

New Source Review/Clean Air Act: U.S. Environmental Protection Agency Draft Guidance Addressing "Begin Actual Construction"



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The United States Environmental Protection Agency ("EPA") issued on March 25th a draft guidance memorandum addressing:

Interpretation of "Begin Actual Construction" Under the New Source Review Preconstruction Permitting Regulations ("Draft Guidance")

The *Draft Guidance* is transmitted from Anne L. Idsal, EPA Principal Deputy Assistant Administrator, to the Regional Air Division Directors.

The *Draft Guidance* revises EPA's view of the phrase "Begin Actual Construction" as defined under the Clean Air Act New Source Review ("NSR") regulations.

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

- Nonattainment
- Prevention of Significant Deterioration

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

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

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

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

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

In issuing the March 25th *Draft Guidance* EPA states that it currently considers almost every physical on-site construction activity that is of a permanent nature to constitute the beginning of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

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

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

The restriction is that they do not constitute physical construction on an emissions unit.

The components of the 22-page *Draft Guidance* include:

- Introduction and Purpose of Memorandum
- Background
- Clean Air Act
- EPA’s Initial NSR Implementing Regulations
- EPA’s Initial Guidance
- The 1980 NSR Rules
- EPA Guidance on “Begin Actual Construction”
- He 1986 Reich Memorandum
- The 1993 Rasnic Memorandum
- The 1993 Howekamp Memorandum
- The 1995 Seitz Letter
- Other Agency Statements
- Discussion
- The Revised Interpretation Is Consistent with the Regulatory Text
- EPA Has Good Reason to Revise Its Interpretation
- EPA’s Revised Interpretation Is A Better Reading of the Regulatory Text
- The Rationale for EPA’s Prior Interpretation Was Based on Considerations of Less Concern Today
- Determining the Scope of an Emissions Unit

A copy of the *Draft Guidance* can be downloaded [here](#).