



Walter Wright, Jr.
wwright@mwlaw.com
(501) 688.8839

New Source Review/U.S. Environmental Protection Agency Draft Guidance Addressing "Begin Actual Construction": National Association of Clean Air Agencies Comments

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The National Association of Clean Air Agencies ("NACAA") submitted May 11th comments on draft March 25th guidance memorandum distributed by the United States Environmental Protection Agency ("EPA").

The draft guidance memorandum is titled:

Interpretation of "Begin Actual Construction" Under the New Source Review Preconstruction Permitting Regulations ("Draft Guidance")

The *Draft Guidance* was transmitted from Anne L. Isdal, EPA Principal Deputy Assistant Administrator to the Regional Air Division Directors.

The *Draft Guidance* revises EPA's view of the phrase "begin actual construction" as defined under the Clean Air Act New Source Review ("NSR") regulations.

The Clean Air Act NSR constitutes a preconstruction permitting program that establishes and documents air pollution emission limits from "major" sources of air pollution. The NSR program includes two permitting programs:

- Nonattainment
- Prevention of Significant Deterioration

Nonattainment NSR applies in nonattainment areas where the air quality is classified as failing to meet the National Ambient Air Quality Standards ("NAAQS") for one or more criteria air pollutants regulated under the Clean Air Act. The program is intended to allow construction of new or modified sources of air pollution in areas while still making progress toward NAAQS.

PSD applies in attainment areas. Such areas are classified as meeting the NAAQS. PSD review and permitting is intended to allow construction of new or modified sources of air pollution in these areas while protecting (i.e., not significantly degrading) air quality.

The NSR program is triggered by new major sources of air pollution and existing major sources that are making a significant modification.

Application of NSR permitting requirement can be significant from a timing issue. Section 165(a) of the Clean Air Act states that:

. . . no major emitting facility. . . may be constructed . . . unless - (1) a permit has been issued.

In issuing the March 25th *Draft Guidance* EPA states that it currently considers almost every physical on-site construction activity that is of a permanent nature to constitute the beginning of “actual construction” (i.e., is therefore prohibited prior to receipt of a NSR permit). The federal agency states this is the case even where that activity does not involve construction “on an emissions unit.” It expresses a concern that such an interpretation prevents facility development in regards to various preparatory activities that might be undertaken before obtaining the permit.

EPA in the *Draft Guidance* is revising its interpretation of the relevant regulatory language. The federal agency now interprets the regulatory language (i.e., “begin actual construction”) to allow a source owner or operator prior to obtaining an NSR permit to undertake physical on-site activities as long as they do not constitute physical construction on an emissions unit. Further, such activities are allowed even if they:

- are costly
- significantly alter the site
- are permanent in nature

The NACAA comments state that EPA’s revised interpretation “represents a wholesale change from its previous approach.” It states that the revised interpretation:

. . . would allow a great deal more construction to occur prior to permit issuance than has been allowed in the past.

The organization does state that it “acknowledges” that:

. . . in certain instances, the remoteness of a construction site coupled with extreme climatic conditions may require extensive preparatory work on a staged and often seasonal basis over multiple years. Such situations may warrant an alternative approach narrowly aimed to solve that issue. However, such decisions are best left to be managed by the state or local permitting authority.

NACAA’s arguments include:

1. The Guidance Does Not Comport with the Regulatory Definition of “Begin Actual Construction”
2. EPA’s Failure to Articulate What Constitutes an “Emissions Unit” Compounds the Problems with the Draft Guidance
3. The Revised Interpretation Undermines Stakeholder Participation in the Preconstruction Permitting Process
4. The “Equity in the Ground” Issue Remains a Legitimate Concern

A copy of the NACAA comments can be downloaded [here](#).