



CALIFORNIA  
AIR RESOURCES BOARD

# ADVISORY

To: California Air Districts  
and Other Interested Parties

June 2018

Advisory: 299

## AIR DISTRICT NEW SOURCE REVIEW RULES REGARDING ELECTRONIC NOTICE

### **Purpose**

In 2016, the U.S. Environmental Protection Agency (U.S. EPA) issued a final rule revising its public notice regulations for several federal programs, including New Source Review), to provide for electronic notice. The California Air Resources Board (CARB) is issuing this Advisory to explain its view that modernizing public notice requirements of NSR rules implemented by local air pollution control and air quality management districts (collectively “districts”) to be consistent with federal rules does not violate the Protect California Air Act of 2003. CARB believes that electronic noticing (e-noticing), performed consistent with federal rules as described in this Advisory, of projects subject to NSR requirements will result in a more widely served and better informed public and will increase the opportunity for meaningful public participation as intended by the Clean Air Act.

### **Background**

NSR rules contain requirements for districts to provide a public notice of preliminary decisions to issue construction permits for projects with potentially significant air quality

impacts, as well as whenever the districts are proposing to issue emission reduction credit (ERC) certificates. The public notice must contain instructions for interested parties on how to obtain further information concerning the noticed project. Historically, these public notices were required by the United States Environmental Protection Agency's (U.S. EPA) regulations and guidance to be published in a newspaper of general circulation for the area of the state in which the project will occur.

On October 5, 2016, in an effort to take advantage of the increased opportunities for communication provided by the internet, U.S. EPA issued a final rule revising its public notice regulations for several federal programs, including NSR.<sup>1</sup> This action removed the requirement to provide public notice for proposed construction permits by newspaper publication and instead provided for media-neutral noticing, including e-noticing. U.S. EPA's rule requires permitting authorities that implement e-noticing to also post the proposed permit on a publicly accessible web site (e-access). Following issuance of this rule, several air districts inquired of CARB staff whether e-noticing constituted a weakening under the Protect California Air Act of 2003 (PCAA).<sup>2</sup>

### **Regulatory Background on CARB's Authority and the PCAA**

CARB is ultimately charged with federal Clean Air Act compliance in California and specifically with oversight of the Protect California Air Act of 2003.<sup>3</sup> The PCAA was enacted to redress relaxations of federal NSR requirements, and to ensure that state NSR programs maintain their rigor in order to protect the public.

The Legislature recognized the importance of NSR to reducing air pollution in California and that any weakening therein would undermine the progress made in air quality and threaten public health.<sup>4</sup> The Legislature also recognized the effectiveness of the air districts' NSR rules and regulations and sought to preserve them in order to protect public health and enhance air quality.<sup>5</sup> Such local rules guide the pre-construction permitting of new and modified stationary sources of air pollutants.

Accordingly, the PCAA established a floor for the stringency of NSR regulations in California by providing that those regulations in existence as of December 30, 2002, could not be weakened.<sup>6</sup> The Legislature tasked CARB with acting as a backstop: if CARB found, after a public hearing, that a district's rules or regulations were less stringent than those that existed on December 30, 2002, CARB must adopt rules for the

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<sup>1</sup> 81 Fed. Reg. 71613 (October 18, 2016), available at: <https://www.gpo.gov/fdsys/pkg/FR-2016-10-18/pdf/2016-24911.pdf>

<sup>2</sup> Cal. Health and Safety Code, §§ 42500, et seq., 42504, subd. (b)(2)(F).

<sup>3</sup> See Health & Saf. Code, §§ 39602, 42501 et seq.

<sup>4</sup> *Id.* § 42501(b), (c), (g).

<sup>5</sup> *Id.* §§ 42502(e), (f); 42503.

<sup>6</sup> Health & Saf. Code, § 42504(a).

district necessary to establish equivalency.<sup>7</sup> The PCAA encompasses requirements for public participation, including public notice.<sup>8</sup>

### **E-Noticing Supports Important Public Policies and Objectives**

In CARB's view, U.S. EPA's decision to allow media-neutral notices, including e-notices, does not reflect a relaxation, exemption, or reduction of obligations under the NSR program for several reasons. E-noticing serves the same purposes as newspaper notification, is often more useful in an era of widespread electronic media, and does not waive the fundamental notice obligations already contained in NSR rules. To wit:

E-noticing offers several advantages over newspaper publication. U.S. EPA noted in its rulemaking that printed newspaper circulation has been declining over the last decade. In contrast, most people have a computer with internet capability, a smart phone, or access to a public library with internet capability.<sup>9</sup> By allowing e-noticing, information such as publicly noticed projects, formerly located only at the library or at the local air district, and available only during regular business hours, can now be accessed around the clock, almost anywhere in the world, and can be saved for future reference.

E-noticing is flexible and allows for more information to be readily available. Multiple documents for a project or permit can be linked for ease of access. The ability to link the public notice to additional information, such as engineering evaluations, which is not possible with newspaper noticing, will allow greater access to the data that were relied upon to make decisions leading up to a permit proposal.

E-noticing is also more efficient and accessible. Since many districts manage established web sites, staff time to send notices to an outside media source is minimized and the cost to make notices available electronically is potentially lower. Electronic mail and distribution lists allow for interested persons to be alerted to notices. This improves outreach compared with limited visibility in the "notice" section that tends to be in the back of many newspapers. Electronic media may be more easily translated into multiple languages when the need is identified and distributed more directly to those in the communities who speak those languages. Electronic browsers can also present information in accessible ways to those with diminished vision.

Because of the advantages described above, CARB believes that the public will be better informed by allowing e-noticing of projects subject to district NSR rules, and that a shift to e-noticing does not improperly relax notice requirements. Therefore, CARB

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<sup>7</sup> *Id.* § 42504(a).

<sup>8</sup> Cal. Health & Safety Code, § 42504, subd. (b)(1)(D), (2)(F).

<sup>9</sup> See, e.g., documents supporting the U.S. EPA rule, in docket EPA-HQ-OAR-2015-0090, available at <https://www.regulations.gov>. *Public Library Funding & Technology Access Study 2010-2011*, American Libraries Magazine, Digital Supplement, Summer 2011, p. 7 [99.3 percent of all public libraries provide public internet access and computers], document no. EPA-HQ-OAR-2015-0090-0041; March 21, 2016 NTIA Digital Nation Data Explorer, document no. EPA-HQ-OAR-2015-0090-0038 [74.6 percent of U.S. population above the age of 3 uses the internet];

does not consider changes to district NSR rules that transition to e-noticing, consistent with the guidance in this advisory, as less stringent than existing newspaper noticing. Similarly, CARB does not consider such changes to be a form of exemption, relaxation, or reduction in the obligations of a stationary source prohibited by the PCAA.

### **Other Requirements for Newspaper Notice Continue to Apply**

This determination is limited to districts wishing to use e-notice in lieu of newspaper noticing for the purposes of satisfying NSR rule requirements. It does not provide grounds to relax or reduce any other requirement in a manner that would otherwise be impermissible under the PCAA, or meet the statutory requirements to relax a requirement.<sup>10</sup> It should be noted, however that newspaper notices may continue to be required under other provisions of the Health and Safety Code and other law, such as the California Environmental Quality Act.<sup>11</sup>

### **Requirements and Recommended Practices for e-Noticing and e-Access**

CARB staff will review all proposed NSR rule revisions replacing newspaper noticing with e-noticing to ensure those revisions are consistent with the requirements of the PCAA and U.S. EPA's e-notice and e-access provisions. To be compliant with the PCAA, such revisions should ensure that e-noticing and e-access are consistent with U.S. EPA's 2016 rulemaking and will be utilized for all projects that were required to be publicly noticed per the district's NSR rule that was in place on December 30, 2002.

In addition, CARB recommends, to ensure that PCAA-required stringency requirements are fulfilled, that districts reference the following elements in their amended rule(s):

- A dedicated web page on its web site listing all public notices related to NSR permitting.
- The minimum content those notices will contain, including at least the following:
  - notice of availability for public comment;
  - comment period duration and dates;
  - name and address of the permittee;
  - link to a copy of the draft permit;
  - how to access the permitting record;
  - how to comment; and
  - how to request or attend a public hearing on the draft permit.

If a proposed amendment to an NSR-related rule does not meet the requirements of PCAA or U.S. EPA's e-notice and e-access provisions, CARB staff will work with the district to address the deficiency.

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<sup>10</sup> See Cal. Health & Safety Code, § 42504, subd. (d) [imposing requirements for a public hearing and specified findings to relax a requirement].

<sup>11</sup> Cal. Pub. Resources Code, § 21000, et seq, 21092; see Cal. Code Regs., tit. 14, § 15087.

In addition to the NSR program-related noticing, CARB recommends the following practices to enhance public participation and outreach:

- Maintenance of an electronic mailing list of persons who request to be e-noticed;
- Registration for electronic mailing and notification lists on the district's public notice web page;
- Design of web page and use of fonts adequately large and legible to allow easy recognition and access to public notification information;
- Providing e-notice and e-access for non-English speaking communities in the communities' native or predominant language; and
- Making paper copies of all documents available for public inspection within a time period consistent with public information disclosure laws.

CARB also advises districts to ensure that their web pages, e-notices, and e-access documents are accessible on currently available platforms, including mobile computing devices, smartphones, and tablets, with software that is free and commonly available. There are software tools available to test accessibility on various devices.

As noted earlier, other California regulations may specifically still require newspaper noticing. Districts must continue to meet other applicable obligations to provide notice in a newspaper of general circulation, including but not limited to, the California Environmental Quality Act.<sup>12</sup>

### **For additional Information**

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<sup>12</sup> Public Res. Code, § 21000, et seq., and implementing regulations in tit. 14, Cal. Code Regs. See, e.g., tit. 14, Cal. Code Regs., § 15087, Public Review of Draft EIR.