

May 11, 2020

Anne L. Idsal
Principal Deputy Assistant Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Mail Code 6101A
Washington, DC 20460

Re: Draft Guidance: Interpretation of "Begin Actual Construction" Under the New Source Review Preconstruction Permitting Regulations

Dear Principal Deputy Assistant Administrator Idsal:

In the draft guidance *Interpretation of "Begin Actual Construction" Under the New Source Review Preconstruction Permitting Regulations* (Draft Published on March 25, 2020), hereafter referred to as the "Begin Actual Construction Guidance Memorandum," the United States Environmental Protection Agency (EPA) is proposing to adopt a revised interpretation of the term "begin actual construction," as that term is defined under EPA regulations implementing the New Source Review (NSR) preconstruction permitting program. EPA's revised interpretation would allow source owners or operators to undertake physical on-site construction activities that may significantly alter the site and be permanent in nature, including activities necessary to accommodate an emissions unit, prior to obtaining a permit. The Connecticut Department of Energy and Environmental Protection (DEEP) respectfully disagrees with such action as adoption of EPA's revised interpretation would lead to inconsistent implementation of the NSR preconstruction permitting program across states and other unintended consequences, including possible increases in transported emissions from upwind states. Such increases could further hinder Connecticut's ability to attain compliance with the ozone National Ambient Air Quality Standards (NAAQS).

The applicable regulations of the NSR preconstruction permitting program dictate that "[n]o [owner or operator of a] new major stationary source or major modification to which the requirements of paragraphs (j) through (r)(5) of [40 CFR Section 52.21] apply shall begin actual construction without a permit that states that the major stationary source or major modification will meet those requirements."¹ Where the term "begin actual construction" is defined as "[the] initiation of physical on-site construction activities on an emissions unit which are of a permanent nature."²

As stated in the 1995 Seitz Letter and 1978 and 1986 Reich Memorandums, which set forth EPA's interpretation of the term "begin actual construction" until now, certain limited activities,

¹ 40 CFR Section 52.21(a)(2)(iii).

² 40 CFR Section 52.21(b)(11).

undertaken at the source owner's or operator's own risk, such as "planning, ordering of equipment and materials, site-clearing, grading, and on-site [temporary] storage of equipment and materials" do not constitute "begin actual construction" and are allowed prior to obtaining a permit.³ Conversely, "[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."⁴ Furthermore, 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."⁵ Consequently, EPA's longstanding policy has been that "[a]ll on-site activities of a permanent nature aimed at completing a Prevention of Significant Deterioration (PSD) source"⁶ or "intended to accommodate an emissions unit or which [are] an integral part of the source or modification"⁷ are prohibited until a permit is obtained. This provides a bright line test for what an owner or operator may do prior to obtaining a permit.

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 Section 52.21(b)(7). In addition, 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 "accommodating installations" may be undertaken in advance of the source owner or operator obtaining a NSR permit.⁸

One of EPA's rationales for adopting a revised interpretation of the term "begin actual construction" is that the prior interpretation does not entirely comport with the plain language of the regulatory text because it fails to give meaning to the distinction between "construction on an emissions unit" and "construction on a major stationary source."⁹ Yet, EPA states that it is beyond the scope of the memorandum at hand to provide guidance on how the specific parameters of an emissions unit are to be ascertained for purposes of determining whether a particular activity constitutes "construction on an emissions unit" within the meaning of 40 CFR Section 52.21(b)(11).¹⁰ This determination is left up to the discretion of the appropriate permitting authorities. Thus, EPA is proposing to replace a clear and definitive rule of acceptable on-site construction activities with a case-by-case standard. Such a change will result in regulatory uncertainty and inconsistent implementation of the NSR preconstruction permitting program across states. Such an interpretation also burdens state and local air agencies' limited resources, as the agencies take responsibility for making or reviewing these case-by-case determinations.

³ Begin Actual Construction Guidance Memorandum at 5.

⁴ Begin Actual Construction Guidance Memorandum at 10.

⁵ Begin Actual Construction Guidance Memorandum at 15.

⁶ Begin Actual Construction Guidance Memorandum at 16.

⁷ Begin Actual Construction Guidance Memorandum at 9.

⁸ Begin Actual Construction Guidance Memorandum at 11.

⁹ Begin Actual Construction Guidance Memorandum at 14.

¹⁰ Begin Actual Construction Guidance Memorandum at 20.

EPA also contends that the risk of “equity in the ground”¹¹ arguments, the second rationale for its prior interpretation, is less of a concern now. EPA explains that state and local permitting authorities now have vast experience implementing the NSR preconstruction permitting program and would not let their permitting decisions be influenced by any “equity in the ground” type arguments, and NSR permit applicants would not undertake significant or costly on-site construction activities prior to permit issuance under the misguided notion that these would help them obtain a favorable permitting decision.¹² Although DEEP agrees that the judgment of local and state permitting authorities would not be compromised by “equity in the ground” type arguments, DEEP believes that allowing significant and permanent on-site construction activities prior to permit issuance would bring unintended and undesirable consequences.

As previously stated, under EPA’s revised interpretation, a source owner or operator may, prior to obtaining an NSR permit, undertake construction activities that involve “accommodating installations” since an “installation necessary to accommodate” an emissions unit is not considered part of that emissions unit. However, “secondary emissions,”¹³ emissions which would occur as a result of the construction of a major stationary source or major modification that do not come from the major stationary source or major modification itself, such as emissions resulting from “accommodating installations,” need to be considered in a PSD analysis. For this reason, allowing source owners or operators to conduct construction activities that would produce secondary emissions prior to permit issuance and the completion of a proper PSD review would be contrary to the goals of the PSD program.¹⁴ Such goals include protecting public health and welfare and ensuring that any applicable permit decision is made only after careful evaluation of all the consequences of such a decision and after adequate procedural opportunities for informed public participation in the decision making process.

Additionally, allowing the aforementioned construction activities prior to permit issuance would put into question the credibility and efficacy of the public participation aspect of the NSR preconstruction permitting program. Federal Land Managers (FLMs), among others, are given the opportunity to review and comment on PSD applications and corresponding permits prior to the issuance of the latter. For example, as part of the Regional Haze program, FLMs often comment on the secondary emissions and corresponding controls associated with new major stationary sources or major modifications. Any opposition or concerns raised with respect to secondary emissions resulting from the construction of the proposed source or modification would be difficult or impractical to address when construction activities have already taken place, casting doubt on the importance of the public participation process. Furthermore, allowing a source owner or operator to undertake significant and permanent on-site construction activities prior to issuance of a permit might give the illusion that the new major stationary source or major modification has already been approved, without consideration of public comment. This might give the appearance that permitting authorities are colluding with source owners or operators.

¹¹ Where a source owner or operator engages in costly and permanent on-site construction activities prior to receiving an NSR permit with the presumption that in doing so, the owner or operator would gain leverage in the permitting process. Begin Actual Construction Guidance Memorandum at 19.

¹² Begin Actual Construction Guidance Memorandum at 19.

¹³ 40 CFR Part 52.21(b)(18).

¹⁴ <https://www.epa.gov/nsr/prevention-significant-deterioration-basic-information>.

EPA's revised interpretation would also to an extent, blur the compliance focus of the NSR permitting program from being a preconstruction review program that evaluates a proposed project at the most health- protective and cost-effective time (i.e., prior to construction) with a retrospective assessment of compliance after the damage is done. And while EPA assures that source owners or operators would be aware of the financial risks of moving forward with construction prior to permit approval, EPA fails to mention the risk of a lengthy and contentious permitting process due to the need to reconfigure accommodating installations or reassess applicable regulatory reviews (e.g., NAAQS compliance). These delays in permit issuance would not only affect permit applicants but also put a strain on state and local air agencies' limited resources.

Lastly, EPA mentions that the revised interpretation is intended to be implemented by EPA Regional offices and by those air agencies exercising delegated authority under 40 CFR Section 52.21(u) to issue federal PSD permits. Whereas air agencies with State Implementation Plan (SIP) - approved programs may arguably¹⁵ choose to apply the aforementioned interpretation, if feasible.¹⁶ Irrespective of whether a state chooses or is forced to adopt the proposed guidance, the consequences would remain the same; adoption of EPA's revised interpretation would lead to an increase in emissions from upwind states. As previously explained, EPA's revised interpretation is based on a case-by-case standard that would be inconsistently applied by state and local agencies, as well as bring unintended consequences.¹⁷ As such, EPA's revised interpretation would lead to a relaxation of standards, thereby, weakening states' PSD programs to the extent of causing some increase in upwind emissions and exacerbating the effects of interstate pollution from these states. For states like Connecticut whose location places it in the path of transported emissions, any conceivable increase in emissions from upwind states would not only contravene with previous action taken by DEEP in an effort to address interstate air pollution, but would also hinder Connecticut's ability to attain compliance with the ozone NAAQS.

For the reasons presented, DEEP opposes adoption of the Begin Actual Construction Guidance Memorandum.

Thank you for the opportunity to submit these comments.

Sincerely yours,



Tracy R. Babbidge, Chief
Bureau of Air Management

¹⁵ Some states with SIP-approved programs might be forced to adopt EPA's revised interpretation if nearby states have adopted it, in an effort to maintain a competitive business climate.

¹⁶ Begin Actual Construction Guidance Memorandum at 22.

¹⁷ Allowing significant and permanent on-site construction activities prior to permit issuance would lead to the failure to properly consider secondary emissions in a PSD analysis.