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MEMORANDUM

SUBJECT: Interpretation of "Begin Actual Construction" Under the New Source Review Preconstruction Permitting Regulations

FROM: Anne L. Idsal
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TO: Regional Air Division Directors

I. Introduction and Purpose of Memorandum

This guidance memorandum addresses how the Environmental Protection Agency (EPA) interprets "begin actual construction" as that term is defined under EPA regulations implementing the major New Source Review (NSR) permitting program.[1] Those regulations provide that "[n]o new major stationary source or major modification to which the requirements of paragraphs (j) through (r)(5) of this section apply shall *begin actual construction* without a permit that states that the major stationary source or major modification will meet those requirements." 40 CFR § 52.21(a)(2)(iii) (emphasis added).[2] The term "begin actual construction" is defined to mean "in

[1] This guidance is also applicable to minor sources on tribal lands as the federal regulations at 40 CFR § 49.152 adopt a definition of "begin construction" that is consistent with the definition applicable to major sources under 40 CFR § 52.21(a)(2)(iii). In addition, state and local permitting authorities that incorporate the definition of "begin actual construction" referenced in this guidance for their minor NSR programs may apply this guidance to their minor sources at their discretion. Regarding permitting of sources in the Outer Continental Shelf (OCS), EPA's OCS regulations at 40 CFR part 55 establish the applicable requirements, which include federal and state air pollution preconstruction permit requirements. 40 CFR part 55 incorporates by reference the federal Prevention of Significant Deterioration (PSD) rules at 40 CFR § 52.21, as well as applicable state permitting program requirements for OCS Sources located within 25 miles of a state's seaward boundary. The definition of "OCS Source," which is based on activities regulated or authorized under the Outer Continental Shelf Lands Act [43 U.S.C. § 1331 et seq.], is substantially different than the definition of "stationary source" under 40 CFR § 52.21. OCS Sources include activities, equipment, and facilities involved in construction, exploration, transportation and other activities that are not of a permanent nature and may never involve on-site physical construction on an emissions unit. Nothing in this guidance should be construed to allow OCS Sources, including temporary and portable sources, to commence construction and/or operation without an OCS permit pursuant to 40 CFR part 55.

[2] The "requirements of paragraphs (j) through (r)(5)" referenced in 40 CFR § 52.21(a)(2)(iii) are the substantive requirements of the PSD program with which sources are required to comply. For simplicity, this memorandum cites the provisions in the federal PSD regulations at 40 CFR § 52.21, although the other major NSR rules in 40 CFR §

general, initiation of physical on-site construction activities on an emissions unit which are of a permanent nature." 40 CFR § 52.21(b)(11).[3] Under EPA's current interpretation of this regulatory definition, the Agency, as a practical matter, considers almost every physical on-site construction activity that is of a permanent nature to constitute the beginning of "actual construction," even where that activity does not involve construction "on an emissions unit." Consequently, this interpretation tends to preclude source owners/operators from engaging in a wide range of preparatory activities they might otherwise desire to undertake for the purpose of ensuring the project is positioned to move forward in an expedient manner prior to obtaining an NSR permit.

The Agency's current interpretation, which has evolved from various EPA actions described later in this memorandum, is considered by many industry stakeholders to be overly and unnecessarily restrictive. Some have asserted that, due to this interpretation, projects have been delayed and efforts to engage in construction pursuant to staged schedules (*e.g.*, which seek to take account of seasonal conditions in cold-weather areas) have been frustrated. A number of stakeholders, in submitting comments in response to the *Federal Register* notice titled, "Evaluation of Existing Regulations," EPA-HQ-OA-2017-0190, 82 FR 17793 (April 13, 2017), specifically identified EPA's interpretation of "begin actual construction" as an important matter the Agency should reconsider.[4]

Upon review, EPA has determined that its current interpretation of the term "begin actual construction" for the major NSR program does not entirely comport with the plain language of the long-standing regulatory definition of that term. Accordingly, EPA is adopting a revised interpretation that better conforms to the regulatory text. Under EPA's 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).[5] Further, under this revised interpretation, an "installation necessary to accommodate" the emissions unit at issue is *not* considered part of that emissions unit, and those construction activities that may involve such

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51.166, 40 CFR § 51.165, and Appendix S of 40 CFR part 51 contain provisions that set forth essentially identical definitions of the term "begin actual construction." *See* 40 CFR § 51.166(b)(11); 40 CFR § 51.165(a)(1)(xv); 40 CFR part 51, Appendix S II.17. EPA interprets the preconstruction review requirements in those regulations consistent with the requirements of 40 CFR § 52.21, and hence the statements in this memorandum apply to those provisions as well.

[3] The definition continues: "Such activities include, but are not limited to, installation of building supports and foundations, laying underground pipework and construction of permanent storage structures. With respect to a change in method of operation, this term refers to those on-site activities other than preparatory activities which mark the initiation of the change." 40 CFR § 52.21(b)(11).

[4] EPA published the April 13, 2017, *Federal Register* notice as directed by Executive Order 13777, "Enforcing the Regulatory Reform Agenda." The Department of Commerce also received a number of comments concerning EPA's interpretation of "begin actual construction" in response to the Department's own request for information entitled "Impact of Federal Regulations on Domestic Manufacturing," Docket No. 170302221-7221-01, 82 FR 12786 (March 7, 2017). The Department had been directed to initiate this request by the presidential memorandum of January 24, 2017, "Streamlining Permitting and Reducing Regulatory Burdens for Domestic Manufacturing." These stakeholder comments are discussed in more detail below.

[5] "Emissions unit" is defined as "any part of a stationary source that emits or would have the potential to emit any regulated NSR pollutant..." 40 CFR § 52.21(b)(7).

"accommodating installations" may be undertaken in advance of the source owner or operator obtaining a major NSR permit.

EPA recognizes that the interpretation at issue was a long-standing one and the Agency does not take lightly the decision to revise it. Accordingly, Part II of this memorandum provides a thorough review of the statutory and regulatory background, along with the history of EPA's application of the prior interpretation. Part III sets forth EPA's revised interpretation, explains why the revised interpretation is consistent with the regulatory text, and gives the Agency's reasons for adopting it. In Part IV, EPA addresses certain matters related to the issue of determining the proper scope of an "emissions unit," which is an issue of particular importance in light of the Agency's revised interpretation of "begin actual construction."

II. Background

A. The Clean Air Act

Congress in the Clean Air Act (CAA or the Act) Amendments of 1977 established the NSR program to be a preconstruction permitting program, a program by which a source owner or operator must obtain a permit prior to constructing a major stationary source (or making a "major modification" to an existing major stationary source).[6] Generally speaking, before a permit to construct can be issued, an analysis must be performed to ascertain the effects that projected emissions from the proposed new facility (or, as may be the case, the proposed "modified" facility) are expected to have on air quality. The permit must also specify the emission limits that the proposed new facility or modified facility will be required to meet for the air pollutants of concern, with those limits being based on a determination of the "best available control technology" (under the PSD program) or the "lowest achievable emission rate" (under the nonattainment NSR program).

While Congress in the 1977 CAA Amendments specified that, for any "major emitting facility on which construction is commenced after August 7, 1977," such facility could not "be constructed . . . unless . . . a permit has been issued," the CAA contains no provision that expressly identifies or defines what constitutes the "construction" of a source, or that specifically establishes the point at which a source can be considered to have been "constructed."[7] Nor does the Act contain

[6] *See* 42 U.S.C. § 7475(a); CAA § 165(a) ("No major emitting facility on which construction is commenced after August 7, 1977, may be constructed in any area to which this part applies unless . . . a permit has been issued for such proposed facility."); 42 U.S.C. § 7502(c)(5); CAA § 172(c)(5) ("Such plan provisions shall require permits for the construction and operation of new or modified major stationary sources anywhere in the nonattainment area."). Preconstruction PSD permits cover major sources or major modifications in attainment or unclassifiable areas and emissions of National Ambient Air Quality Standards (NAAQS) pollutants and other regulated pollutants. Preconstruction nonattainment NSR permits cover major sources or major modifications in nonattainment areas and emissions of those nonattainment NAAQS. This memorandum uses the term "NSR" to refer to both the PSD program and the nonattainment NSR program.

[7] In enacting the 1977 CAA Amendments, Congress initially failed to include a statutory definition for the term "construction." Congress also failed to apply the requirements of the PSD program to major sources that underwent modification. In an effort to correct this oversight, Congress, through a post-enactment technical amendment – *i.e.*, Pub. L. No. 95-190, 91 Stat. 1402 (November 16, 1977) – added section § 169(1)(C) to the Act, providing a

any provision that directly establishes when physical on-site "construction" activities can be said to have begun.[8] Accordingly, it was left to EPA's discretion, in adopting implementing regulations for the then-new NSR program, to give meaning to these terms through regulatory definitions.

B. EPA's Initial NSR Implementing Regulations

In June 1978, EPA promulgated implementing regulations for the PSD program enacted by the 1977 CAA Amendments.[9] Those rules contained a "source applicability" provision that specified that "[n]o major stationary source or major modification shall be *constructed* unless the requirements of paragraphs (j) through (r) of this section, as applicable, have been met." 40 CFR § 52.21(i)(1) (1978) (emphasis added); 43 FR 26406. While the 1978 PSD rules contained no definition of the term "constructed," the term "construction" was defined to mean "fabrication, erection, installation, or modification of a source." *Id.* § 52.21(b)(7) (1978); 43 FR 26404. The term "source" was defined to mean "any structure, building, facility, equipment, installation, or operation (or combination thereof) which is located on one or more contiguous or adjacent properties and which is owned or operated by the same person (or by persons under common control)." *Id.* § 52.21(b)(4) (1978); 43 FR 26404.

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definition for "construction." Even then, Congress only managed to clarify that "construction" *included* "modification," and still failed to define "construction" itself. *See* 42 U.S.C. § 7479(2)(C) ("The term 'construction' when used in connection with any source or facility, includes the modification (as defined in section 7411(a) of this title) of any source or facility.").

[8] Congress did not intend for the requirements of its new statutory PSD program to apply to either (i) those sources in existence as of the date of enactment of the 1977 CAA Amendments (*i.e.*, August 7, 1977); nor to (ii) those sources, the "construction" of which had already "commenced" as of that date. In colloquial terms, such sources were to be considered "grandfathered." For purposes of determining whether a source owner or operator was sufficiently committed to the construction of a particular source at a particular site, so that its under-construction facility would qualify for this "grandfathered" status, Congress provided a definition for the term "commenced." *See* 42 U.S.C. § 7479(2)(A) (The "term 'commenced' as applied to construction of a major emitting facility means that the owner or operator has obtained all necessary preconstruction approvals or permits required by Federal, State, or local air pollution emissions and air quality laws or regulations," and either has "(i) begun, or caused to begin, a continuous program of physical on-site construction of the facility" or has "(ii) 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 construction of the facility to be completed within a reasonable time."). The PSD regulations contain substantially the same definition of "commence" (*e.g.*, 40 CFR § 52.21(b)(9)), and that definition is used both in implementing the statutory grandfathering provisions described above (*see* 40 CFR § 52.21(i)(1)(i) – (v)) and also in determining those circumstances under which a PSD permit may become invalid (*see* 40 CFR § 52.21(r)(2), which provides, in relevant part, that "approval to construct shall become invalid if construction is not commenced within 18 months after receipt of such approval …"). While the term "commence construction" is sometimes used in place of the regulatory term "begin actual construction," each term speaks to a different concept, and the two terms are not interchangeable. The term "commence" does not speak to what sorts of on-site "construction" activities require a permit *before* they can be undertaken. Rather, the term "commenced" is meant to identify the nature and extent of the construction activity a source owner or operator must have engaged, *after* having obtained "all necessary preconstruction approvals or permits," in order for the source under construction to warrant "grandfathered" status or to avoid invalidation of an issued PSD permit.

[9] *See* 43 FR 26380 (June 19, 1978) (40 CFR part 51); 43 FR 26388 (June 19, 1978) (40 CFR part 52) (collectively, the 1978 PSD rules). The first set of rules implementing the nonattainment NSR program enacted by the 1977 CAA Amendments were promulgated in January 1979. *See* 44 FR 3274 (January 16, 1979).

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In neither the regulatory text nor in the accompanying preamble to the 1978 PSD rules did EPA provide an explanation of the phrase "shall be constructed." Moreover, the Agency did not identify what sort of physical on-site construction activities a source owner or operator could permissibly undertake prior to receiving a preconstruction permit.[10] It fell therefore to EPA to explicate this regulatory provision through interpretive guidance. By the end of 1978, EPA had done so. *See* Memorandum, Edward E. Reich, Director, U.S. EPA Division of Stationary Source Enforcement, to U.S. EPA Enforcement Division Directors, Regions I-X (December 18, 1978) (the December 1978 Reich Memorandum).

C. EPA's Initial Guidance

In the December 1978 Reich Memorandum, EPA framed the issue as "where on the continuum from planning to operation of a major emitting facility does a company or other entity violate the PSD regulations if it has not yet received a PSD permit." December 1978 Reich Memorandum at 1. "This question has arisen several times in particular cases," EPA stated, and "general guidance now appears necessary." *Id.*[11] EPA went on to note that the "statute and regulations do not answer this question." *Id.* Thus, the Agency stated, the "term 'constructed' seems to be open to further interpretation by EPA." *Id.*

EPA then announced that it was abandoning what it described as its prior approach of "mak[ing] the determination on a case-by-case basis, after considering all the facts of the individual situation," in favor of a "new policy," under which "certain limited activities will be allowed in all cases." December 1978 Reich Memorandum at 2. "These allowable activities," EPA stated, are "planning, ordering of equipment and materials, site-clearing, grading, and on-site storage of equipment and materials." *Id.* EPA added that "[a]ny activities undertaken prior to issuance of a PSD permit would, of course, be solely at the owner's or operator's risk." *Id.* At the same time, the Agency continued, "[a]ll on-site activities of a permanent nature aimed at completing a PSD source for which a permit has yet to be obtained are prohibited under all circumstances." *Id.* "These prohibited activities," EPA explained, "include installation of building supports and foundations, paving, laying of underground pipe work, construction of permanent storage structures, and activities of a similar nature." *Id.*

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[10] The 1978 PSD rules did not expressly preclude an owner or operator from engaging in any particular on-site construction activity prior to obtaining a PSD permit. The terminology employed by the "source applicability" provision of the 1978 PSD rules – *i.e.*, ". . . shall be constructed unless the requirements of paragraphs (j) through (r) have been met" – established a preconstruction permit program only by implication.

[11] One such "particular case" had been addressed by EPA two months earlier. *See* Memorandum, Edward E. Reich, Director, U.S. EPA Division of Stationary Source Enforcement, to Thomas W. Devine, Chief Air Branch, U.S. EPA Region I (October 10, 1978) (the October 1978 Reich Memorandum). Responding to a request for "guidance on the extent to which a company can legally construct, prior to PSD permit issuance, a building which will house both PSD-affected and non-PSD affected facilities," EPA said that, "[i]n general, a structure which is to house independent facilities, some of which are subject to PSD and some of which are not, may be constructed before a PSD permit is issued only if the building is a necessary part of the PSD-exempt project and if it is in no way modified to specifically accommodate the PSD-affected facilities." October 1978 Reich Memorandum at 1. In the specific case of certain "diesel engines . . . subject to PSD review," EPA continued that, "[a]lthough drains, diesel footings, and various other installations may be considered part of the structure of the building," those elements of the project "may not be constructed until the permit is issued if they are specific to the diesel engines." *Id.*

EPA suggested that this "new policy" would have "several advantages," anticipating that it would be "easy to administer, since case-by-case determinations will not be required." December 1978 Reich Memorandum at 2. Further, EPA stated, it "assures national consistency and permits no abuse of discretion." *Id.* "Finally," the Agency opined, "it appears to be the most legally correct position." *Id.*[12]

The 1978 PSD implementing rules were subsequently challenged by various parties. Those challenges were resolved by the U.S. Court of Appeals for the District of Columbia Circuit in *Alabama Power Co. v. Costle*, 636 F.2d 323 (D.C. Cir. 1979). The 1978 rules were upheld in part, while certain provisions were struck down.[13] Subsequently, on remand, EPA extensively revised its NSR rules. *See* 45 FR 52676 (August 7, 1980) (the 1980 NSR rules).

D. The 1980 NSR Rules

EPA, in the 1980 NSR rules, made four changes to the NSR preconstruction permitting provisions that are relevant here. First, EPA revised the "source applicability" provision to read: "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." 40 CFR § 52.21(i)(1) (1980) (emphasis added); 45 FR 52738. In other words, it was here that EPA explicitly incorporated into those rules the term "begin actual construction."[14]

Second, EPA adopted a definition of "begin actual construction." As promulgated in 1980, the definition read then the same as it does today. 40 CFR § 52.21(b)(11) (1980); 45 FR 52736.

[12] EPA provided no explanation for why it believed this approach reflected the "most legally correct position." EPA acknowledged that the "statute and regulation do not answer this question" of "where on the continuum from planning to operation of a major emitting facility does a company . . .violate the PSD regulations if it has not yet received a PSD permit." December 1978 Reich Memorandum at 1. The CAA itself, EPA noted, "states simply that, '[n]o major emitting facility . . . may be constructed . . . unless – (1) a permit has been issued.'" *Id.*, *quoting* 42 U.S.C. § 7475(a). Further, EPA observed, while the term "commenced" was "quite specifically defined in . . . Section 169(2)(A) of the Clean Air Act" (and, as well, in 40 CFR § 52.21(b)(8)), that term served only the "purpose of deciding the threshold question of the applicability of the PSD regulations." *Id.* at 2. *See* note 8, above. EPA also recognized that the 1978 PSD rules themselves did "not explicitly answer the question" at hand. *Id.* Thus, EPA understood that, given the lack of statutory and regulatory direction in this matter, the Agency possessed considerable discretion – *i.e.*, "[W]e are not bound by [the statutory and regulatory definitions of "commencement of construction"] in deciding what activities may be conducted prior to receiving a necessary PSD permit." *Id.* But EPA did not otherwise explain its position that, in exercising this discretion, the Agency had arrived at the "most legally correct position."

[13] Nothing in the *Alabama Power Co.* decision speaks directly to the issues addressed by this memorandum. The court did, however, strike down the 1978 PSD rules' definition of "source" set forth in 40 CFR § 52.21(b)(4). The D.C. Circuit found that, because Congress had in CAA § 111(a)(3) expressly defined "stationary source" to mean "any building, structure, facility, or installation which emits or may emit any air pollutant," the Agency had erred by including in its regulatory definition of "source" the additional elements "equipment," "operation," and "combination thereof." *See Alabama Power Co.*, 636 F.2d at 395-396.

[14] The equivalent provision in the current NSR rules (*i.e.*, 40 CFR § 52.21(a)(2)(iii)) was recodified in conjunction with the promulgation of the NSR reform rules in 2002. *See* 67 FR 80275 (December 31, 2002).

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Third, EPA introduced in the NSR rules another new term ("emissions unit"), which it defined as "any part of a stationary source which emits or would have the potential to emit any pollutant subject to regulation under the Act." 40 CFR § 52.21(b)(7) (1980); 45 FR 52736. The term "emissions unit" was used in various places throughout the 1980 NSR rules, including in the definition of "begin actual construction" – *i.e.*, "in general, initiation of physical on-site construction activities on an *emissions unit* which are of a permanent nature." 40 CFR § 52.21(b)(11) (1980) (emphasis added); 45 FR 52736.

Fourth, EPA revised the definition of "construction." The revised definition provided that the term "means any physical change or change in the method of operation (including fabrication, erection, installation, demolition, or modification of an emissions unit) which would result in a change in actual emissions." *Id.* § 52.21(b)(8) (1980); 45 FR 52736. In equating "construction" to a "physical change" which would result in a "change in actual emissions," this revision reflected the 1980 NSR rules' shift to the use of "actual emissions" in determining post-change emission increases.[15] In revising the definition, EPA also substituted the newly-introduced term "emissions unit" for "source," which had been used in the 1978 PSD rules' definition of "construction."[16]

E. EPA Guidance on "Begin Actual Construction"

When it first promulgated the term "begin actual construction" as part of the 1980 NSR rules, EPA did not in the preamble to those rules discuss its purpose for having done so. Nor had the Agency originally proposed to adopt that term.[17] Rather, the new term, as defined at 40 CFR § 52.21(b)(11), appeared for the first time, without explanation, in the final rule. Thus, it was again left to the Agency to explain its approach to determining when a source "begin[s] actual construction" through subsequent guidance. In a memorandum issued in March 1986, EPA had occasion to interpret the new regulatory term "begin actual construction." *See* Memorandum,

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[15] The 1978 PSD rules had specified that a "major modification" was "any physical change in, change in the method of operation of, or addition to a stationary source which increases the *potential emission rate* of any air pollutant regulated under the [A]ct . . . ." 40 CFR § 52.21(b)(2) (1978) (emphasis added). In the 1980 NSR rules, EPA adopted an "actual emissions" approach, citing the D.C. Circuit's *Alabama Power Co.* decision. *See* 45 FR 52700 ("Following the lead of the court, EPA has also shifted the focus of its regulatory definitions from 'potential to emit' to 'actual emissions.'"). In 2002, EPA again revised the term "construction" by removing the word "actual," so that the regulatory definition now concludes ". . . which would result in a change in emissions." *See* 67 FR 80276 (December 31, 2002). In doing so, EPA explained that the "change was necessary because of how the definition of 'actual emissions' is used in the final rule" that the Agency was at that time adopting, but that "the deletion is not intended to change any meaning in the term 'construction.'" *Id.* at 80190.

[16] EPA in 1980 also replaced the defined term "source" (as had been used in the 1978 PSD rules) with the term "stationary source." In so doing, EPA removed the elements "equipment," "operation," and "combination thereof" that had appeared in the old definition of "source," which elements the D.C. Circuit in the *Alabama Power Co.* decision had found to be unlawful. *See* note 13, above; *see also* 40 CFR § 52.21(b)(5) (1980); 45 FR 52736 (defining "stationary source" to mean "any building, structure, facility, or installation which emits or may emit any pollutant subject to regulation under the Act.").

[17] *See* 44 FR 51924 (September 5, 1979). As the "source applicability" provision (*i.e.*, 40 CFR § 52.21(i)) was proposed in 1979 to be revised, it provided: "(1) No stationary source or modification to which the requirements of paragraphs (j) through (u) of this section apply *shall be constructed* without a permit that states that the stationary source or modification would meet those requirements." *Id.* at 51953 (emphasis added).

Edward E. Reich, Director, U.S. EPA Division of Stationary Source Compliance, to Robert R. DeSpain, Chief, Air Programs Branch, EPA Region VIII (March 28, 1986) (the 1986 Reich Memorandum).

1. The 1986 Reich Memorandum

This being the first guidance statement on "begin actual construction" since issuing the 1980 NSR rules, EPA began by pointing back to the December 1978 Reich Memorandum and stating that the "question of what type of construction activities may be conducted prior to issuance of a PSD permit" had already "been covered by EPA policy for many years." 1986 Reich Memorandum at 2. This "policy statement from 1978," the 1986 Reich Memorandum announced, continued to represent EPA's "policy on the types of construction activities which are prohibited, or may occur at risk to the owner prior to issuance of a PSD permit." *Id.* at 3.

Such activities, EPA explained, included "planning, ordering of equipment and material, site-clearing, grading, and on-site storage of equipment and materials." *Id.* at 2. Meanwhile, "[a]ll on-site activities of a permanent nature aimed at completing a PSD source (including, but not limited to, installation of building supports and foundations, paving, laying of underground pipe work, construction of permanent storage structures, and activities of a similar nature)," the Agency said, "are prohibited until the permit is obtained, under all circumstances." *Id.*

The continuation of these elements of the 1978 policy was supported by the fact that EPA had used language from the 1978 memo in the definition of "begin actual construction."[18] But in other parts of the 1986 memo, EPA also identified a need to give meaning to language in the definition of "begin actual construction" that was not reflected in the 1978 memo, particularly, the use of the term "emissions unit." EPA recognized that it would now be necessary to draw a distinction between a "major stationary source" on the one hand and an "emissions unit" on the other, insofar as an emissions unit is, by definition, a *part* of a stationary source. *Id.* ("[A]lthough applicability of PSD is determined on a source-wide basis, it may become necessary to distinguish the emissions unit from the major stationary source or modification in order to determine at what point in construction planning or construction activities a PSD permit is required."). Notwithstanding this observation in the 1986 memo, EPA continued to use the term "PSD source," rather than "emissions unit." EPA also stated that "[l]anguage changes in the regulations" – *i.e.*, the adoption of the defined term "begin actual construction" by the 1980 NSR rules – "after [the

[18] For example, the December 1978 Reich Memorandum had stated: "All *on-site activities of a permanent nature* aimed at completing a PSD source for which a permit has yet to be obtained are prohibited under all circumstances." December 1978 Reich Memorandum at 2 (emphasis added). *Cf.* 40 CFR § 52.21(b)(11) (". . . initiation of physical *on-site* construction *activities* on an emissions unit which are *of a permanent nature*." (emphasis added)). Further, the December 1978 Reich Memorandum had provided as examples of "prohibited activities" such things as the "installation of building supports and foundations, paving, laying of underground pipe work, construction of permanent storage structures, and activities of a similar nature." December 1978 Reich Memorandum at 2. The second sentence of 40 CFR § 52.21(b)(11) uses much the same language. In a letter dated some eight months after promulgation of the 1980 NSR rules, EPA suggested that the definition of "begin actual construction" had been "based upon Mr. Reich's December 18, 1978 memorandum," in that it "was intended to embody in regulatory form the Agency's policy that site preparation activities do not trigger Federal PSD requirements." *See* Letter from Valdas V. Adamkus, Acting Regional Administrator, EPA Region V, to Joseph M. Polito, Honigman, Miller, Schwartz and Cohen (April 29, 1981) at 2.

1978 Reich Memorandum] was issued did not alter EPA's interpretation of what a source may do prior to obtaining a PSD permit." *Id.* at 3.

However, when interpreting the term "emissions unit," the 1986 memo added something to the policy that had not been reflected in the 1978 memo. EPA stated that, as used in the definition of "begin actual construction," the term "emissions unit" should be construed to "include any installations necessary to accommodate that unit." 1986 Reich Memorandum at 2. EPA continued by stating that "if the emissions unit (including any accommodating installation) is an integral part of the source or modification (i.e., the source or modification would not serve in accordance with its original intent, except for inclusion of the emissions unit) the PSD permit must be obtained before construction on the entire source commences." *Id.* at 2-3.

The interpretation of "begin actual construction" set forth in the 1986 Reich Memorandum would remain the Agency's interpretation until now. Over that time, EPA has reiterated and elaborated upon the interpretation, both in other guidance documents, and in providing direction to states and to the Regions in the form of applicability determinations.

2. The 1993 Rasnic Memorandum

In April 1993, EPA was asked by the then-Region III air enforcement branch chief to provide its opinion about the applicability of the PSD program to "certain Georgia-Pacific activities at a site in West Virginia." *See* Memorandum, John B. Rasnic, Director, U.S. EPA Stationary Source Compliance, Office of Air Quality Planning and Standards, to Bernard E. Turlinski, Chief, Air Enforcement Branch, EPA Region III (May 13, 1993) (the 1993 Rasnic Memorandum) at 1. In responding, EPA concluded that "the activities as described by Georgia-Pacific . . . are construction activities prohibited prior to issuance of a PSD permit." *Id.* To reach that conclusion, EPA looked to the 1986 Reich Memorandum, which it cited as support for its position that "[i]f 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. *Id.* at 1-2.

EPA further stated that the 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." 1993 Rasnic Memorandum at 2. "This standard," EPA stated, "prohibits activities in a permanent way that the source would reasonably undertake only with the intended purpose of constructing the regulated project." *Id.*

3. The 1993 Howekamp Memorandum

In November 1993, EPA Region IX issued an internal memorandum the purpose of which was to "reiterate[] EPA's longstanding interpretation concerning the range of construction related activities that lawfully may occur prior to the issuance of a permit to construct or modify a facility or emissions unit." Memorandum, Dave Howekamp, Director, Air and Toxics Division, EPA Region IX, to all Region IX Air Agency Directors and NSR Contacts (November 4, 1993) (the 1993 Howekamp Memorandum). The memorandum explained that the "question of what type of preliminary site activities may be conducted prior to permit issuance" had already been "addressed

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by EPA policy memoranda on December 18, 197[8], March 28, 1986, and May 13, 1993." 1993 Howekamp Memorandum at 1.

"These memoranda," EPA stated, "explain that 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." *Id.* EPA cautioned, however, that "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." *Id.* at 2.

4. The 1995 Seitz Letter

In December 1995, EPA responded to a request from the Minnesota Pollution Control Agency (MPCA) for "clarification . . . concerning the scope of construction-related activities that may occur prior to issuance" of a PSD permit "under the Federal regulations at 40 CFR 52.21, which are also incorporated into Minnesota's rules." Letter from John S. Seitz, Director, EPA Office of Air Quality Planning and Standards, to Charles W. Williams, Commissioner, Minnesota Pollution Control Agency (December 13, 1995) (the 1995 Seitz Letter) at 1. The MPCA had indicated that it "interprets the Federal PSD rules to not prohibit site clearing activities prior to receiving a PSD permit, but that there is a prohibition on beginning construction activities that are of a permanent nature." *Id.* at 2.

In response, EPA said that it "agree[d] with Minnesota that site clearing and grading are not prohibited" by the regulatory definition of "begin actual construction." 1995 Seitz Letter at 2. EPA added that "[a]llowed preconstruction activities would also include ordering materials and temporary storage on site." *Id.*, *citing* 1986 Reich Memorandum. Conversely, EPA stated, "[p]rohibited (permanent and/or preparatory) preconstruction activities . . . would include any construction that is costly, significantly alters the site, and/or [is] permanent in nature." *Id.* at 2. It was "EPA's longstanding policy," the Agency represented, citing the 1986 Reich Memorandum, "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.'" *Id.*

The MPCA had also inquired of EPA "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." 1995 Seitz Letter at 3. In response, EPA stated that its "general view is that such an exemption is not authorized under the Act or the Federal PSD rules." *Id.*

5. Other Agency Statements

In 1996, EPA proposed numerous changes to its NSR rules. 61 FR 38250 (July 23, 1996). At that time, the Agency took note of the fact that "[s]everal 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." 61 FR 38270. These

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members, EPA stated, had "asserted that it was unnecessary and inappropriate to prohibit preliminary activities to achieve the statutory purpose of requiring a permit before construction begins," and that "such prohibitions caused delay and added expense for no good purpose." *Id.* Recognizing that there was a "wide difference of opinion on these issues," EPA solicited comment on the matter. *Id.*

To "assist in formulating comments," EPA then set forth a summary of its own position, in which the Agency stated that the CAA "plainly bars construction without a permit," and that it was "clear that core activities at an industrial site, such as the fabrication or installation of pollution-generating equipment, constitute 'construction' within the meaning of the Act." 61 FR 38270-71. "At the same time," EPA acknowledged, "the statute does not address the details of the construction process, nor does it constrain EPA's discretion to fashion regulatory mechanisms to harmonize the needs of environmental protection and economic growth in a manner consistent with the legislative purpose." *Id.* at 38271. In the case of "begin actual construction," the Agency concluded, the "regulations and EPA's longstanding policy clearly identify the scope of prohibited preconstruction activities," and those "current regulations and policies" would "remain in effect regardless of today's request for comment." *Id.*

Having summarized its position, EPA then solicited comment on "whether there exists a significant problem with the current system," and, if so, "whether a broader range of preliminary activities should be allowed prior to the issuance of a final NSR permit." *Id*. In particular, EPA asked for comment "regarding the need for potential changes to the current regulations that would allow greater flexibility with respect to construction activities in the case of a proposed modification to the source," while at the same time "preserving the essential characteristics of a preconstruction review program." *Id.*

Ultimately, however, when EPA took final action in 2002 to promulgate the NSR reform rules, the Agency made no changes to the definition of "begin actual construction" in 40 CFR § 52.21(b)(11) with no explanation for its having declined to do so. *See generally* 67 FR 80186. To date, the July 1996 preamble discussion has been the most recent significant discussion on EPA's part regarding its approach to applying the term "begin actual construction" under the NSR rules.

III. Discussion

After careful consideration, EPA is adopting a revised interpretation of "begin actual construction," as that term is defined in 40 CFR § 52.21(b)(11) and used in 40 CFR § 52.21(a)(2)(iii). EPA has determined that the interpretation of "emissions unit" set forth in the 1986 Reich Memorandum and reiterated in subsequent Agency guidance is not the best reading of the relevant regulatory text because it fails to give meaning to the distinction between an emissions unit and a major stationary source. Going forward, therefore, EPA will be applying the revised interpretation set forth in this memorandum.

Under EPA's 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). Further, under this revised interpretation, and in contrast to the 1986 Reich Memorandum, an "installation necessary to accommodate" the emissions unit at issue is *not* considered part of that emissions unit,[19] and construction activities that involve an "accommodating installation" may be undertaken in advance of the source owner or operator obtaining an NSR permit.

In conjunction with its adoption of this revised interpretation of the term "begin actual construction," EPA no longer intends to follow the interpretation of "begin actual construction" reflected in the 1986 Reich Memorandum, the 1993 Howekamp Memorandum,[20] and the 1995 Seitz Letter. While prior interpretations failed to apply this distinction between the 1980 and 1978 PSD rules, this guidance adopts an interpretation of the term "begin actual construction" that gives meaning to the added term "emissions unit."

EPA notes that it remains the case, as had been true under prior Agency guidance, that where a prospective source owner or operator chooses to undertake on-site construction activities prior to obtaining an NSR permit, as may be permitted under this revised interpretation, the owner or operator does so at their own risk. That is, the prospective source owner or operator must recognize that the resources (*e.g.*, time, money) expended in undertaking such construction may be wasted should the owner or operator be required to re-do or revise work already completed in order to obtain a permit or should it ultimately be the case that no permit is issued or if the permit review agency determines that design changes (*e.g.*, stack height, emission unit location, etc.) are needed to assure compliance with the National Ambient Air Quality Standards (NAAQS) and increment. A source cannot use the equity and resources expended to claim cost infeasibility or otherwise influence the Best Available Control Technology (BACT) determination or the decision to grant the permit. In addition, an owner/operator should also be mindful that some on-site activities prior to obtaining a PSD permit could be limited by other laws that may apply in certain circumstances, such as the Endangered Species Act and National Historic Preservation Act, when there are listed species or historic resources at the site.

The discussion that follows describes how EPA's revised interpretation of "begin actual construction" is consistent with (and a better reading of) the relevant regulatory language and explains the Agency's rationale for adopting the revised interpretation.

A. The Revised Interpretation Is Consistent with the Regulatory Text.

As relevant here, the NSR rules define "begin actual construction" in the following terms:

> *Begin actual construction* means, in general, initiation of physical on-site construction activities on an emissions unit which are of a permanent nature. Such activities include, but are not limited to, installation of building supports

[19] *Cf.* 1986 Reich Memorandum at 2.

[20] While the 1978 Reich Memorandum provides some indication of EPA's intent with regard to the 1980 rule, the 1978 memo should not have been cited by both the 1986 Reich Memorandum and the 1993 Howekamp Memorandum as being the basis of, and providing support for, an interpretation of "begin actual construction" that fails to give independent meaning to emissions unit and major stationary source.

> and foundations, laying underground pipework and construction of permanent storage structures.

40 CFR § 52.21(b)(11). The first sentence of this regulatory definition sets forth five distinct criteria that, collectively, identify the type of activity that a source owner or operator is precluded from undertaking prior to obtaining an NSR permit – *i.e.*, activity (1) that is "physical" in nature; (2) that is undertaken "on-site"; (3) that involves "construction";[21] (4) that is "on an emissions unit";[22] *and* (5) that is of a "permanent nature." An activity will constitute the "beginning" of "actual construction" only if it meets all five of these criteria. The fourth criterion is key. A source owner or operator is permitted to undertake a physical on-site construction activity, even if it is of a permanent nature, without having first obtained an NSR preconstruction permit, provided that the activity does *not* involve construction "*on* an emissions unit."

The second sentence of the regulatory definition provides a non-exclusive list of examples of "[s]uch activities." In context, each example must satisfy the criteria in the first sentence of the definition in order for that activity to constitute "begin[ning] actual construction." In particular, the activity must involve construction "on an emissions unit." The regulatory definition would unambiguously allow, therefore, a source owner or operator to undertake the "installation of building supports and foundations" prior to obtaining an NSR permit where the installation in question is not on an emissions unit. On the other hand, in the case of a structure that is itself an emissions unit, the source owner or operator would have to obtain an NSR permit prior to undertaking the "installation of building supports and foundations" where the supports and foundations in question are reasonably considered to be part of the emissions unit.

Similarly, in those cases where a "permanent storage structure" is not an emissions unit (*e.g.*, an equipment storage building), activities associated with its construction can be initiated and proceed to completion prior to issuance of an NSR permit needed for an emissions unit at the same stationary source. Conversely, no construction can be initiated, prior to permit issuance, where the storage structure in question is an emissions unit (*e.g.*, a petroleum or volatile organic liquid tank or vessel).

In placing its focus on those activities that involve "construction . . . on an emissions unit," EPA's revised interpretation of "begin actual construction" gives full effect to the regulatory definition. By contrast, an interpretation that precludes a source owner or operator, prior to obtaining an NSR permit, from undertaking any on-site activity of a "permanent nature," regardless of the relationship between the activity and an emissions unit at the same stationary source for which a permit is needed – *i.e.*, the Agency's prior approach – reads words out of the regulatory text.

B. EPA Has Good Reason to Revise Its Interpretation.

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[21] The term "construction" is defined under the current NSR rules to mean "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 emissions." *See* 40 CFR § 52.21(b)(8).

[22] The term "emissions unit" is defined under the current NSR rules to mean "any part of a stationary source that emits or would have the potential to emit any regulated NSR pollutant . . . ." 40 CFR § 52.21(b)(7).

While Congress intended the NSR program to function as a preconstruction permitting program – *i.e.*, "No major emitting facility . . . may be constructed . . . unless a permit has been issued for such proposed facility" – as the Agency has long recognized, nothing in the CAA specifies "where on the continuum" from initial "planning" to ultimate "operation" a source owner or operator would run afoul of this statutory provision by acting to "construct" prior to receiving the required permit.[23] The phrase "may be constructed" might reasonably be construed as precluding the initiation of any construction activity prior to the issuance of a permit. On the other hand, the phrase could also reasonably be read to allow construction to proceed right up to the point of near completion, before the source would be considered to have been "constructed." Given this ambiguity, and given that Congress provided neither a statutory definition of "constructed" nor a meaningful definition of "construction,"[24] EPA has discretion to determine where on that "continuum" it should draw a reasonable line. In 1980, EPA through rulemaking chose to draw that line at the point where "physical on-site construction activities" take place "on an emissions unit." While EPA would be authorized to change that regulatory definition through a further rulemaking, at this time, the Agency is acting merely to provide a revised interpretation of that definition that is consistent with the regulatory text.

EPA has two reasons for providing a revised interpretation at this time. First, EPA has determined that its prior interpretation failed to give meaning to the distinction between emissions unit and major stationary source in the regulatory text. Second, EPA is less concerned now with the risks that formed the longstanding rationale for its prior approach.

The revised interpretation set forth in this memorandum is expected to have no emissions consequences. Nor will it result in any adverse effect on the environment. It remains the case under this revised interpretation that only after receiving the required NSR permit may a source owner or operator initiate permanent construction on, and subsequent operation of, an emissions unit. As has always been the case, any on-site construction or preparatory activity that a permit applicant undertakes prior to receiving a required NSR permit will be at the applicant's own risk.

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1. EPA's Revised Interpretation Is A Better Reading of the Regulatory Text.

Even after EPA had incorporated into its NSR rules in 1980 the term "begin actual construction," the Agency, in interpreting and applying that new regulatory term, continued to follow the policy set forth in the December 1978 Reich Memorandum. However, the 1978 PSD rules (i) did not contain the term "begin actual construction;" (ii) did not employ the term "emissions unit;" and (iii) did not "explicitly answer the question" of "where on the continuum from planning to operation of major emitting facility does a company or other entity violate the PSD regulations if it has not yet received a PSD permit."[25] As a consequence of not giving

[23] December 1978 Reich Memorandum at 1.

[24] *See* note 8, above.

[25] December 1978 Reich Memorandum at 1.

sufficient attention to these details, EPA adopted an interpretation of "begin actual construction" in 1986 that failed to give meaning to different parts of the regulatory text that was enacted in 1980 and that, as applied to specific situations, has resulted in the Agency's determining that activities that clearly do not involve construction "on an emissions unit" nevertheless constitute the "begin[ning of] actual construction."

As was previously noted, EPA first provided an interpretation of the term "begin actual construction" in the 1986 Reich Memorandum. EPA acknowledged at that time that the regulatory definition focuses specifically, and exclusively, on activities that involve construction "on an emissions unit." *See* 1986 Reich Memorandum at 1 ("[T]he term 'begin actual construction' at Section 52.21(b)(11) . . . refers to 'construction activities on an emission unit.'"). Further, EPA recognized that, under this definition, it would now be necessary to draw a distinction between a "major stationary source" on the one hand and an "emissions unit" on the other, insofar as an emissions unit is, by definition, a *part* of a stationary source. *Id.* at 2 ("[A]lthough applicability of PSD is determined on a source-wide basis, it may become necessary to distinguish the emissions unit from the major stationary source or modification in order to determine at what point in construction planning or construction activities a PSD permit is required.").[26]

Despite creating and acknowledging this distinction between a "major stationary source" on the one hand and an "emissions unit" on the other, EPA's 1986 Reich Memorandum adopted an overly broad reading of the term "emission unit." EPA took the position that it was "necessary to clarify the definition of emissions unit" and deemed an emissions unit to "include any installations necessary to accommodate that unit." *Id.* "Therefore," EPA stated, "before issuance of the PSD permit, construction is prohibited on any emissions unit or on any installation designed to accommodate the emissions unit." *Id.* This interpretation failed to adequately reflect the distinction EPA had simultaneously identified between a major stationary source and an emissions unit.

In the 1980 NSR rules, "emissions unit" had been defined to mean "any part of a stationary source which emits or would have the potential to emit any pollutant subject to regulation under the Act." The phrase "which emits or would have the potential to emit" is best understood to modify the term "part." A "part" of a stationary source that does not "emit" or "have the potential to emit" is not an emissions unit. But without pointing to any particular language in this definition, in the 1986 Reich Memorandum, EPA construed the term "emissions unit" to include "any installations necessary to accommodate that unit." EPA does not today believe such an interpretation to be appropriate because it has no support in the text of the regulation and has been applied to reach "parts" of a stationary source that do not emit.[27] Although EPA acknowledged

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[26] As the pertinent regulatory language provided in 1980, and as it provides today, an "emissions unit" is defined to mean "any *part of* a stationary source which emits or would have the potential to emit any pollutant . . . ." 40 CFR § 52.21(b)(7) (emphasis added).

[27] It is also not appropriate to read the language of the 1980 NSR rules' definitions of either "emissions unit" or "begin actual construction" to support the follow-on statement in the 1986 Reich Memorandum that, where "the emissions unit (including any accommodating installation)" is an "integral part of the source or modification (i.e. the source or modification would not serve in accordance with its original intent, except for inclusion of the emissions unit)," an NSR permit "must be obtained before construction on the entire source commences." 1986 Reich Memorandum at 2-3.

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that, given the 1980 NSR rules' definition of "begin actual construction," it would be necessary for the Agency to "distinguish the emissions unit from the major stationary source or modification," EPA's clarification" of the term "emissions unit" for all practical purposes erased the distinction between "emissions unit" and "stationary source." EPA has effectively construed the phrase "that emits or would have the potential to emit" to modify the term "stationary source" rather than the word "part." The noun in this part of the sentence, however, is best understood to be a "part of a stationary source." The term "stationary source" is separately defined in the PSD regulations as "any building, structure, facility, or installation which emits or may emit a regulated NSR pollutant." 40 CFR 52.21(b)(5). Thus, within the definition of "emissions unit," the phase "emits or would have the potential to emit" is not needed to give meaning to the term "stationary source." Accordingly, the most sensible reading is that an emissions unit is the "part" of a stationary source "that emits."

The interpretation of "emissions unit" reflected in the 1986 Reich Memorandum underpinned EPA's approach in subsequent guidance and applicability determinations. For example, in the 1993 Rasnic Memorandum, EPA relied upon the approach and rationale of the 1986 Reich Memorandum in stating that "all on-site activities of a permanent nature aimed at completing a PSD source for which a permit has yet to be obtained are prohibited under all circumstances," and that "such prohibited activities . . . include any emissions unit *or installation necessary to accommodate the PSD source*." 1993 Rasnic Memorandum at 1 (emphasis added). This emphasized phrase is not found in the definition of "emissions unit" and is unnecessary because it immediately follows the defined term. Furthermore, the 1993 Rasnic Memorandum continued to use the term "PSD source" rather than the term "emissions unit" that appears in the regulatory text.

Elsewhere in the 1993 Rasnic Memorandum, EPA characterized the regulatory definition of "begin actual construction" as "prohibit[ing] 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 activities not related to the emissions unit(s) in question, prior to the receipt of a construction permit." 1993 Rasnic Memorandum at 2. Although EPA recognized the distinction between construction activities that involve an emissions unit and those that do not, the Agency disregarded that distinction, stating that "[t]his standard prohibits activities *affecting the property in a permanent way* that the source would reasonably undertake *only with the intended purpose of constructing the regulated project*." *Id.* (emphases added). This is not the best reading of the regulatory text.[28]

Based on this interpretation, EPA found in the 1993 Rasnic Memorandum that the construction of a retaining wall to shore up an excavated pit at the site of an oriented strand board plant proposed to be built by Georgia-Pacific could not begin in advance of the issuance of a PSD permit. "Our policy," EPA explained, "focuses on the relation of the activity to the PSD source," while distinguishing between "activities of a preparatory nature from those of a permanent nature." 1993 Rasnic Memorandum at 2. "Construction of a retaining wall," EPA continued, "is considered

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[28] The 1993 Rasnic Memorandum represents that the "regulations and several memoranda specifically state that 'begin actual construction means initiation of physical on-site construction activities . . . which are of a permanent nature.'" *See* 1993 Rasnic Memorandum at 1. The omitted text represented by the ellipsis is comprised of the words "on an emissions unit."

an activity under 'begin actual construction' because it is of a permanent nature." *Id.* Even the "excavation activities" were found by EPA to fit "within the meaning of 'begin actual construction,'" since they were "costly, they significantly alter[ed] the site, are an integral part of the overall construction project, and are clearly of a permanent nature." *Id.* at 3.

The conclusion that such activities could not be permissibly undertaken prior to the issues of a PSD permit exemplifies how the approach to "begin actual construction" taken by the 1986 Reich Memorandum fails to give independent meaning to the term "emissions unit." Neither the excavation of ground nor the subsequent construction of a retaining wall within the excavated space could fairly be considered construction "on an emissions unit" by themselves. EPA focused here on the permanent nature of the activities without paying sufficient attention to whether these activities were "on an emissions unit." EPA appears to have precluded the activities not due to any demonstration that these activities were, in fact, part of an emissions unit, or that they would result in an emissions increase, but because EPA determined the activities to be permanent when considered in the context of the major stationary source subject to a permit.

Similarly, in the 1995 Seitz Letter, EPA had stated that, under 40 CFR §§ 52.21(i)(1) and (b)(11) . . . "*any* permanent and/or preparatory" construction activity that is "costly, significantly alters the site, and/or permanent in nature" is "prohibited" prior to the source's obtaining an NSR permit. 1995 Seitz Letter at 2 (emphasis added). EPA continued that "[t]his would include, but is not limited to: (1) excavating, blasting, removing rock and soil, and backfilling, and (2) installing footings, foundations, permanent storage structures, pipe, and retaining walls." *Id.* In support, EPA pointed to what it described as its "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.'" 1995 Seitz Letter at 2. That "longstanding policy," EPA stated, had first been announced in the 1986 Reich Memorandum. *Id.* However, by this time, EPA had so thoroughly erased the distinction between a major stationary source and an emissions unit that it did not explain how site clearing and grading, which were allowed under the 1978 policy, could not include excavating, blasting, removing rock and soil, and backfill.[29]

The position taken in the 1995 Seitz Letter that "any" permanent or preparatory activity (even site clearing, grading, and installation of retaining walls) is prohibited where that activity is "costly," "significantly alters the site," or is "permanent in nature" is inconsistent with the 1978 policy EPA codified in the 1980 regulation and fails to give meaning to the relevant regulatory language adopted in 1980. Such a reading does not make the necessary distinction between an activity that involves an emissions unit and an activity that does not. This is another example of how the interpretation of "emissions unit" set forth in the 1986 Reich Memorandum, when applied

[29] The 2014 Amendments to the Federal Indian Country—Amendments to the Federal Indian Country Minor New Source Review Rule promulgated a definition for "begin construction" that was identical to that promulgated in the 1980 NSR rules but also enumerated certain preparatory activities that would be excluded including "[e]ngineering and design planning, geotechnical investigation (surface and subsurface explorations), clearing, grading, surveying, ordering of equipment and materials, storing of equipment or setting up temporary trailers to house construction management or staff and contractor personnel." 40 CFR § 49.152. This provides further evidence that EPA did not conceive activities not on an emissions unit (i.e., clearing, grading, surveying) to be considered "begin actual construction."

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to actual site-specific circumstances, can produce a result that is contrary to what a straightforward application of the relevant regulatory language would provide.

In this regard, some of the on-site activities that the 1993 Rasnic Memorandum and the 1995 Seitz Letter identify as being precluded prior to issuance of an NSR permit – *i.e.*, "blasting," "excavation," "backfilling,"– do not appear to meet the regulatory definition of the term "construction" itself.[30] This is a peculiar result that underscores how application of the 1986 Reich Memorandum became increasingly disconnected from the plain language of the relevant regulatory text.

2. The Rationale for EPA's Prior Interpretation Was Based on Considerations of Less Concern Today.

The only rationale that EPA has provided for its policy of requiring sources to obtain an NSR permit prior to undertaking any on-site construction activity "of a permanent nature" was first articulated in the October 1978 Reich Memorandum. There, EPA expressed concern that it would be "extremely difficult to deny issuance of a permit when it results in a completed portion of a project having to remain idle." October 1978 Reich Memorandum at 2. "Therefore," EPA reasoned, "in order to avoid any equity arguments at a later time, it is better to prevent any construction now rather than have a 'white elephant' on our hands later on." *Id.* The Agency has since reiterated this position in subsequent guidance and a proposed rulemaking.[31]

Underpinning these concerns about a source owner or operator being allowed to place "equity in the ground" by engaging in costly and permanent on-site construction activities prior to receiving an NSR permit is the presumption that, in doing so, the owner or operator would gain "leverage" in the permitting process. That is to say, in such circumstances, it is supposed the permitting authority might feel compelled to issue a permit that was not as stringent in its terms as it otherwise would have been.

However, EPA no longer believes that this original rationale provides a good basis for interpreting the term "begin actual construction" to preclude *any* activity "of a permanent nature" regardless of whether that activity involves construction "on an emissions unit." While EPA's

[30] The NSR rules' definition of "construction" itself focuses on activities that involve an "emissions unit." Activities such as blasting, excavation, backfilling, and building a retaining wall do not constitute the "fabrication, erection, installation, demolition, or modification" of an emissions unit, nor is any of them a "physical change or change in the method of operation . . . that would result in a change in emissions" within the plain terms and evident meaning of 40 CFR § 52.21(b)(8).

[31] *See*, *e.g.*, 1993 Rasnic Memorandum at 2 (A "permitting authority would be placed in a very difficult position when denying issuance of a permit when it results in a completed portion of a project having to remain idle."); 1995 Seitz Letter at 2 ("[A]bsent a prohibition on any costly, significant or permanent preconstruction," sources could "defeat" the "preconstruction requirement or its enforcement by making a costly, substantial, and/or permanent investment" and then "later argue that retrofitting of PSD requirements or a denial of the permit would unreasonably interfere with their investment."); 61 FR 38270 ("If . . . companies were given unlimited ability to place 'equity in the ground' by constructing plants before a permit is issued," then a permitting authority's "discretion in making permit decisions may be compromised" and the "ability of EPA and citizens to challenge the permit that is eventually issued may likewise be undermined.").

concerns over potential "equity" arguments may have had validity at the inception of the NSR preconstruction permitting program in 1978, when both EPA and state permitting authorities as yet lacked experience in implementing the program, the Agency does not believe that such concerns are warranted today. Today, EPA finds it implausible that state and local permitting authorities, with some 40 years of experience in implementing the NSR preconstruction permitting program, would allow their judgment to be compromised in making permitting decisions by any "equity in the ground"-type arguments that could potentially be advanced by permit applicants who may have previously expended time, money, and other resources in undertaking on-site construction activities of a significant nature (*e.g.*, costly, permanent). For example, a PSD permitting authority must still continue to determine BACT for a new emissions unit at a facility based upon the permit application submitted, without regard to the preparatory activities an applicant may conduct on the site.[32]

Nor does EPA find it plausible that NSR permit applicants themselves imagine that undertaking significant on-site construction activities prior to permit issuance will allow them to gain leverage with respect to the outcome of the permitting process. Stationary source owners or operators cannot expect that any site activities prior to permitting will alter or influence the BACT analysis for an emissions unit or other elements of a permitting decision. Permit applicants that choose to undertake on-site construction activities in advance of permit issuance do so at their own risk. Given this, it is reasonable to imagine scenarios under which the greater the irretrievable commitments a permit applicant may make to construct a particular source at a particular site – *i.e.*, the *more* "equity" the prospective source owner or operator were to place "in the ground" – the *less* leverage, as a practical matter, that applicant would retain in the permitting process. With the prospective owner or operator having made such significant commitments, it is conceivable that, during negotiations over the terms and conditions that were to be included in the permit, the prospective owner or operator would be more motivated to accept proposals made by the permitting authority or by interested outside parties, where doing so would bring to a conclusion an otherwise lengthy and contentious permitting process that threatened to delay construction and the time at which the prospective owner or operator would begin to realize a return on investment.

In sum, EPA no longer believes that its previous concerns over potential "equity" arguments provide sufficient justification for retaining such a restrictive policy on "begin actual construction," particularly given that, as has been explained, that policy was predicated on an interpretation that reads the term "emissions unit" so expansively that it erases the distinction between the regulatory definition of an emissions unit and a stationary source. Further, because EPA has now determined that prior policy is no longer necessary to prevent some potential compromise of the NSR permitting process, there is no reason to believe that the adoption of the revised interpretation set forth here will result in, or could result in, any adverse effects on the environment. The outcome of a permitting decision should not be any different because a source undertakes construction activity on those parts of a facility that are not emissions units prior to obtaining a PSD permit for the construction of, or modification to, an emissions unit.

IV. Determining the Scope of an Emissions Unit

[32] Accordingly, the permitting authority, in conducting an analysis of BACT should not include the cost of any adjustments or modifications to already constructed portions of the facility necessary to install any particular control technology when determining the cost of that technology.

While EPA has sought to clarify in this memo that some activities should no longer be considered construction on an emissions unit that is prohibited without a permit, EPA recognizes that both sources and permitting authorities, in order to ascertain whether particular on-site activities involves "construction . . . on an emissions unit" within the meaning of 40 CFR § 52.21(b)(11), will still have to make case-specific determinations regarding the scope of the emissions unit in question.[33] In so doing, these parties will have to exercise judgment to resolve a matter presenting potentially complicated technical questions.

Providing detailed guidance on how the specific parameters of an emissions unit are to be ascertained for purposes of determining whether a given activity constitutes "construction . . . on an emissions unit" is beyond the scope of this memorandum. EPA notes, however, that this is a task that sources and permitting authorities are already called upon to do, and with which they have experience, albeit in different contexts. It is also an area where EPA has previously provided direction on a case-specific basis.

For example, when EPA was asked "how the 'emissions unit' should be defined" for purposes of applying BACT at a synthetic fiber manufacturing facility, the Agency observed that a New Source Performance Standard (NSPS) is "one source of information that may be helpful in defining an emission unit for the purpose of evaluating control options" in PSD permitting. *See* Letter from Judith M. Katz, Director, Air Protection Division, EPA Region III to John M. Daniel, Jr., Director, Air Program Coordination, Virginia Department of Environmental Quality (November 30, 2000) at 3. Specifically, EPA was asked whether the separate pieces of equipment comprising a solvent-spun synthetic fiber process located at the manufacturing site should each be considered separate emissions units or whether the entire process should be considered a single emissions unit. In response, the Agency pointed to the relevant NSPS, Subpart HHH, Standards of Performance for Synthetic Fiber Production Facilities, which provided that the entire solvent-spun synthetic fiber process was the "affected facility," and that this affected facility "includes spinning solution preparation, spinning, fiber processing (wash/draw) and solvent recovery, but does not include the polymer production equipment." *Id.* at 3.

EPA noted that its guidance in this instance was "consistent with guidance issued by EPA, Region VIII in a letter dated February 6, 1990, regarding a determination of Lowest Achievable Emission Rate . . . for Coors Container." *Id.* at 3. In that case, EPA had "determined that an emissions unit consisted of the entire coating operation . . . based on the NSPS definition of affected facility for that source category (Subpart WW)." *Id.* "The NSPS definition," EPA continued, "was relied on because the rule provided a rationale as to why these processes should be grouped together for purposes of setting a unique emission limitation covering all the equipment." *Id.* at 3-4.

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[33] The December 1978 Reich Memorandum had identified as one of "advantages" presented by the then-"new policy" that it would be "easy to administer, since case-by-case determinations will not be required." December 1978 Reich Memorandum at 2. As explained above, EPA adopted, at that time, an approach under which essentially any on-site activity of a "permanent" nature was precluded unless, and until, the source had obtained an NSR permit. While ease of administration and a desire to avoid case-specific determinations are themselves laudable goals, the Agency must also interpret and apply its rules in a manner that it consistent with the plain text of those rules.

More recently, EPA addressed this issue of determining the scope of an emissions unit in connection with the permitting of semiconductor manufacturing facilities under the PSD program. When EPA was asked whether certain state and local permitting authorities had acted properly in treating an individual semiconductor fabrication building (a "fab") as a single emissions unit for purposes of determining PSD applicability, the Agency responded that this "approach seems appropriate because of the interconnected nature of the 'tools' in the fab," and given that the "systems that deliver materials to those tools and manage their discharges have also generally been treated as part of the emissions unit." *See* Letter from Stephen D. Page, Director, Office of Air Quality Planning and Standards to David Isaacs, Vice President, Government Policy, Semiconductor Industry Association (August 26, 2011). In support, EPA added that, "although not determinative, New Source Performance Standards (NSPS) and National Emission Standards for Hazardous Air Pollutants (NESHAP) can be sources of information that may be helpful in defining an emission unit." *Id.* at 2-3. In this particular case, EPA found that NESHAP Subpart BBBBB, National Standards for Hazardous Air Pollutants for Semiconductor Manufacturing "provides relevant information on what a semiconductor manufacturing process unit," and, in turn, what an "emissions unit" for purposes of NSR "might be." *Id.* at 3.

However, not all determinations of emissions unit for NSR permitting rely on a precedent or framework established by an NSPS or NESHAP. In a recent letter, EPA defined "emissions unit" in the context of a marine oil loading terminal, determining that the addition of a new emissions point that would load crude oil offshore is part of a single emissions unit with the source's existing onshore loading and unloading operation consisting of ten docks. *See* Letter from William L. Wehrum, Assistant Administrator, EPA Office of Air and Radiation, to LeAnn Johnson Koch, Perkins Coie, Re: Limetree Bay Terminals, St. Croix, U.S. Virgin Islands – Permitting Questions (April 5, 2018). The Limetree Bay Terminals (LBT) project, referred to as a single point mooring (SPM), "would 'extend from the jetty on the seabed for approximately 5,800 feet to a Pipeline End Manifold' that would be connected to a buoy via a flexible hose, and the buoy would load/unload crude oil onto ships via two floating hoses." *Id.* at 6. In its determination that the proposed SPM and the existing loading terminal are considered a single emissions unit, EPA reasoned that the SPM "would not change the nature of the pollutant-emitting activity occuring at the existing marine terminal" and that it would be "physically connected to the existing marine loading terminal by way of an underwater piping system and will be completely integrated with the loading and storage operations at the existing terminal. Consequently, the SPM and current marine terminal appear to share the same interconnectedness that EPA previously found persuasive in its analysis of semiconductor fabs, which supports treating LBT's proposed SPM and the existing terminal as a single emissions unit." *Id.* at 7. Thus, in this instance, EPA did not specifically rely on an applicable NSPS or NESHAP to guide its decision, and it instead focused its case-specific analysis on other considerations, including one of the factors it previously used in defining the emissions unit for the semiconductor manufacturing facilities, in arriving at its decision.

EPA expects that sources will continue to work with their permitting authorities to determine the scope of an "emissions unit" for the purpose of evaluating whether a particular activity constitutes "construction . . . on an emissions unit" within the meaning of 40 CFR § 52.21(b)(11). As illustrated above, the definition of "affected facility" and/or "process unit" under a relevant NSPS or NESHAP can occasionally provide useful direction for this analysis.

Nevertheless, in making this determination, a source or permitting authority would be acting contrary to the purpose and intent of EPA's interpretation of "begin actual construction" set forth here were that source or permitting authority to take an unduly broad or otherwise unreasonable view of the scope of an emissions unit that fails to recognize a distinction between an emissions unit and the major stationary source.

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The guidance contained herein is an interpretation or "interpretive rule" not subject to notice-and-comment rulemaking requirements, and this memorandum does not itself create or alter any binding requirements on regulatory agencies, permit applicants, or the public. This revised interpretation is intended to be implemented by EPA Regional offices and by those air agencies to which EPA has delegated its authority to issue federal PSD permits under 40 CFR § 52.21(u). EPA is also making this memorandum available as guidance for consideration by air agencies with SIP-approved programs. Depending on the particular regulatory context and wording of the applicable SIP, air agencies implementing a SIP-approved program may be able to apply this revised interpretation as well.

For any questions concerning this memorandum, please contact Juan Santiago, Associate Division Director of the Air Quality Policy Division, Office of Air Quality Planning and Standards at (919) 541-1084 or *santiago.juan@epa.gov*.

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