

PERMITTING & CIVIL AUTHORITIES CLAUSES



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In the USA, the Clean Air Act (CAA) establishes a number of permitting programmes designed to enforce the goals of the act. Some of these programmes are directly implemented by the Environmental Protection Agency through its regional offices, but most are carried out by individual states and local agencies. The CAA requires facilities that are major sources of air pollutants (i.e. oil, gas and petrochemical facilities) to have an air permit in order to be built as well as to operate. As we were to learn, the process of gaining a permit for both new and pre-existing facilities can be extremely time-consuming.

An assignment in which a small refinery in the US Midwest suffered an explosion and fire became our first experience of 'permitting' being a significant factor in the calculation of the period of interruption. As we were to discover, the post-loss requirement for the insured to make the relevant application added another layer of complexity to the adjustment process, and delay to the reinstatement project.

ANY SIGNIFICANT REPAIR PROJECT WILL LIKELY TRIGGER THE NEED FOR PSD PERMITTING, WHICH IS COMPLICATED.

TRIGGERS FOR PERMITTING

In simple terms, every facility is allocated an emissions allowance, but in more complex facilities each subset of equipment can also have an individual rating. This is so that, if the emissions from an individual process unit change, re-permitting may be necessary. In our experience, the need for permitting can be triggered by at least three elements:

- 1 **If a facility is rebuilt following an incident, with a like-kind replacement of equipment damaged due to the incident.**
- 2 **Where a unit's capacity is upgraded and the emissions alter as a result.**
- 3 **Construction works necessary to complete the reinstatement of damage are also subject to permitting.**

Typically, a facility is likely to be classified as a major stationary source for each criteria pollutant according to the geographic area in which the source is located. National ambient air quality standards (NAAQS) determine threshold levels and, if increases in pollutant levels remain below the thresholds, the facility may only be subject to minor modification construction permitting, which is relatively straightforward to achieve.

However, if a facility incurs damage as a result of an incident and most of the following repair or reconstruction activities performed on damaged units meet the criteria for a "replacement unit" versus a new emissions unit, any significant repair project will likely trigger the need for Prevention of Significant Deterioration (PSD) permitting, which is complicated, costly and requires considerably more time than the minor modification alternative.

The most critical part of successfully qualifying as a "replacement unit" is that the rated capacity from an emissions perspective does not increase. It must also be "identical or functionally equivalent" and not change the basic design parameters of the process. Replacing decades-old process equipment with modern technology (as is common in the USA and other parts of the world) can sometimes be a challenge when trying to demonstrate that it is functionally equivalent and does not change design parameters.

A PSD permit application must include an ambient air impact analysis with robust dispersion modelling and details of the Best Available Control Technology (BACT) used. In some cases, a public notice and comments period is necessary, which creates the risk of a 'contested permit application' by third parties.

PERMIT TIMELINES

Understanding the likely permitting response following a loss is important because of the potential impact it will have on both the cost of the reinstatement project and the repair timeline. Each state has its own attitude towards environmental issues. In Texas, the relevant authority is the Texas Commission on Environmental Quality (TCEQ). TCEQ provides guidance as to its application response times, which for a full PSD permit is 365 days.

AS ADJUSTERS,
WE NEED TO KNOW
WHICH ACTIVITIES
ARE ALLOWED WHILST
THE PERMITTING
PREPARATION AND
APPLICATION REVIEW
PROCESS IS UNDERWAY.

However, this projected timescale starts from the point of lodging an application for a permit, is non-binding on TCEQ and does not reflect the time necessary for the insured to compile and prepare the application. In Integra's experience, preparing the application cannot commence until the front-end engineering and design (FEED) is largely completed, because the selection and specification of emissions-creating equipment must be known before the necessary calculations can be performed. This in turn cannot be started until the scope of physical damage is determined and decisions made as to the repair or replacement of the original equipment. Consequently, the work necessary to assemble an application is likely to require a further 4-8 months, depending upon the reinstatement approach adopted by the insured.

STREAMLINING THE PROCESS

As adjusters, we need to know which activities are allowed whilst the permitting preparation and application review process is underway. By way of example, demolition and debris removal, asbestos abatement and general site clearance may be permitted and could occur concurrently.

Although construction activities cannot commence on site until the necessary permit is in place or some form of dispensation is granted by the state, there are numerous construction activities which can be performed off-site by way of prefabrication of vessels and procurement of equipment (pumps, heat exchangers, valves etc.). Pipe

spools and related instrumentation and cable runs can be prefabricated remotely and brought to site once permitting is in place. Of course, there is some design risk implicit in this approach. However, with incisive planning and detailed logistics, the duration of the permitting process does not have to result in a commensurate delay to the reinstatement project.

Specialist consultants should be able to advise on what measures can be taken to fast-track an application, and if desirable, work with the insured's advisers to ensure all opportunities to do so are exploited.

Given the plethora of manuscripted wordings in the energy sector, it is difficult to generalise regarding the potential coverage impacts of the need for an insured to secure a PSD permit. However, if a BACT upgrade is required as part of the reinstatement, then Public Authorities and Demolition and Increased Cost of Construction (DICC) clauses are potentially in play.

IMPACT ON BI

From a time element point of view, based on a standard gross earnings wording, the period of liability will run until, "...when with the application of due diligence and dispatch, the building and equipment could be repaired or replaced". So, depending upon any limitation in respect of the period of indemnity (24, 36 months etc.), the permitting process can add very significantly to the business interruption, up to 20 months on the example cited earlier.

We know that some insurers are looking to the wording of By-laws, or Civil and Military Authorities clauses in an attempt to moderate their exposure.

Although this article relates to our experiences in the USA, we anticipate that there will be similar requirements in other jurisdictions and lines of business. It is a small step to imagine authorities imposing constraints on the reinstatement of older coal-fired power plants and certain extraction industry facilities, where there is the prospect of significant physical damage following a loss. Prior to this loss we expect most downstream underwriters had not factored this permitting phenomenon into their PML calculations, but post settlement of the claim we expect those insurers subscribing to the risk, and perhaps those who were not but are reading this article, to be paying much closer attention to this topic when analysing future downstream energy risks in North America.