

Questions and Answers Section 316(b) Phase I Rule Implementation

Per the Federal Register of December 18, 2001, Phase I rules became effective on January 17, 2002. This date is important because it is used to define a new facility. A facility which began construction prior to this date is not subject to the requirements of these rules. The difficulty relates to determining "construction". Is grubbing and clearing the beginning of construction or is construction restricted to actually installing a structure? Does construction begin when contracts are signed with the contractor?

40 CFR 122.29(b)(4) provides that:

Construction of a new source as defined under § 122.2 has commenced if the owner or operator has:

- (i) Begun, or caused to begin as part of a continuous on-site construction program:
 - (A) Any placement, assembly, or installation of facilities or equipment; or
 - (B) Significant site preparation work including clearing, excavation or removal of existing buildings, structures, or facilities which is necessary for the placement, assembly, or installation of new source facilities or equipment; or
- (ii) Entered into a binding contractual obligation for the purchase of facilities or equipment which are intended to be used in its operation within a reasonable time. Options to purchase or contracts which can be terminated or modified without substantial loss, and contracts for feasibility engineering, and design studies do not constitute a contractual obligation under the paragraph.

The grubbing/clearing fact pattern falls under the first provision, which has a three prong test: (1) there must be a continuous on-site construction program; (2) the activity in question must be significant; and (3) the activity must be necessary for the placement, assembly or installation of new source facilities or equipment?

As to a continuous on-site construction program, when did the grubbing and clearing take place? If grubbing and clearing took place in 2003 and there has been no activity since, I do not believe that demonstrates a continuous on-site construction program. However, if there has been continuous activity, the requirement may have been met.

Second, was the activity “significant?” While significant is not defined in the regulations or preamble, dictionaries provide the following:

“significant” means important. Webster's New Riverside University Dictionary 512, 1083 (1988).

“significant” means, among other things, "(1) Having or expressing a meaning; meaningful * * * (3) Having or likely to have a major effect; important; (4) Fairly large in amount or quantity * * *." American Heritage Dictionary of the English Language (3d ed. 1992) 1679.

Third, was the activity necessary for the placement, assembly or installation of new source facilities or equipment?

These are questions of fact which are to be addressed on a case by case basis.

The signing of a contract involves the second provision. Relevant questions include the following:

- Is the contract binding?
- Does the contract provide for the purchase of facilities or equipment which are intended to be used in the facility's operation?
- Is the contract to be completed within a reasonable time? (Notice the time frame cannot be open ended.)

Contracts which may be terminated or modified without substantial loss do not qualify. Likewise, contracts for feasibility engineering and design studies do not qualify.

These are questions which must be decided on a case by case basis.

Suppose the construction of a power generating facility began prior to January 17, 2002 based upon the guidance provided for the previous question. Could this facility be subject to the requirements of the Phase II or Phase III rules?

Yes. For instance, if a power generating facility began construction in 2001, it is not subject to the Phase I rules, but it may be subject to the Phase II or Phase III rules. Under these circumstances, it is recommended that at least three years prior to the expiration of the facility's current NPDES permit, the permittee determine the applicability of the Phase II rules. If the Phase II rules are applicable to this facility, sampling and/or preparation of the necessary

documents should be initiated. (The applicability of the Phase III rules cannot be determined at this time since these rules have not been finalized.)

If an NPDES permit were issued for a new power generating facility prior to January 17, 2002, but construction was not initiated for the facility until after this date, would this facility be subject to the requirements of the Phase I rules?

Yes. This facility would be subject to the Phase I rule requirements, and as such, would need to demonstrate compliance with the Phase I rules when the permit renewal application for this facility is submitted. (See the Phase I rules to determine the necessary studies and information which must be submitted.)