UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

APR 17 2012

OFFICE OF
AIR AND RADIATION

MEMORANDUM

SUBJECT: Minor New Source Review Program Public Notice Requirements under 40 CFR 51.161(b) (3)

FROM: Janet McCabe, Principal Deputy Assistant Administrator
Office of Air and Radiation

TO: Regional Administrators, Regions 1-10

The purpose of this memorandum is to clarify the U.S. Environmental Protection Agency's position on what constitutes prominent advertisement for minor sources[1] under the New Source Review (NSR) State Implementation Plan (SIP) requirements at 40 Code of Federal Regulations (CFR) Subpart I, section 51.161(b)(3)[2]. 40 CFR 51.161 sets the requirements state or local agencies must follow to provide the opportunity for public comment on the information submitted by owners and operators as part of the pre-construction permitting process. Specifically, 40 CFR 51.161(b) establishes that the opportunity for public comment for pre-construction permitting shall include, among other requirements, "a notice by prominent advertisement in the area affected of the location of the source information" and the state and local agency analysis of the source's effect on ambient air quality (40 CFR 51.161(b)(3)).

Over the years, this "prominent advertisement" requirement for minor source programs, including minor NSR permits, has been interpreted in many instances as being met by a public notice in a newspaper of general circulation. However, as the public continues to increase its use of web based sources of information and states experience decreases in the budgets allocated for public noticing of permits, we believe that, for purposes of minor NSR programs and permits, the "prominent advertisement" requirement at 40 CFR 51.161(b)(3) is media neutral. A state program may meet that requirement by using newspapers to publish those notices, or may opt to publish such notices elsewhere as long as it is reasonable to conclude that the public would have routine and ready access to any alternative publishing venues used and the use of the alternative publishing venues is consistent with the state's law or SIP. This interpretation of the "prominent advertisement" requirement is the same as the interpretation of the same term discussed in the policy memorandum titled: "Regional Consistency for the Administrative Requirements of State Implementation Plan Submittals and the Use of 'Letter Notices'" (page 6,

[1] This guidance applies to minor sources, which are sources that have the potential to emit regulated NSR pollutants in amounts that are less than the applicable major source thresholds, and excludes synthetic minor sources. 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.

[2] Although major source permits issued under SIP-approved NSR programs must also comply with 40 CFR 51.161, this memo is intended to clarify these requirements only as they apply to minor source programs and permits in SIP-approved States, because major source permits issued under SIP-approved programs must also comply with 40 CFR 51.166(q)(2)(iii), which requires public notification "by advertisement in a newspaper of general circulation in each region in which the proposed source would be constructed…"

Memorandum from Janet McCabe, Deputy Assistant Administrator of EPA's Office of Air and Radiation to EPA Regional Administrators, April 6, 2011, available at: http://www.epa.gov/glo/pdfs/20110406mccabetoRAs.pdf).

That memorandum indicated that "the EPA has determined that the term 'prominent advertisement' as used in 40 CFR Part 51 when referring to the public notice required by Section 110 of the CAA for SIP revisions is media neutral." The memorandum further explains that "[t]he state may continue the use of newspapers to publish these notices or may opt to publish such notices elsewhere so long as the state has determined that the public would have routine and ready access to such alternative publishing venues." The memorandum also provided the option for states to choose "a combination approach whereby a short (and presumably less expensive) notice is published in a newspaper that informs the public where to access the complete public notice that satisfies all of 40 CFR Part 51 requirements." However, the EPA was also clear that these notice opportunities are available to states "only to the extent allowed by state law, since the SIP actions discussed in that memorandum had to be "developed and adopted by the state agency in accordance with such law and its legal authority."

We believe that 40 CFR 51.161 gives us considerable discretion to determine whether state minor NSR programs and permits meet the notification by "prominent advertisement" requirement. We also believe that using the same definition of "prominent advertisement" for purposes of determining the adequacy of notification for state minor NSR programs and permits that is used in determining the adequacy of notification regarding SIP submittals will provide consistency between these programs.

Furthermore, this general policy statement on "prominent advertisement" of minor source programs and permits is similar to the public notification requirements for minor NSR permits in Indian country. In the recently finalized rule titled: "Review of New Sources and Modifications in Indian country" (76 FR 38748), the EPA explicitly listed alternative ways for providing public notice for minor NSR permits in Indian country (40 CFR 49.157(b)(1)(ii)(A)-(E)), which include mailing lists and postings at one or more locations in the area affected by the source, and expressly approved the use of websites (40 CFR 49.157(b)(1)(ii)(B)). While these alternative ways are not listed in the permitting regulations applicable to minor sources in SIP-approved states and the Indian country rule does not extend those regulations to SIP-approved states, the EPA's inclusion of these alternative means of notification in its minor source FIP suggest that they may, depending on the circumstances, be appropriate ways of providing public notice of permits by SIP-approved states.

In light of this information, this memorandum is intended as a general statement of the EPA's policy with respect to what constitutes "prominent advertisement" for the purpose of providing public notice of minor NSR programs and permits in accordance with 40 CFR 51.161(b)(3). We believe it is appropriate to give state and local programs the flexibility to determine what constitutes prominent advertisement for purposes of minor NSR programs and permits, consistent with the overarching requirement that the public have routine and ready access to the alternative publishing venues. This memorandum, however, does not change the Clean Air Act, the current Review of New Sources and Modifications provisions found at 40 CFR Part 51 Subpart I, or the specific notice requirements that states may have already adopted into their state law or their SIPs. Please share this information with the state and local agencies in your Region. For any questions regarding this guidance, please contact Raj Rao at rao.raj@epa.gov.

cc: Regional Air Division Directors
Regional Air Program Managers
Steve Page