NACAA
national association of clean air agencies



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U.S. Environmental Protection Agency
Submittal via web form and email: draft_permitting_guidance@epa.gov

To Whom It May Concern:

The National Association of Clean Air Agencies (NACAA) offers the following comments on the Environmental Protection Agency's (EPA's) draft guidance document, *Interpretation of "Begin Actual Construction" Under the New Source Review Preconstruction Permitting Regulations*, which was released for public review and comment on March 25, 2020. NACAA is the national, non-partisan, non-profit association of air pollution control agencies in 41 states, including 116 local air agencies, the District of Columbia and four territories. The air quality professionals in our member agencies have vast experience dedicated to improving air quality in the U.S. These comments are based upon that experience. The views expressed in these comments do not represent the positions of every state and local air pollution control agency in the country.

In the draft guidance, EPA introduces a new interpretation of the phrase "begin actual construction" as it appears in rules implementing the New Source Review (NSR) permitting program. Those regulations provide that no owner or operator of a new major stationary source or a source undertaking a major modification shall "begin actual construction" before obtaining an NSR permit.[1] "Begin actual construction" is defined by the regulations as follows:

> *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 underground pipework and construction of permanent storage structures. With respect to a change in method of operations, this term refers to those on-site activities other than preparatory activities which mark the initiation of the change. [2]

[1] 40 C.F.R. § 52.21(a)(2)(iii).

[2] *Id.* § 52.21(b)(11).

Under EPA's previous, longstanding interpretation of this language, iterated in a succession of memoranda dating back to at least 1986 (a history that EPA recounts extensively in the draft guidance), construction activities that could not proceed prior to obtaining an NSR permit included any construction that is "costly," that "significantly alters the site," and/or is "permanent in nature." Further, EPA construed the rules as prohibiting any preconstruction "intended to accommodate an emissions unit" or which is an "integral part of the source or modification." State and local air permitting authorities have accumulated decades of experience in applying this interpretation.

With the draft guidance, EPA is adopting a revised interpretation that represents a wholesale change from its previous approach. The agency's new interpretation provides that a source owner or operator may, prior to obtaining or even applying for 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 C.F.R. § 52.21(b)(7) ("any part of a stationary source that emits or would have the potential to emit any regulated NSR pollutant…"). Further, an "installation necessary to accommodate" the emissions unit at issue is *not* considered part of that emissions unit, and construction activities that involve such "accommodating installations" may be undertaken before the owner or operator obtains an NSR permit. All told, the revised interpretation would allow a great deal more construction to occur prior to permit issuance than has been allowed in the past.

NACAA acknowledges that, in certain instances, the remoteness of a construction site coupled with extreme climatic conditions may require extensive preparatory work on a staged and often seasonal basis over multiple years. Such situations may warrant an alternative approach narrowly aimed to solve that issue. However, such decisions are best left to be managed by the state or local permitting authority.

As we explain below, NACAA has a number of concerns with EPA's draft guidance. The stark change that it represents when compared to EPA's previous policy, coupled with the conspicuous lack of direction on how it is to be implemented, will lead to confusion, uncertainty, inconsistent application, legal challenges, and if ultimately adopted, increased burdens on state and local air agencies.

## 1. The Guidance Does Not Comport with the Regulatory Definition of "Begin Actual Construction"

The thrust of EPA's justification for its more expansive interpretation of allowable pre-permit construction activities is that the previous interpretation wrongly conflates an "emissions unit" with a "source." The "begin actual construction" definition, EPA argues, is intended to and should apply solely and strictly to construction of the physical "emissions unit" itself, because the term as it appears in the first sentence of the "begin actual construction" definition strictly limits the remainder of the definition.

NACAA does not share EPA's conviction that this is the most logical reading of the regulations. Rather, it appears that EPA is placing too much emphasis on the reference to

"emissions unit" in the first sentence, to the exclusion of the rest of the definition. In particular, the agency effectively disregards the definition's second sentence: "Such activities include, but are not limited to, installation of building supports and foundations, laying underground pipework and construction of permanent storage structures." This sentence serves to *elaborate and expand* on what is meant by the term "on an emissions unit," and the listed examples clearly go beyond the physical confines of the emissions units themselves, *i.e.*, the parts of a source that actually emit pollutants.

EPA's attempts to justify its interpretation are not convincing. Nowhere does it rationalize or provide examples of when and how "laying underground pipework" would be considered part of an emissions unit. In the one example given, EPA asserts that when a "permanent storage structure" is "not an emissions unit," its construction prior to issuance of an NSR permit would be permissible. But: "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)."

EPA's example, rather than lending clarity, instead renders the phrase "construction of permanent storage structures" superfluous. If the only storage structures covered by the definition are "emissions units" themselves, there would be no need for EPA to list it as an example of construction of a permanent nature covered by the definition – because it is obvious that a petroleum storage tank, etc., is an "emissions unit." The same can be said for the rest of the second and third sentences. If the only construction that is prohibited prior to permit issuance is construction on the actual emissions units themselves, the second and third sentences serve no purpose.

The more reasonable interpretation of the phrase "on an emissions unit" – as elaborated by the second and third sentences of the definition – is that it extends to construction of a permanent nature not just on the emissions unit itself, but to installations closely related to or intended to accommodate the unit. That is, it is best understood to be in accordance with EPA's original interpretation of the definition. It is a basic canon of construction that all of the words in a statutory or regulatory provision should be given effect, if possible. The original, longstanding interpretation of "begin actual construction" abides by that precept. The new interpretation does not.

Two important points are at issue here. First, because EPA's new interpretation is a departure from the plain meaning of the regulatory language, it will sow confusion among regulators, the regulated community and the public and will likely be subject to legal challenge. Second, EPA's new interpretation constitutes a major departure from the original interpretation. EPA acknowledges this in the guidance, stating: "EPA recognizes that the interpretation at issue was a long-standing one and the Agency does not take lightly the decision to revise it."

Taken together, those two facts demonstrate that EPA should not attempt to change the meaning of (or "interpretation" of) "begin actual construction" through guidance, but rather, through notice-and-comment rulemaking. This should not be taken as a recommendation from

NACAA that such a rulemaking is desirable. But if EPA is intent on pursuing this significant change to the NSR program, notice-and-comment rulemaking is the proper way to accomplish it.

### 2. EPA's Failure to Articulate What Constitutes an "Emissions Unit" Compounds the Problems with the Draft Guidance

The draft guidance does not include any direction as to 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." This analysis is left entirely to the permitting authorities to work through with their regulated sources. Considering that EPA's new approach to determining what pre-permit construction is permissible hinges entirely on how an "emissions unit" is defined, EPA's failure to provide guidance on this key issue is a serious concern.

The omission places state and local permitting authorities in the position of having to make case-by-case determinations without any criteria or record of past decision-making to rely upon. This will likely cause inconsistent implementation, both across states and within them, as the permitting authorities wrestle with where to "draw the line" as to what is part of an "emissions unit" and what is not. Further, it will demand significant agency staff time and resources and makes demonstration of compliance an uncertainty for the source.

Before finalizing this guidance, EPA should provide additional information that clearly articulates and provides detailed examples of what can and cannot be constructed prior to obtaining a NSR permit. This should start with a clear definition or explanation regarding what constitutes an "emissions unit" and how to delineate construction activities that are part of an emissions unit and activities that are not. As part of that clarification, EPA should explain under what circumstances the "installation of building supports and foundations, laying underground pipework and construction of permanent storage structures" would and would not be considered separate from construction "on an emissions unit."

### 3. The Revised Interpretation Undermines Stakeholder Participation in the Preconstruction Permitting Process

State and local agencies are required to solicit input from members of the public and other stakeholders, including Federal Land Managers, as part of the NSR permitting process *before* a permit is issued. If a source owner or operator is allowed to engage in extensive construction activities on a facility prior to obtaining a permit, the ability of these stakeholders to influence the permitting process may be diminished. This may undermine the state and local permitting authorities' credibility and have an adverse effect on public participation.

At the very least, members of the public may come away convinced that their input is not taken into consideration in the determination of whether a facility can be constructed. This is not in accordance with the Clean Air Act, which ensures significant public participation, and it will lead to diminished trust in regulatory agencies and of public participation processes in general.

**4. The "Equity in the Ground" Issue Remains a Legitimate Concern**

A primary rationale behind EPA's original, longstanding interpretation of "begin actual construction" was that it may become more difficult for an air agency to deny issuance of a permit once a source has placed significant "equity in the ground." EPA argues in the draft guidance that this rationale is "of less concern today." On the contrary, EPA asserts, it is reasonable to imagine that the more "equity" a permit applicant places in the ground, "the less leverage, as a practical matter, that applicant would retain in the permitting process."

Based on the considerable experience and concerns of our members, NACAA disagrees with EPA's assessment. The "equity in the ground" issue remains a serious concern for state and local agencies. Once significant construction activities have begun on a facility, owners and operators become less willing and/or able to make any necessary design changes to implement the provisions of the NSR program, such as the inclusion of Best Available Control Technology emission controls and monitoring device installation. EPA's assertion in the guidance that any pre-permit construction is "at their own risk" does not obviate the ability of owners and operators to bring legal or political leverage to bear on the permitting decision. Many of the larger projects may involve public funds in terms of tax incentives, bonds, grants or other funds which could be put at risk should the source decide to proceed down this path.

Furthermore, if an owner or operator is allowed to construct before a permit application is even submitted to the state or local permitting agency, construction could commence before the agency is even aware of what type of emission units are planned for a project. This could potentially affect the overall emissions of the project. If owners or operators are reluctant to make design changes due to the amount of "equity in the ground," an opportunity to reduce emissions through design and operability improvements could be lost.

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NACAA recognizes that EPA's new interpretation presented in the draft guidance document is not binding on state and local agencies that implement the NSR program under their own approved State Implementation Plans. Nevertheless, the revised interpretation will have significant impacts on all states. It will lead to significant inconsistencies between states in how the NSR program is implemented with respect to a fundamental part of the program. This is not desirable. We urge EPA to reconsider the guidance and, should it choose to pursue a revised interpretation of "begin actual construction," that it do so through notice-and-comment rulemaking rather than through a guidance document.

Thank you for your consideration of these comments. If you have any questions, please do not hesitate to contact either of us or Karen Mongoven of NACAA (kmongoven@4cleanair.org).

Sincerely,

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