



# Department of Environmental Protection

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## “Ask the Office of the Permit Ombudsman” Issue Summary: Pre-permit Construction for Air Plans

*MassDEP’s Office of Permit and Regulatory Ombudsman serves as a Point of Contact for raising issues about permitting or questions about how law, policy, and regulations are being applied across the agency. This summary provides information about an issue raised to the Office and should not be considered legal or consulting advice. Project proponents should consult the regulations and appropriate MassDEP Regional Office on how this information may apply to their specific projects.*

**Inquiry:** What work can be conducted at a site before MassDEP issues a final air quality Plan Approval?

**Regulatory Background:** MassDEP’s air pollution control regulations (310 CMR 7.00) state that “a Plan Approval is required prior to any construction, substantial reconstruction, alteration, or subsequent operation of a facility that may emit contaminants to the ambient air” 310 CMR 7.02(1)(b). 310 CMR 7.00 *Definitions* contains the following definitions:

Construct or 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 an increase in potential emissions.

Alter or Alteration means any physical change or change in the method of operation (including modification or reconfiguration of an emissions unit, change in the raw material used or change in the operation rate) which would result in an increase in potential emissions or an increase in ambient air impacts (i.e., reduced stack height).

Substantial Reconstruction means any physical change in, or changes in the method of operation of a facility or its appearances which changes the amount of emissions from such facility.

In addition, MassDEP’s nonattainment major new source review regulations in 310 CMR 7.00: Appendix A(2) define “begin actual construction” as “physical on-site construction activities of an emissions unit which is 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 structures.”

Under MassDEP's regulations, an activity that meets the definition of construction, alteration, or reconstruction is prohibited from commencing until MassDEP issues a final plan approval. An activity that does not meet one of these definitions may commence prior to receiving a final plan approval.

MassDEP's air permit programs are based on Massachusetts General Laws but also fulfill federal Clean Air Act (CAA) requirements. Therefore, MassDEP relies on U.S. Environmental Protection Agency (EPA) CAA regulations and guidance documents for interpreting MassDEP's regulations. EPA has issued guidance<sup>1</sup> for its Prevention of Significant Deterioration (PSD) permit program for determining what types of site activities can and cannot take place when a PSD permit is pending by applying the following basic tests:

1. Is the construction activity an integral part of the PSD source or modification? In other words, if the construction would not happen in accordance with its original intent except for the installation of the emissions unit, such construction is prohibited prior to obtaining a PSD permit.
2. Is the activity permanent in nature? This standard prohibits activities affecting the property in a permanent way that the source would reasonably undertake only with the intended purpose of constructing the regulated project.

EPA's guidance allows certain limited activities in all cases, including:

- planning;
- ordering of equipment and materials;
- site-clearing;
- grading; and
- on-site storage of equipment and materials.

EPA's guidance prohibits other activities of a permanent nature that are integral to the air pollution source, including:

- installation of building supports and foundations;
- paving;
- laying of underground pipe work;
- construction of permanent storage structures; and
- activities of a similar nature.

MassDEP advises applicants for Plan Approvals to wait until the Plan Approval has been issued before conducting site preparation activities. While some site preparation activities related to a proposed facility or emissions unit may not be prohibited while a Plan Approval is pending (because they do not meet the regulatory definition of "construction"), such activities may give the appearance of unauthorized construction of a facility, and should generally be avoided. Where an applicant faces extenuating circumstances and wishes to conduct "non-construction" site preparation work in advance of a plan approval, MassDEP recommends that the applicant contact the appropriate MassDEP regional

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<sup>1</sup> Memorandum dated December 18, 1978, "Interpretation of 'Constructed' as it Applies to Activities Undertaken Prior to Issuance of PSD Permit;" Memorandum dated May 13, 1993, "Memorandum on Construction Activities at Georgia Pacific;" and Memorandum dated November 4, 1993, "Preconstruction Review and Construction."

office to discuss the activities. In no case will MassDEP approve of activities that meet the definition of “construction” prior to issuing a final Plan Approval.

It also should be noted that, if MassDEP issues a final Plan Approval that is then appealed to MassDEP’s Office of Appeals and Dispute Resolution, the applicant cannot begin construction of the facility while the appeal is pending and may only begin construction after the Commissioner of MassDEP issues a Final Decision.