 2016, https://www.google.com/?gws_rd=ssl#q=public+notices

VI. Conclusion

The Agency's proposal to eliminate public notices in newspapers will result in lower public awareness of the permits it issues and less civic engagement in its decision-making processes. Requiring the public to trust it to provide notification of its own permitting decisions will also lower public confidence in the Agency, and its inability to properly archive and verify e-notices posted on EPA websites will make it difficult to meet longstanding public-notice traditions.

In spite of all this, the Agency's NPRM provides little evidence to support its broad assumptions, including that the proposal will result in cost savings that justify its reduction in public notice and civic engagement.

ORGANIZATIONS JOINING THESE COMMENTS

In addition to any other newspaper organizations that may have filed comments, the undersigned join PNRC in submitting these comments.

Alabama Press Association

American Court and Commercial
Newspapers

Arizona Newspapers Association

Arkansas Press Association

California Newspaper Publishers
Association

Colorado Press Association

Florida Press Association

Georgia Press Association

Illinois Press Association

Iowa Newspaper Association

Hoosier State Press Association

Kansas Press Association

Kentucky Press Association

Louisiana Press Association

Maryland/Delaware/DC Press Association

Massachusetts Newspaper Publishers
Association

Michigan Press Association

Minnesota Newspaper Association

Mississippi Press Association

Missouri Press Association

Montana Newspaper Association

National Newspaper Association

Nebraska Press Association

Nevada Press Association

New Jersey Press Association

New Mexico Press Association

New York News Publishers Association

New York Press Association

Newspaper Association of America

North Dakota Newspaper Association

Ohio Newspaper Association

Oklahoma Press Association

Oregon Newspaper Publishers Association

Pennsylvania NewsMedia Association

South Dakota Newspaper Association

Tennessee Press Association

Texas Press Association

Utah Press Association

Vermont Press Association

Virginia Press Association

Washington Newspaper Publishers
Association

Wisconsin Newspaper Association

Wyoming Press Association