

EPA's Guidance on “Begin Actual Construction” & the Double-edged Sword

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NSR/PSD Program Primary Purpose

- ▶ Require preconstruction review of all new major stationary sources and major modifications to existing major stationary sources.
- ▶ Source subject to NSR must obtain a NSR permit before actual construction begins.
- ▶ Reference LAC 33:III.504.D & 509.A.3

PSD and “Begin Actual Construction”

- ▶ Desire/need for guidance recognized in earliest years of PSD program
- ▶ Any designation is going to result in advantages/disadvantages
- ▶ Key is knowing what
 - ▶ Cannot be done before receiving permit
 - ▶ Can be done to keep construction authorization valid
- ▶ Date your project begins actual construction is a key date

What is PSD?

- ▶ Prevention of Significant Deterioration air permitting program
 - ▶ Major Sources
 - ▶ Major Modifications
- ▶ Nonattainment New Source Review (NNSR) is similar program for nonattainment pollutants in areas not meeting a NAAQS
- ▶ Federal program administered one of three ways
 - ▶ SIP approved for state/local agency
 - ▶ Delegated to state/local agency
 - ▶ By EPA directly
- ▶ States also have minor NSR programs covering projects that do not trigger PSD/NNSR review requirements

Some PSD Milestones

- ▶ 1970 Clean Air Act (Amendments) – NAAQS
- ▶ 1972 *Sierra Club v. Ruckelshaus*
- ▶ 1974 EPA promulgated first PSD regulations
- ▶ 1977 CAAA – detailed statutory basis for PSD program that led to EPA's 1978 PSD regulations
- ▶ 1980 EPA updates PSD regulations due to litigation
- ▶ 1990 EPA publishes guidance in “Draft” NSR Workshop Manual
- ▶ 2002 NSR Reform Rule

EPA attempts clarity - 1978

- ▶ 1978 Reich memo changes from case-by-case policy to specifics allowed in every case

“Begin Actual Construction” 40 years ago

- ▶ “Begin actual construction” first appears in 1980 PSD regulations
- ▶ “No stationary source or modification to which the requirements of paragraphs (j) through (r) of this section apply shall *begin actual construction* without a permit which states that the source or modification would meet those requirements.” [emphasis added]
- ▶ Definition of “begin actual construction” added
- ▶ EPA also added term “emissions unit” and defined it as “any part of a stationary source which emits or would have the potential to emit any pollutant subject to regulation under the Act.”
- ▶ EPA revised definition of “construction” substituting new term “emissions unit” for term “source,” which was used in 1978 rules

“Begin Actual Construction” definition

- ▶ Louisiana:

Begin Actual Construction—initiation of physical on-site construction activities on an emissions unit that are of a permanent nature. Such activities include, but are not limited to, installation of building support and foundations, laying of underground pipework, and construction of permanent storage structures. With respect to a change in method of operating this term refers to those on-site activities other than preparatory activities that mark the initiation of the change.

- ▶ Texas:

Begin actual construction--In general, initiation of physical on-site construction activities on an emissions unit that are of a permanent nature. Such activities include, but are not limited to, installation of building supports and foundations, laying of underground pipework, and construction of permanent storage structures. With respect to a change in method of operation, this term refers to those onsite activities other than preparatory activities that mark the initiation of the change.

“Construction” definition

- ▶ Louisiana:

Construction—any physical change or change in the method of operation (including fabrication, erection, installation, demolition, or modification of an emissions unit) that would result in a change in actual emissions.

- ▶ Texas:

Construction--Any physical change or change in the method of operation (including fabrication, erection, installation, demolition, or modification of an emissions unit) that would result in a change in actual emissions.

“Commence” definition

- ▶ Louisiana

Commence—as applied to construction of a major stationary source or major modification means that the owner or operator has all necessary preconstruction approvals or permits and either has: a. begun, or caused to begin, a continuous program of actual on-site construction of the major stationary source, to be completed within a reasonable time; or b. entered into binding agreements or contractual obligations, which cannot be canceled or modified without substantial loss to the owner or operator, to undertake a program of actual construction of the major stationary source to be completed within a reasonable time.

- ▶ Texas:

Commence--As applied to construction of a major stationary source or major modification, means that the owner or operator has all necessary preconstruction approvals or permits and either has: (A) begun, or caused to begin, a continuous program of actual onsite construction of the source, to be completed within a reasonable time; or (B) entered into binding agreements or contractual obligations, which cannot be canceled or modified without substantial loss to the owner or operator, to undertake a program of actual construction of the source to be completed within a reasonable time.

After 1980 rules, over 5 years go by

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- ▶ March 1986 Reich memo – EPA provides interpretation of the “new” regulatory term “begin actual construction”
- ▶ EPA added policy determination that the term “emissions unit” should be construed to “include any installations necessary to accommodate that unit.”
- ▶ The interpretation in 1986 remained the foundation for the EPA’s policy on “begin actual construction” until last year (and still is*), with EPA reiterating and elaborating through the years

* 4/25/2020 memo is a “draft” memo, and EPA essentially orphaned it in December.

EPA's 1993 Rasnic Memo

- ▶ “If the construction activity is an integral part of the PSD source or modification,” the source “must obtain a PSD permit” prior to undertaking that construction.
- ▶ NSR rules “prohibit any construction activities that are of a permanent nature related to the specific project for which a PSD permit is needed,” as opposed to “general construction not related to the emission unit(s) in question, prior to receipt of a construction permit.”
- ▶ “This standard prohibits activities in a permanent way that the source would reasonably undertake only with the intended purpose of constructing the regulated project.”

EPA's 1993 Howekamp Memo

- ▶ “... certain limited activities that do not represent an irrevocable commitment to the project would be allowed, such as planning, ordering of equipment and materials, site clearing, grading, and on-site temporary storage of equipment and materials.”
- ▶ “all on-site activities of a permanent nature aimed at completing construction” of the “source including but not limited to installation of building supports and foundations, paving, laying of underground pipe work, construction of any permanent storage structure, and activities of a similar nature are prohibited until after the permit is issued and effective, under all circumstances.”

EPA's 1995 Seitz Letter

- ▶ Agreed with Minnesota that site clearing and grading are not prohibited by the regulatory definition of “begin actual construction.”
- ▶ Allowed preconstruction activities would also include ordering materials and temporary storage on site. (citing 1986 Reich memo)
- ▶ Prohibited (permanent and/or preparatory) preconstruction activities . . . would include any construction that is costly, significantly alters the site, and/or [is] permanent in nature.
- ▶ “... it is EPA's longstanding policy that section 52.21(i) reasonably prohibits any preconstruction ‘intended to accommodate’ an ‘emissions unit’ or which is an ‘integral part of the source or modification.’” (citing 1986 Reich memo)
- ▶ MN asked “whether there is flexibility under the Clean Air Act . . . or rules to allow construction of footings for emissions units without a PSD permit in cold weather States such as Minnesota,” and EPA responded its “general view is that such an exemption is not authorized under the Act or the Federal PSD rules.”

EPA's 1996 Request for Comments

- ▶ 7/23/1996 – EPA proposed numerous changes to its NSR rules
- ▶ Several industry members of the Clean Air Act Advisory Committee's Subcommittee on NSR Reform had “recommended that EPA change the NSR regulations to enable sources to engage in a broader range of activities prior to receipt of an NSR permit in cases involving modifications to existing sources.”
- ▶ EPA summarized its position and requested comments
- ▶ However, EPA made no changes to the definition of “begin actual construction” in the 2002 NSR Reform rules.

Just last year

- ▶ 4/25/2020 Anne L. Idsal “draft” memo addressed to Regional Air Division Directors “Interpretation of ‘Begin Actual Construction’ Under the New Source Review Preconstruction Permitting Regulations”
- ▶ Memo stemmed from a 2017 request by EPA for comments on what could be done to help U.S. manufacturing
- ▶ Memo stated EPA was adopting a revised interpretation of “begin actual construction”
- ▶ EPA was proposing to drop the previous EPA interpretations from the 1986 Reich Memorandum, the 1993 Howekamp Memorandum, and the 1995 Seitz Letter.
- ▶ Marked at top “Draft – Internal – Deliberative” but was released for comment

EPA's 2020 Proposed Revised Interpretation

- ▶ “... a source owner or operator may, prior to obtaining an NSR permit, undertake physical on-site activities – including activities that may be costly, that may significantly alter the site, and/or are permanent in nature – *provided* that those activities do not constitute physical construction *on an emissions unit*, as the term is defined in 40 CFR §52.21(b)(7).”
- ▶ an “installation necessary to accommodate” the emissions unit at issue is *not* considered part of that emissions unit, and construction activities that involve an “accommodating installation” may be undertaken in advance of the source owner or operator obtaining an NSR permit.
- ▶ But then, NSR Law Blog reported:
“At a December 8, 2020, Clean Air Act Advisory Committee meeting, acting Assistant Administrator for Air Anne Austin reportedly stated that EPA would not take further action on the “Begin Actual Construction” guidance that was released for public comment on March 25, 2020. Instead, EPA will defer action while it considers whether a rulemaking may be more appropriate.”

Louisiana DEQ guidance

- ▶ [LouisianaGuidanceforAirPermittingActions.pdf](#)
- ▶ Activities that constitute “actual construction” include
 - ▶ the installation of building supports and foundations,
 - ▶ laying of underground pipework,
 - ▶ construction of permanent storage structures, and
 - ▶ construction of other permanent structure supporting the new major source or major modification.
- ▶ Allowed activities include
 - ▶ planning, ordering of equipment and material,
 - ▶ site-clearing,
 - ▶ grading,
 - ▶ on-site storage of equipment and materials, and
 - ▶ construction of permanent structures not associated in any way with an emissions unit (e.g., stand-alone administrative buildings)

TCEQ guidance

- ▶ www.tceq.texas.gov/permitting/air/newsourcereview/before.html
- ▶ Equipment may be received at a plant site and stored provided no attempt is made to assemble the equipment or to connect the equipment into any electrical, plumbing, or other utility system.
- ▶ All work such as excavation, form erection, or steel laying pertaining to foundations upon which permit units will rest shall be considered construction. For permit units not requiring a concrete foundation, the erection or construction of associated items like earthen dams, placement of piling, soil stabilization, storage tank fills, or retaining structures shall be considered construction, and will NOT be allowed without prior receipt of the construction permit.
- ▶ Land clearing, soil load bearing tests, leveling of the area, sewer and utility lines, road building, power line installation, fencing, construction shack building, etc., are considered "site clearance/preparation." However, once the soil and site are ready for foundations, the first excavation into the readied soil is "start of construction."

Bottom Line

- ▶ Interpretation is just that – interpretation
- ▶ State/local agencies with SIP-approved PSD/NNSR programs have some latitude but are still constrained by EPA oversight
- ▶ Companies/facilities subject to EPA oversight, too
- ▶ Cannot “begin actual construction” prior to receiving permit for the project
- ▶ Have to “begin actual construction” within 18 months of receiving permit or go through process to request an extension:

“The LDEQ may extend the 18-month deadline upon a satisfactory showing that the extension would be justified, but in no circumstance can the LDEQ extend the 18-month deadline for phased construction projects. Construction of each independent phase of a phased project must begin within 18 months of the LAER/BACT determination for that phase.”

Questions?

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