



EPA's New Proposed Interpretation of "Begin Actual Construction" Under the New Source Review Preconstruction Permitting Regulations

On March 25, 2020, EPA released a draft [guidance memorandum](#) proposing to change the agency's interpretation of the term "begin actual construction" under the New Source Review (NSR) preconstruction permitting regulations. If finalized, this proposed guidance would expand the activities the factories, power plants, refineries and other industrial operations may undertake while waiting to receive an NSR permit.

Federal NSR permitting regulations provide that "[n]o new major stationary source or major modification . . . 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). The regulations define the term "begin actual construction" to mean "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).

EPA currently interprets "begin actual construction" as almost any physical on-site construction activity that is of a permanent nature, even if the activity does not involve construction "on an emissions unit." This interpretation precludes many preparatory activities such as installation of building supports and foundation, paving, laying of underground piping, construction of a permanent storage structure, and other similar activities.

Under the proposed revised interpretation, a source owner or operator, prior to obtaining an NSR permit, may 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. Under this interpretation, an "installation necessary to accommodate" the emissions unit at issue is not considered part of the actual emissions unit; thus, construction of such an installation would be permissible in advance of obtaining an NSR permit. EPA believes that this interpretation is more consistent with the regulatory text and will be less restrictive on those seeking NSR permits.

EPA does caution, however, that any activities undertaken prior to obtaining an NSR permit are undertaken at the owner's or operator's own risk. Resources expended prior to obtaining a permit may be wasted if changes are necessary to obtain the permit or the permit is not granted. EPA further warns that some on-site activities that would be permissible under the revised federal NSR interpretation could be limited by other laws. Such law could include state permitting programs or the Endangered Species Act.

EPA is providing an opportunity for interested stakeholders to review and comment on the draft guidance. EPA will accept comments on the draft guidance through May 11, 2020.

For additional information and assistance with draft comments, please contact Julie R. Domike at 202.853.3453 or jdomike@babstcalland.com or Michael H. Winek at 412.394.6538 or mwinek@babstcalland.com.

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