

DEPARTMENT OF ENVIRONMENTAL QUALITY

Air Enforcement and Compliance Section

INTRA-AGENCY MEMORANDUM

TO: Greg Clayton
FROM: Boots King
SUBJECT: PSD Definitions
DATE: July 21, 1995 (amended September 14, 2009)

§120-08-02 (9 VAC 5 Chapter 80, Article 8*) Permits – Major stationary sources and major modification locating in prevention of significant deterioration.

§120-08-02 B (9 VAC 5-80-1615 C*) Definitions

“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 and foundations, laying of 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.

“Construction” 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.

“Commence” as applied to construction of a major stationary source or major modification, means that the owner has all necessary preconstruction approvals or permits and either has:

- (1) Begun, or caused to begin, a continuous program of actual on-site construction of the source, to be completed within a reasonable time; or
- (2) Entered into binding agreements or contractual obligations, which cannot be canceled or modified without substantial loss to the owner, to undertake a program of actual construction of the source, to be completed within a reasonable time.

WEBSTER Definitions:

“Fabrication” means a fabricating or being fabricated; construction; manufacture.

OPINION:

The first requirement contained in the definition of “Commence” is for an owner of a major stationary source to obtain all necessary preconstruction approvals or permits. “Section 169(2)(B) of the Clean Air Act defines “All necessary preconstruction approvals or permit” as meaning those permits or approvals required by the permitting authority as a precondition to undertaking any activity under clauses (1) or (2) of the definition of “Commence”. Once these preconstruction approvals or permits have been obtained by the owner, then the owner must either (1) Begun, or caused to begin, a continuous program of actual on-site construction of the source, to be completed within a reasonable time; or (2) enter in binding agreements or contractual obligations, which cannot be canceled or modified without substantial loss to the owner, to undertake a program of actual construction of the source, to be completed within a reasonable time.

§120-08-02 S (9 VAC 5-80-1785*) adds credence to this opinion. Paragraph 1 states: “Any owner who constructs or operates a source or modification not in accordance (i) with the application submitted pursuant to this section or (ii) with the terms and conditions of any permit to construct or operate, or any owner of a source or modification subject to this section who commences construction or operation after the effective date of these **regulations without applying for and** receiving a permit hereunder, shall be subject to appropriate enforcement action including, but not limited to, any specified in subsection Z of this section (9 VAC 5-80-1985*).”

Paragraph 2 (9 VAC 5-80-1985 A and B*) states: “Approval to construct shall become invalid if construction is not commenced within 18 months after receipt of such approval, if construction is discontinued for a period of 18 months or more, or if construction is not completed within a reasonable time.”

EPA’s December 18, 1978, memorandum “Interpretation of ‘Constructed’ as is Applies to Activities Undertaken Prior to Issuance of a PSD Permit” add additional confirmation on this subject. The issue addressed in this memorandum is 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. Commencement of construction is specifically defined in Section 169(2)(A) of the Clean Air Act, 40 CFR 52.21(b)(8) and §120-08-02 B (9 VAC 5-80-1615 C*). However, these definitions are for the purpose of deciding the threshold question of the applicability of the PSD regulations. Therefore, we are not bound by it in deciding what activities may be conducted prior to receiving a necessary PSD permit.

The memorandum establishes EPA policy and allows certain limited activities **in all cases**. These allowable activities are planning, ordering of equipment and materials, site-clearing, grading, and on-site storage of equipment and materials. However, the memorandum cautions that any activities undertaken prior to issuance of a PSD permit would be solely at the owner’s or operator’s risk. That is, even if considerable expense were incurred in site-clearing and purchasing equipment, for example, there would be no guarantee that a PSD permit would be forthcoming. Further, the memorandum states 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**.” These prohibited activities include installation of building supports and foundations, paving, laying of underground pipe work, construction of permanent storage structures, and activities of a similar nature.”

*Current regulation citation as of September 14, 2009.