



Clarification #2025-03

Construction Activities Permissible Prior to Receiving an Air Permit

JANUARY 17, 2025

I. PURPOSE

The purpose of this document is to provide clarification to DEQ air compliance and permitting staff, and to the general public, regarding what construction activities are permissible at a site prior to a facility receiving a minor source air permit, an exemption, or providing calculations of self-determination of an exemption.

II. APPLICABILITY

- A. This document is applicable **only** to facilities that are subject to the New Minor Source Review Air Permit regulations contained in Article 6¹ of Virginia's Administrative Code. Facilities subject to the Virginia Prevention of Significant Deterioration (PSD) Air Permit regulations in Article 8² or Major Nonattainment New Source Review Permit (NNSR) regulations in Article 9³ follow different regulations and federal policies and must refer to the regulations and Air Permit Guidance (APG) – 303, dated September 14, 2009⁴ for clarification regarding construction before obtaining a major source PSD or NNSR permit.

- B. The pertinent definitions from Article 6 are listed below:

"Begin actual construction" means initiation of permanent physical on-site construction of an emissions unit. This includes but is not limited to, installation of building supports and foundations, laying of underground pipework⁵, 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 that mark the initiation of the change. With respect to the initial location or relocation of a portable emissions unit, this term refers to the delivery of any portion of the portable emissions unit to the site.

¹ 9VAC5 Chapter 80, Article 6 Permits for New and Modified Sources

<https://law.lis.virginia.gov/admincodefull/title9/agency5/chapter80/partII/article6/>

² 9VAC5 Chapter 80, Article 8 Permits for Major Stationary Sources and Major Modifications Locating in Prevention of Significant Deterioration Areas

<https://law.lis.virginia.gov/admincodefull/title9/agency5/chapter80/partII/article8/>

³ 9VAC5 Chapter 80, Article 9 Permits for Major Stationary Sources and Major Modifications Locating in Nonattainment Areas or the Ozone Transport Region

<https://law.lis.virginia.gov/admincodefull/title9/agency5/chapter80/partII/article9/>

⁴ <https://townhall.virginia.gov/L/ViewGDoc.cfm?gdid=2846>

⁵ Point of clarification: The underground pipework includes but is not limited to electrical conduit. The pipework can extend no further than 5 feet from the edge of the building towards outdoor emissions units.

"Commence," as applied to the construction of an emissions unit, means that the owner has all necessary preconstruction approvals or permits and has either:

1. Begun or caused to begin a continuous program of actual on-site construction of the unit, 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 unit, to be completed within a reasonable time.

"Construction" means fabrication, erection, installation, demolition, relocation, addition, replacement, or modification of an emissions unit that would result in a change in the uncontrolled emission rate.

"Emissions unit" means any part of a stationary source that emits or would have the potential to emit any regulated air pollutant.

III. IMPLEMENTATION

- A. 9VAC5-80-1120 A⁶ of the regulation states, "No owner or other person shall begin actual construction of, or operate, any new stationary source or any project subject to this article without first obtaining from the department a permit under the provisions of this article. The owner may not construct or operate the stationary source or project contrary to the terms and conditions of that permit." Therefore, DEQ regulations prohibit the beginning of actual construction for new, modified, or reconstructed stationary sources prior to the issuance of an appropriate air permit. **Note that certain site preparation work such as grading does not, by itself, meet the definition of "Begin actual construction" and the grading of a potential site is permissible prior to the applicant receiving an air permit.** At the request of an applicant, DEQ air compliance can determine on a case-by-case basis whether other types of site preparation work fall outside the definition of "Begin actual construction."
- B. In addition, while the definition of "Begin actual construction" is silent on the question whether the storage and staging of equipment to be installed at a site is permissible prior to receiving an air permit, the DEQ Office of Air Compliance prohibits such activities if they appear to fall under the regulatory definition of "Commence,"⁷ which is somewhat at odds with the definition of "Begin actual construction" and on its face can be interpreted very broadly. Note the definition of "Commence" encompasses an applicant entering into certain "binding agreements or contractual obligations." Because such contractual agreements are "behind the scenes" and difficult for an air inspector to evaluate, DEQ nearly always determines compliance based on the definition of "Begin actual construction" and what can be seen on site. Therefore, if there is no evidence of installing foundations, constructing of permanent structures, running electrical wiring, laying underground pipework, etc., in the planned vicinity and which are integral to the emissions unit, the storing and staging of equipment on site, by itself, is permissible prior to receiving an air permit.
- C. Finally, the definition for "Begin actual construction" specifically refers to the construction of an emissions unit. Therefore, in addition to site preparation activities such as grading mentioned above, **it is permissible to start construction on aspects of a project that do not support or house emissions units prior to receiving an air permit for those**

⁶ <https://law.lis.virginia.gov/admincode/title9/agency5/chapter80/section1120/>

⁷ <https://law.lis.virginia.gov/admincode/title9/agency5/chapter80/section1110/>

emissions units. For example, with respect to a manufacturing facility it would be permissible to start construction on auxiliary warehouses, office buildings, or garages that do not contain or house emissions units but are nevertheless part of the overall project. Another example with respect to a data center: It is permissible to start construction on the building that houses the servers and other computer equipment, as long as the building does not house the backup or emergency electrical generators requiring an air permit prior to the data center receiving that permit. It would not be permissible, on the other hand, to lay foundations or pads for those generators, or to install and connect those generators themselves, prior to receiving the required permit. (Although it is permissible to extend ductwork that may be necessary to connect a potential emissions unit several feet from building structure in accordance with good construction practices.) An additional example for certain buildings, such as hospitals, office buildings, or apartment complexes, that have heating units requiring an air permit: It is permissible to begin construction on the buildings as long as no construction is performed on the emissions unit and the emissions unit has not been brought onsite until the air permit is issued.

IV. MORE INFORMATION

This document is not intended to cover every situation but should be applicable in many scenarios. Questions or comments concerning this memorandum should be directed to DEQ's Office of Air Compliance Coordination. DEQ encourages facilities to contact the appropriate DEQ regional office and discuss their particular situation before proceeding if they have any questions about what may be considered non-compliant.