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Memorandum

DATE: July 13, 2017
TO: Ted Schooley, Permitting Programs Manager 
FROM: Robert Samaniego, Major Source Permitting Section Manager 
SUBJECT: 20.2.72.211 NMAC- Permit Cancellations

Does Section 211 refer to cancellation of entire permits, individual units, or both?

20.2.72.211.A NMAC:

The provisions at 20.2.72.211.A NMAC state (in relevant part) that, “The department shall automatically cancel any permit for any source which ceases operation for five years or more”. The definition of “Stationary source” or “source” at 20.2.72.7.EE NMAC, source may refer to the entire facility or individual units (equipment). Thus, a 211.A cancellation can apply to the entire facility or an individual unit(s) at a facility.

20.2.72.211.B NMAC:

The provisions at 20.2.72.211.B NMAC state (in relevant part) that, “The department may cancel a permit if the construction or modification is not commenced within two years from the date of issuance” The definition of “modification” at 20.2.72.7.P NMAC refers to “stationary source”. The definition of stationary source at 20.2.72.7.EE NMAC includes any piece of equipment (unit). Thus, per Subsection 211.B, the Department does cancel the permit to construct the entire facility or an individual unit(s) if the construction has not commenced within two years.

Implementation:

211.A Cancellations: Auto-cancellation applies to entire facilities or individual units that have ceased operation for five years or more. Prior to cancelling a source, obtain your manager’s approval. Should the need arise to cancel a source outside the technical or significant revision process, the Department shall use the administrative permit revision process to cancel the permit

or remove sources from the permit for sources (facilities or units) that are subject to this Subpart. However, in consideration of efficient use of resources, sources subject to this part will typically be removed from the permit only during the technical and significant review process.

211.B Cancellations: Significant effort is invested by Department, consultants, and industry to successfully obtain a permit. Significant consideration shall be given to this effort in determinations of whether cancellation of permit to construct for sources (facilities or units) for which the construction or modification has not commenced within two years from the issuance of the permit. Only in cases in which significant reasons exist to cancel permit to construct shall this option to cancel be exercised (i.e. anticipated facility construction has been shown to be limited by dispersion modeling, the unconstructed source significantly impacts a limited available air shed for future sources, etc.). The process for these cancellations will be, with your manager's approval, the appropriate choice of administrative, technical, or significant revisions.

Background:

Automatic Cancellation for Sources that Cease Operation for Five Years or More:

The provisions for automatic permit cancellations for any source which ceases operation for five years or more, currently at 20.2.72.211.A NMAC, were originally added to AQCR 702 in the version that was filed on August 18, 1987. The relevant portions of the transcript from Hearing Number 86-12-02, Volume 2, are reproduced in Appendix 1.

It is clear from the transcript that the Department (the Division at the time) intended for this provision to apply automatically. In addition, the transcript did directly address the possibility of a temporary startup before the end of the five year period to avoid cancellation. It expressly indicated that the permit would still be cancelled if the startup, "...is just a token move to avoid cancellation."

Cancellation for Sources that Do Not Commence Construction Within Two Years of Permit Issuance:

The provisions for permit cancellations currently at 20.2.72.211.B NMAC were part of the original version of AQCR 702 that was filed on July 31, 1972 (AQCR 702.M). The original version had a time frame of one year before the Department may cancel a permit. The timeframe was changed to two years in the version that was filed on August 18, 1987. The relevant portions of the transcript from Hearing Number 86-12-02, Volume 2, are reproduced in Appendix 1.

The testimony indicates that the Division did not intend for this provision to apply automatically. The Division acknowledged that there might be legitimate economic reasons for a delay, or that other conditions such as air quality in the air shed may not have changed during the period of delay and thus would not warrant cancellation.

Applicability of Both Cancellation Provisions to Individual Sources:

The testimony in the transcripts for both provisions was limited to cancellation of the permit. There was no discussion regarding whether or not either of these provisions would apply to specific units (sources) within a permit. However, the terms "source" and "sources" are used in the testimony for both provisions. Today, most facilities have multiple sources that are included in a permit. If one of those sources has ceased operation for five or more years, it does not seem reasonable to cancel the entire permit. Likewise, if a permit modification was issued that

authorized the construction of five sources, and the permittee only constructed three, it does not seem reasonable to cancel the entire permit modification if the remaining two sources were not constructed within the two-year timeframe.

There was discussion in the transcripts from Hearing Number 72-07-25 regarding the rationale behind the cancellation provision for sources that do not commence construction within a prescribed timeframe. The Department (the Environmental Improvement Agency at the time) was concerned that sources that obtained a permit but did not construct would potentially prevent other sources from obtaining permits due the source's impact on the air shed.

When the cancellation provision for a source which ceases operation for five years or more was added in 1987, it was clear that the Division felt enough time had passed that the circumstances under which the original permit was obtained were no longer valid. Thus, re-starting the source would require a new permit review.

The Department included these cancellation provisions to allow for other new sources to be constructed and for the reason to allow a re-evaluation of the impacts after delay in construction. Given this, a reasonable interpretation of the cancellation provisions today would be to apply them to any applicable individual emission unit (source) in a permit. This would still meet the original intent of potentially allowing for other new sources to be constructed and to require a new permit review after a period of time has passed before a source that has ceased operation for five years or more re-starts operation.

APPENDIX

The excerpts in items 1 and 2 below are taken from AQCR 702, filed on August 18, 1987, and Hearing Number 86-12-02, Volume 2. Testimony for items 1 and 2 below by Bruce Nicholson, Manager of the Permits and Modeling Analysis section of the Air Quality Bureau.

1. AQCR 702.L.1.: The division shall automatically cancel any permit for any source which ceases operation for five years or more, or permanently. Reactivation of any source after the five year period shall require a new permit.

“...Section 1 is new and deals with sources which cease operation.

...We have allowed five years as a reasonable period of time, considering economic cycles. A number of industries felt that five years was a reasonable period of time to consider. In this case, we have made cancellation automatic since enough time will have passed since issuance to make the circumstances surrounding the permit no longer valid. It is appropriate in that case that the source reapply, since after such a period of time, we are essentially dealing with new construction. Section 1 is new language to 702 and deals with the case of a source which ceases operation for five years or more. In the August 22 version, we had proposed a two-year period after which the permit would be cancelled. Several comments during the public review indicated that five years was more appropriate, and we agree. Some responses, as well, were that this should not be discretionary. Once a permit is cancelled, then a new permit must be obtained. If prior to cancellation the source resumes operation, then the permit will not be cancelled unless it is just a token move to avoid cancellation.”

[Hearing Number 86-12-02, Volume 2, pages 341-343]

2. AQCR 702.L.2.: The division may cancel a permit if the construction or modification is not commenced within two years from the date of issuance or, if during the construction or modification, work is suspended for a total of one year,

“...When a permit is reviewed, it is done for a specific set of circumstances including current air quality, state and federal requirements and regulations as of the date of the review, the state of the art in monitoring, air pollution control, process technology and so on. Any or all of these can change over time.

If a permit is submitted and reviewed too early, then it is being reviewed with faulty information and data. The Division is placed in a situation of having a permit with enforcement, inspection and inventory requirements on a source that does not exist and having to consider for other nearby permit applicants, air quality impacts that do not and may never exist.

We have not made cancellation automatic, however, because there may be no change in the circumstances of the permit including construction of other sources, and there may be legitimate economic reasons for delay, provided that the delay does not become unreasonably long. At some point, it becomes obvious that the construction will not occur, and it is appropriate to cancel the permit.”

[Hearing Number 86-12-02, Volume 2, pages 341-342]

AQCR 702, Part One, 30: "stationary source" or "source" means any building, structure, equipment, facility, installation (including temporary installations), operation or portable stationary source which emits or may emit any air contaminant. Any research facility may group its sources for the purpose of this regulation; at the discretion of the Director of the Environmental Improvement Division;

The excerpts in items 3 below are taken from AQCR 702, filed on July 31, 1972, and Hearing Number 72-07-25. Testimony for item 3 below by Theodore Jones, with the legal office of the Environmental Improvement Agency.

3. AQCR 702.M: The department may cancel a permit if the construction is not commenced within one year from the date of issuance or, if during the construction, work is suspended for a total of one year.

“...The one year has been built in to handle these kinds of contingencies and we think that the one year is necessary and it is adequate. How long are you going to allow one source to hold up everyone else? ... The question is how long are you going to allow one particular source to keep out other sources that want to come in, and we feel the one year period is adequate to handle these contingencies.”

“That's correct. Like I say, the situation of where we are likely to cancel a permit is where this source is holding up other sources. If it is not holding up other sources, there may not be that much reason to cancel it. It depends on the situation, but certainly the discretion is there.”

[Hearing Number 72-07-25, pages 39, 52]

AQCR 702.T.5: “stationary source” means any building, structure, facility or installation which emits or may emit any air contaminant.