New Source Review/Clean Air Act: U.S. Environmental Protection Agency Proposed Rule Addressing "Begin Actual Construction"



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The United States Environmental Protection Agency ("EPA") published in the May 13th Federal Register proposed revisions to the Clean Air Act New Source Review ("NSR") air permitting regulations. See 91 Fed. Reg. 26958.

The proposed rule distinguishes between construction of a stationary source and construction of non-emitting components or structures.

Specifically, the proposed rule addresses the definition of "begin actual construction" in the 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 regulations include two permitting programs:

- Nonattainment
- Prevention of Significant Deterioration

Nonattainment NSR applies in nonattainment areas where 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 newer 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 in permitting is intended to allow construction of new or modified sources of air pollution in those 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 can be significant from a timing standpoint. Section 165(a) of the Clean Air Act states that:

… no major emitting facility … may be constructed … unless a permit has been issued.

The proposed rule distinguishes between construction of a stationary source and construction of non-emitting components or structures, while clarifying and codifying that the latter can occur before an

owner or operator obtains an NSR air permit for a new major stationary source or major modification of an existing major stationary source. The revisions will update the definition of ‘‘begin actual construction’’ and add a definition of ‘‘pollutant-emitting activities’’ in the Federal NSR regulations.

EPA notes in the preamble to the proposed rule that the current regulatory definitions of the terms “begin actual construction” and “begin construction” in the NSR regulations prohibit certain on-site construction activities on an emissions unit which are of a permanent nature. These activities are stated to include by way of example:

- Installation of building supports and foundations.
- Laying underground pipework.
- Construction of permanent storage structures.

The term “emission unit” has also been construed to include any installations necessary to accommodate that unit.

EPA states that such interpretations have resulted in uncertainties, delays, and regulatory burdens that are not intended and do not represent the best reading or further the purposes of the Clean Air Act.

The proposed rule is stated to be intended to remove some of these restrictions to allow, before obtaining an NSR air permit, construction of components that do not emit air pollutants, such as:

- Utility service infrastructure for a site.
- Concrete pads.
- Some types of buildings and building components.

A copy of the Federal Register notice can be found here.