



May 11, 2020

U.S. Environmental Protection Agency
Attn: Anne L. Idsal
Principal Deputy Assistant Administrator
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Re: Comments on Draft Memorandum, “Interpretation of ‘Begin Actual Construction’ Under the New Source Review Preconstruction Permitting Regulations”

Dear Ms. Idsal:

GPA Midstream Association (“GPA Midstream”) appreciates this opportunity to submit comments to the U.S. Environmental Protection Agency (“EPA”) in response to its request for comments on the March 25, 2020 Draft Memorandum, “Interpretation of ‘Begin Actual Construction’ Under the New Source Review Preconstruction Permitting Regulations” (“Draft Memo”).

GPA Midstream has served the U.S. energy industry since 1921. GPA Midstream is composed of nearly 100 corporate members that are engaged in the gathering and processing of natural gas into merchantable pipeline gas, commonly referred to in the industry as “midstream activities.” Such processing includes the removal of impurities from the raw gas stream produced at the wellhead as well as the extraction for sale of natural gas liquid products (“NGLs”) such as ethane, propane, butane, and natural gasoline or in the manufacture, transportation, or further processing of liquid products from natural gas. GPA Midstream membership accounts for more than 90% of the NGLs produced in the United States from natural gas processing.

Summary

GPA Midstream strongly supports the Draft Memo’s proposed interpretation of “begin actual construction.” EPA’s existing interpretation, dating back to 1978, fails to distinguish between the regulations’ differing definitions of a “major stationary source” and an “emissions unit” and is based on regulatory language that has since been revised. Although the proposed interpretation is not the only possible one, it is clearly the best interpretation that provides meaning to all of the relevant regulatory terms. Further, the existing interpretation erroneously predicted that a project developer’s sunk costs in pre-permit construction activities would be a major factor in a permitting authority’s decision to issue or deny a New Source Review (“NSR”) or Prevention of Significant Deterioration (“PSD”) permit. As decades of experience has demonstrated, that prediction never came true. The proposed interpretation, if finalized, would provide significant flexibility to project construction schedules that can be unnecessarily delayed under EPA’s current interpretation without any increase in emissions.

I. EPA's Proposed Legal Interpretation Correctly Distinguishes Between a "Major Stationary Source" and an "Emission Unit" Within that Source

GPA Midstream supports EPA's proposed interpretation of "begin actual construction" because it is consistent with the term's regulatory definition and properly recognizes the distinction the regulations draw between a "major stationary source" and an "emissions unit."

Foremost, as EPA reasons, the proposed interpretation follows from the plain regulatory text. The core requirements of the PSD rules "apply to the *construction* of any new major stationary source or the major modification of any existing major stationary source..." 40 C.F.R. § 52.21(a)(2)(ii) (emphasis added). Moreover, the central prohibition in EPA's PSD regulation is that a "new major stationary source or major modification" to a source shall not "*begin actual construction* without a permit" 40 C.F.R. § 52.21(a)(2)(iii) (emphasis added). To guide this process, the rules then define the phrase "begin actual construction," which requires a multi-part series of actions to be satisfied: the (1) "initiation of physical on-site construction activities [2] *on an emissions unit* [3] which are of a permanent nature." *Id.* § 52.21(b)(11) (emphasis added). An "emissions unit," in turn, is defined as "any part of a stationary source that emits or would have the potential to emit a regulated NSR pollutant...." *Id.* § 52.21(b)(7). Thus, under the plain terms of the regulation, an owner or operator does not "begin actual construction" at a "major stationary source" until it initiates physical on-site construction "on an emissions unit," the "part" of a source that actually emits pollutants, not the other structures, facilities, or appurtenances at the source that do not. EPA's proposal sensibly follows this clear regulatory framework.

EPA's proposed interpretation is further bolstered by how it defines "construction" for purposes of PSD. Under the rules, EPA defines "construction" to mean "any physical change ... (including fabrication, erection, installation, demolition of an emissions unit) that would *result in a change in emissions*." 40 C.F.R. § 52.21(b)(8) (emphasis added). Hence, by definition, for work to be "construction" the activity must itself be an action that would result in a change in emissions.

As such, it makes perfect sense to interpret "begin actual *construction*" as the physical change to the actual emissions unit itself. As an example, installing a concrete pad for a compressor station is not the "construction" of an "emissions unit," as it will not "result in a change in emissions" absent actual installation of the compressor station itself. This is the most straightforward reading of the current regulations and consistent with the Clean Air Act's aim of regulating pollutants from emissions units, not other components of industrial sites which have no emissions.

Moreover, the proposed interpretation reflects how EPA regulations *currently* define construction. This definition has changed since EPA's original PSD rules in 1978, where "construction" was defined "in the regulations as 'fabrication, erection, installation, or modification of a *source*.'" 40 C.F.R. 52.21(b)(7), 43 FR 26404." Memorandum from Edward E. Reich, "Interpretation of 'Constructed' as it Applies to Activities Undertaken Prior to Issuance of a PSD Permit" at 1 (Dec. 18, 1978) (emphasis added). EPA's interpretative guidance on "begin

actual construction” has not changed with the revised definition of “construction” and is, therefore, outdated¹

Further, an interpretation that a permit is required before work begins on the actual emissions unit would render the phrase “begin actual construction” superfluous. There would be little point to § 52.21(b)(11) being so specific – directing that to “begin actual construction” only pertains to “physical on-site construction activities on *an emissions unit*” – if activities on other aspects of the source were interpreted as requiring a permit. The regulation does go on to provide examples of prohibited construction activities to include “installation of building supports and foundations, laying underground pipework and construction of permanent storage structures.” However, EPA properly proposes to read those as limited to activities of that type that are in fact “on an emissions unit,” as the regulation actually reads. When interpreting “administrative regulations, as well as statutes, it is presumed that every phrase serves a legitimate purpose and, therefore, constructions which render regulatory provisions superfluous are to be avoided.” *Hart v. McLucas*, 535 F.2d 516, 519 (9th Cir. 1976).

In sum, allowing construction activities that are not directly on the emission unit itself gives proper effect to the distinction between a “major stationary source” and an “emission unit.”

II. Sunk Costs are not a Factor Considered in NSR/ PSD Permitting

In the Draft Memo, EPA has also prudently proposed to reconsider the original rationale for broad prohibitions on pre-permit construction activities. Over 40 years ago, EPA had justified its interpretation, in part, on the proposition that it would be “extremely difficult to deny issuance of a permit when it results in a completed portion of a project having to remain idle. Therefore, in order to avoid any equity arguments at a later time, it is better to prevent any construction now rather than to have a ‘white elephant’ on our hands later on.” Memorandum from Edward E. Reich to Thomas W. Devine, “Source Construction Prior to Issuance of PSD Permit” (Oct. 10, 1978) at 2. This reasoning is no longer valid, if it was ever valid.

Today, for a particular project, the key questions involve whether a project is a physical change that results in a significant net emissions increase – and if so, what Best Available Control Technology (“BACT”) emission limits may be appropriate. However, at the time of Mr. Reich’s 1978 memorandum, the statutory definition of BACT, found at 42 U.S.C. § 7479(3), had been added to the Clean Air Act only the year before, Pub. L. No. 95-95, 91 Stat. 685, 741 (Aug. 7, 1977), and the Agency (and state permitting agencies) had little or no experience with it. Under EPA’s 1975 regulations, BACT was equivalent to New Source Performance Standards and a case-by-case determination was only performed where no New Source Performance Standard existed. 40 C.F.R. §§ 52.01(f), 52.21(d)(2)(ii) (1975). At the time of Mr. Reich’s 1978 memorandum, EPA believed that implementing BACT “could impose severe administrative burdens on EPA, as well as severe economic burdens on the construction of new facilities.” *Alabama Power Co. v. Costle*,

¹ It should be noted that the Clean Air Act defines the word “construction” as “when used in connection with any source or facility, includes the modification (as defined in section 7411(a) of this title) of any source or facility.” This definition is ambiguous in the sense that it does not draw any line between what type of construction activities may or may not be commenced prior to securing an NSR or PSD permit.

636 F.3d 323, 405 (D.C. Cir. 1979). That created uncertainty about whether a project would proceed.

At this juncture, determining BACT is a much more well-established process. In 1990, EPA issued a draft guidance which formalized the five-step BACT process, which has served as the framework for PSD review of emissions limitations. *See* EPA, Draft New Source Review Workshop Manual (Oct. 1990) (“1990 Draft Manual”). In this guidance, EPA established a policy that sunk costs, such as construction already undertaken before the regulator issues a permit, were not part of the “economic impacts and other costs” criterion of a BACT review under the CAA. 42 U.S.C. § 7479(3). Instead, the 1990 Draft Manual advised that EPA and other permitting authorities should only consider the total annualized costs, cost effectiveness, and incremental cost effectiveness of the pollution controls themselves. 1990 Draft Manual at B.25. Therefore, the concern that a regulator would grant a permit it would otherwise deny, or alter the stringency of BACT emissions limits, based on an applicant’s sunk costs at a site has never been justified.

Even if sunk costs were considered, EPA permitted applicants to expend significant resources on a proposed project prior to the receipt of a permit so long as they were part of an arbitrarily selected class of expenses. In a subsequent memo by Mr. Reich, EPA explained that, while the “installation of building supports and foundations, paving, [and] laying of underground pipe work” were all too costly to allow prior to obtaining a permit, the owner or operator was still permitted to undertake “planning, ordering of equipment and materials” and “on-site storage of equipment and materials.” Memorandum from Edward E. Reich, “Interpretation of ‘Constructed’ as it Applies to Activities Undertaken Prior to Issuance of a PSD Permit” (Dec. 18, 1978) at 2; *see also* Letter from John S. Seitz, EPA OAQPS, to Charles W. Williams, Minnesota Pollution Control Agency (Dec. 13, 1995) (“Seitz Memo”) at 1 (permitting “entering into binding agreements or contractual obligations” prior to obtaining a permit). The costs of designing and engineering a major stationary source (“planning”), entering into binding contractual agreements, and ordering and taking delivery of equipment for that source can commit an owner operator to many millions of dollars in costs. These costs will often dwarf those involved in laying foundations, paving, or installing underground pipe. Yet, to the extent that EPA’s fear of sunk costs was ever valid, to allow developers to incur certain classes of high-cost expenses but not other relatively low-cost expenses was an arbitrary line that is not defensible. EPA’s proposal to eliminate it is sound.

III. The Proposed Interpretation Would Provide a Significant Benefit to Project Developers – Without Resulting in an Increase in Emissions

The proposed interpretation is sound policy because it would provide project developers with significant flexibility to schedule construction and minimize unnecessary delays – without resulting in any increase in emissions. Delays in ultimately receiving a permit can cause significant disruption to construction plans and schedules. Allowing site construction activities unrelated to the emissions unit itself (provided that the developer has other necessary permits and approvals for construction) provides significant flexibility to manage project work. For example, developers may have seasonal limitations on certain construction activities as a result of the potential presence of endangered or threatened species during certain times of the year or due to weather. EPA’s historic policy had not allowed developers to schedule work around those limitations while awaiting a final permit decision. *See* Seitz Memo at 3 (denying that “there is flexibility ... to allow construction of footings for emissions units without a PSD permit in cold weather States such as

Minnesota.”). Allowing them the flexibility to undertake a wide range of construction activities that are not on the emissions unit itself can avoid months of delays, even where a permit is processed relatively quickly.

With regard to both equipment order lead times and mobilization of contractors, the inability to “begin actual construction” until a permit is issued brings about challenges that can delay aspects of the project that have nothing to do with emission units well past the time that the permit is issued. Having the ability to conduct activities like building foundations, installing electrical systems, and laying piping, none of which constitutes “construction on an emissions unit,” allows projects to move forward without having a negative impact on the environment. The strict current interpretation on start of construction prolongs the uncertainty around permit issuance primarily based on scheduling. Delays in project construction result in unanticipated costs as construction contractors are mobilized and then forced to stand down once it becomes clear permit approval will take longer than expected. The company must incur further costs to re-mobilize construction contractors once it believes permit approval is imminent. Finally, delays in permit approval cause companies to incur additional costs when they are unable to set large process equipment at the facility location and must, instead, pay for the equipment to be transported and stored at a separate location pending permit approval.

Once winter arrives in the northern states (*e.g.*, North Dakota and Wyoming), the ability to excavate, trench and pour foundations becomes virtually impossible in the frozen ground. By having the ability to perform this work in the fall prior to freezing temperatures, companies can take advantage of limited windows of time to complete necessary preparatory work pending permit approval. In addition, counties in northern states issue “frost laws” which, due to melting ice or snow, restrict the size of vehicles that can travel on county roads. Because many facilities are located on unpaved county roads, the annual implementation of frost laws impairs the ability of a company to deliver heavy equipment to its sites. By allowing companies – prior to permit approval – to deliver equipment to a pad but not connect it in a way that would allow it to be considered an emission source, EPA will give companies the flexibility they need to more effectively manage the combination of harsh winter weather and frost law-imposed restrictions in northern states.

Lastly, with respect to some midstream facilities, delaying construction activities can increase emissions. For instance, the construction of pipeline tie-ins requires the shutdown of a large portion of a facility, if not the entire facility. Typically, tie-in construction is coordinated with a planned facility shut down for maintenance and repair activities. When permitting is delayed, however, and the tie-ins cannot be made, the developer postpone the shutdown. This not only delays construction, but the repair or replacement of leaking components subject to the Leak Detection and Repair Program. Where two shut downs are required to separately address tie-in construction and maintenance, this unnecessarily doubles startup and shutdown emissions. Allowing flexibility for the construction of tie-ins, which are not emission sources themselves, prior to permit issuance will give developers the flexibility to complete work without unnecessary shutdown and startup emissions.

GPA Midstream appreciates the opportunity to submit these comments in response to EPA’s proposed guidance document and is standing by to answer any questions that the agency may have.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Matt Hite". The signature is written in a cursive, flowing style with a large initial "M".

Matt Hite

Vice President of Government Affairs
GPA Midstream Association

