



## ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 49, 51, and 52

[EPA-HQ-OAR-2025-0618; FRL-12757-01-OAR]

RIN 2060-AW84

**Begin Actual Construction in the New Source Review (NSR) Preconstruction**

**Permitting Program**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** The U.S. Environmental Protection Agency (EPA) is proposing revisions to the New Source Review (NSR) air permitting regulations. These regulatory revisions would distinguish between construction of a stationary source and construction of non-emitting components or structures, while clarifying and codifying that the latter can occur before an owner or operator obtains an NSR air permit for a new major stationary source or major modification of an existing major stationary source. The revisions will update the definition of “begin actual construction” and add a definition of “pollutant-emitting activities” in the Federal NSR regulations for both Nonattainment New Source Review (NNSR) and Prevention of Significant Deterioration (PSD); revise the definition of “begin construction” and “commence construction” in the Federal minor NSR regulations applicable in Indian country; and address the applicability procedures for “begin actual construction” in the NNSR regulations.

**DATES:** Comments must be received on or before **[INSERT DATE 45 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

*Public hearing:* If anyone contacts us requesting a public hearing on or before May 18, 2026, the EPA will hold a virtual public hearing on **[INSERT DATE 15 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. *See*

**SUPPLEMENTARY INFORMATION** for information on requesting and registering for a public hearing.

**ADDRESSES:** You may send comments, identified by Docket ID No. EPA-HQ-OAR-2025-0618, by any of the following methods:

- Federal eRulemaking Portal: <https://www.regulations.gov> (our preferred method). Follow the online instructions for submitting comments. You can also find a plain language summary of the rule on the Federal eRulemaking Portal.
- E-mail: [a-and-r-docket@epa.gov](mailto:a-and-r-docket@epa.gov). Include Docket ID No. EPA-HQ-OAR-2025-0618 in the subject line of the message.
- Fax: (202) 566-9744.
- Mail: U.S. Environmental Protection Agency, EPA Docket Center, Docket ID No. EPA-HQ-OAR-2025-0618, Mail Code 28221T, 1200 Pennsylvania Avenue NW, Washington, DC 20460.
- Hand Delivery or Courier (by scheduled appointment only): EPA Docket Center, WJC West Building, Room 3334, 1301 Constitution Avenue, NW, Washington, DC 20004. The Docket Center's hours of operations are 8:30 a.m. to 4:30 p.m., Monday through Friday (except Federal holidays).

*Instructions:* All submissions received must include the Docket ID No. EPA-HQ-OAR-2025-0618 for this rulemaking. Comments received may be posted without change to <https://www.regulations.gov>, including any personal information provided. For detailed instructions on sending comments and additional information on the rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of this document. For information on EPA Docket Center services, please visit us online at <https://www.epa.gov/dockets>.

**FOR FURTHER INFORMATION CONTACT:** For information about this proposed rule, contact Andrew Kormos, Permitting & Program Support Division, Office of State Air Partnerships, Environmental Protection Agency, Post Office Box 12055, Research Triangle Park, NC 27711; telephone number: (919) 541-4566; email address: *kormos.andrew@epa.gov*.

**SUPPLEMENTARY INFORMATION:**

*Participation in virtual public hearing.* To request a virtual public hearing, contact the public hearing team at 919-541-9782 or by email at *OSAPpublichearing@epa.gov*. If requested, the hearing will be held via virtual platform on **[INSERT DATE 15 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. The hearing will convene at 10 a.m. Eastern Time (ET) and will conclude at 4 p.m. ET; additional hearing hours may be added at the discretion of the EPA. The EPA may close a session 15 minutes after the last pre-registered speaker has testified if there are no additional speakers. The EPA will announce further details at *<https://www.epa.gov/nsr/nsr-regulatory-actions>*.

If a public hearing is requested, the EPA will begin pre-registering speakers for the hearing no later than one business day after a request has been received. To register to speak at the virtual hearing, please use the online registration form available at *<https://www.epa.gov/nsr/nsr-regulatory-actions>* or contact the public hearing team at 919-541-9782 or by email at *OSAPpublichearing@epa.gov*. The last day to pre-register to speak at the hearing will be May 25, 2026. Prior to the hearing, the EPA will post a general agenda that will list pre-registered speakers in approximate order at: *<https://www.epa.gov/nsr/nsr-regulatory-actions>*.

The EPA will make every effort to follow the schedule as closely as possible on the day of the hearing; however, please plan for the hearings to run either ahead of schedule or behind schedule.

Each commenter will have approximately four minutes to provide oral testimony. The EPA recommends submitting the text of your oral testimony as written comments to the rulemaking docket.

During the hearing, the EPA may ask clarifying questions but will not respond to comments made during oral testimonies. Written statements and supporting information submitted during the comment period will be considered with the same weight as oral testimony and supporting information presented at the public hearing.

Please note that any updates made to any aspect of the hearing will be posted online at <https://www.epa.gov/nsr/nsr-regulatory-actions>. While the EPA expects the hearing to be conducted as set forth earlier, please monitor our website to determine if there are any updates. The EPA reserves the right to delay the date of the public hearing for any reason including scheduling conflicts. If this occurs, the comment period will be extended by the delayed number of days. The EPA does not intend to publish a document in the *Federal Register* announcing updates. All updates and announcements will be communicated on the webpage listed above.

If you require the services of a translator or special accommodations, please pre-register for the hearing with the public hearing team and describe your needs by May 20, 2026. The EPA may not be able to arrange accommodations without advanced notice.

*Docket.* The EPA has established a docket for this action under Docket ID No. EPA-HQ-OAR-2025-0618. All documents in the docket are listed in <https://www.regulations.gov>. Although listed, some information is not publicly available, e.g., Confidential Business Information (CBI) or other information the disclosure of which is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only as PDF versions that can only be accessed on the EPA computers in the docket office reading room. Certain databases and physical items cannot be downloaded from the docket but may be requested by

contacting the docket office at 202-566-1744. With the exception of such material, publicly available docket materials are available electronically at <https://www.regulations.gov>.

*Instructions:* Direct your comments to Docket ID No. EPA-HQ-OAR-2025-0618. The EPA's policy is that all comments received will be included in the public docket without change and may be made available online at <https://www.regulations.gov>, including any personal information provided, unless the comment includes information claimed to be CBI or other information the disclosure of which is restricted by statute. Do not submit electronically to <https://www.regulations.gov> any information that you consider to be CBI or other information the disclosure of which is restricted by statute. This type of information should be submitted as discussed below.

The EPA may publish any comment received to its public docket. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.*, on the Web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <https://www.epa.gov/dockets/commenting-epa-dockets>.

The <https://www.regulations.gov> website allows you to submit your comment anonymously, which means the EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to the EPA without going through <https://www.regulations.gov>, your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, the EPA recommends that you include your name and other contact

information in the body of your comment and with any digital storage media you submit. If the EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, the Agency may not be able to consider your comment. Electronic files should not include special characters or any form of encryption and should be free of any defects or viruses. For additional information about the EPA's public docket, visit the EPA Docket Center homepage at <https://www.epa.gov/dockets>.

*Submitting CBI.* Do not submit information containing CBI to the EPA through <https://www.regulations.gov>. Clearly mark the part or all of the information that you claim to be CBI. For CBI information on any digital storage media that you mail to the EPA, note the docket ID, mark the outside of the digital storage media as CBI, and identify electronically within the digital storage media the specific information that is claimed as CBI. In addition to one complete version of the comments that includes information claimed as CBI, you must submit a copy of the comments that does not contain the information claimed as CBI directly to the public docket through the procedures outlined in *Instructions* section above. If you submit any digital storage media that does not contain CBI, mark the outside of the digital storage media clearly that it does not contain CBI and note the docket ID. Information not marked as CBI will be included in the public docket and the EPA's electronic public docket without prior notice. Information marked as CBI will not be disclosed except in accordance with procedures set forth in 40 Code of Federal Regulations (CFR) part 2.

Our preferred method to receive CBI is electronic transmission using email attachments, File Transfer Protocol (FTP), or other online file sharing services (*e.g.*, Dropbox, OneDrive, Google Drive). Electronic submissions must be transmitted directly to the Office of State Air Partnerships (OSAP) CBI Office at the email address [oaqps\\_cbi@epa.gov](mailto:oaqps_cbi@epa.gov) and, as described above, should include clear CBI markings and note the docket ID. If assistance is needed with submitting large electronic files that

exceed the file size limit for email attachments, and if you do not have your own file sharing service, please email [oaqps\\_cbi@epa.gov](mailto:oaqps_cbi@epa.gov) to request a file transfer link. If sending CBI information through the postal service, please send it to the following address: U.S. EPA, Attn: OSAP Document Control Officer, Mail Drop: C404-02, 109 T.W. Alexander Drive, P.O. Box 12055, Research Triangle Park, North Carolina 27711, Attention Docket ID No. EPA-HQ-OAR-2025-0618. The mailed CBI material should be double wrapped and clearly marked. Any CBI markings should not show through the outer envelope.

*Preamble acronyms and abbreviations.* Throughout this preamble the use of “we,” “us,” or “our” is intended to refer to the EPA. We use multiple acronyms and terms in this preamble. While this list may not be exhaustive, to ease the reading of this preamble and for reference purposes, the EPA defines the following terms and acronyms here:

APA	Administrative Procedure Act
BACT	Best Available Control Technology
CAA	Clean Air Act
CBI	Confidential Business Information
CFR	Code of Federal Regulations
EPA	Environmental Protection Agency
FIP	Federal Implementation Plan
FR	Federal Register
LAER	Lowest Achievable Emissions Rate
NAAQS	National Ambient Air Quality Standard or Standards
NSR	New Source Review
NNSR	Nonattainment New Source Review
OAQPS	Office of Air Quality Planning and Standards, EPA
OSAP	Office of State Air Partnerships, EPA
OMB	Office of Management and Budget
PBI	Proprietary Business Information
PRA	Paperwork Reduction Act
PSD	Prevention of Significant Deterioration
RFA	Regulatory Flexibility Act
SIP	State Implementation Plan
TIP	Tribal Implementation Plan
UMRA	Unfunded Mandates Reform Act
U.S.C.	United States Code

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## **I. Executive Summary**

As currently written, the EPA’s regulatory definitions of the terms “begin actual construction” and “begin construction” in the NSR regulations prohibit certain on-site construction activities on an emissions unit which are of a permanent nature. These activities include the installation of building supports and foundations, laying underground pipework, and the construction of permanent storage structures. The EPA has also construed the term “emissions unit” in these NSR regulations to include any installations necessary to accommodate that unit.<sup>1</sup> This regulatory language and its interpretations have resulted in uncertainties, delays, and regulatory burdens that are not intended and do not represent the best reading or further the purposes of the Clean Air Act (CAA).

The EPA is proposing revisions to the Agency’s NSR air permitting regulations to remove some of these restrictions to allow construction of components that do not emit air pollutants, such as utility service infrastructure for a site, concrete pads, and some types of buildings and building components, before obtaining an NSR air permit. These changes aim to foster economic growth by providing greater flexibility for owners and operators building or modifying stationary sources of air pollution to engage in certain construction activities prior to obtaining an NSR permit, while still ensuring the same degree of public health and welfare protection provided through the NSR permitting requirements. The proposed revisions are intended to clarify terms that apply to State and local air agency permitting programs included in State Implementation Plans (SIPs) and to Federal permitting programs administered by the EPA or a delegated permitting authority.

The proposed revisions are primarily contained in regulations applicable to major stationary sources subject to the PSD program or the NNSR program. As such, the EPA

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<sup>1</sup> Definition of “Emissions unit” —40 CFR 51.165(a)(1)(vii), 51.166(b)(7), and 52.21(b)(7).

is proposing to revise the definition of “begin actual construction” and add a new definition for “pollutant-emitting activities” in 40 CFR 51.165, 51.166, 52.21, and 40 CFR part 51 appendix S. To be consistent across the NSR program, the EPA is also proposing to add the prohibition on beginning actual construction without a permit and relevant definitions to the NNSR applicability procedures of 40 CFR 51.165 and 40 CFR part 51 appendix S. Finally, the EPA is proposing to revise the definition of “begin construction” and “commence construction” in the Tribal NSR regulations at 40 CFR 49.152 and rename the term “begin construction” to “begin actual construction,” which are terms that apply to minor sources and minor modifications at existing major sources of air pollution located in Indian country. The proposed definitions of “begin actual construction,” “pollutant-emitting activities,” and “commence construction” and the rationale for these proposed revisions to the NSR regulations can be found in section IV of this preamble.

## **II. Background**

### *A. The New Source Review Program*

In the CAA Amendments of 1977, Congress established the NSR preconstruction air permitting program to require stationary sources of air pollution with air emissions above certain thresholds to obtain permits prior to beginning construction. This component of the CAA is designed to, among other purposes, ensure that development will occur in a manner consistent with the preservation of air quality.<sup>2</sup>

The NSR permitting program applies to construction of new stationary sources and major modifications of existing major stationary sources, regardless of the designation of the area for the National Ambient Air Quality Standards (NAAQS) where the source is located (*i.e.*, attainment, unclassifiable, or nonattainment area). New

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<sup>2</sup> 42 U.S.C. 7470(3); *see, e.g., New York v. EPA*, 413 F.3d 3, 13, 23-24 (D.C. Cir. 2005) (*per curiam*) (discussing multiple purposes of the program).

stationary source construction and major modifications at existing major stationary sources that emit “regulated NSR pollutants” over certain thresholds are subject to major NSR requirements, while new stationary source construction of lower-emitting sources and modifications that increase emissions at existing sources in lower amounts may be subject to minor NSR requirements or be excluded from NSR permitting altogether.<sup>3</sup>

Major NSR permits for sources located in attainment or unclassifiable areas are referred to as PSD permits. As part of the CAA statutory framework for PSD applicability, “no major emitting facility... may be constructed in an area to which this part applies unless ... a permit has been issued for such proposed facility” that meets specified requirements.<sup>4</sup> Major NSR permits for sources located in nonattainment areas that emit pollutants above the specified thresholds are referred to as NNSR permits. Similar to PSD permits, NNSR permits are required for the construction and operation of major stationary sources in a nonattainment area. More specifically, the NNSR provisions in the CAA state that “[SIP] provisions shall require permits for the construction and operation of new or modified major stationary sources anywhere in the nonattainment area” in accordance with specific requirements.<sup>5</sup>

The air pollutant(s) emitted, the amount of those emissions, and the air quality designation of the area where the source is located or proposed to be built determines the specific permitting requirements. For example, the CAA requires major stationary sources subject to PSD to meet emission limits based on Best Available Control Technology (BACT) requirements specified by CAA section 165(a)(4), while major stationary sources subject to NNSR are required to meet Lowest Achievable Emissions Rate (LAER) requirements pursuant to CAA section 173(a)(2).

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<sup>3</sup> Definition of “Regulated NSR pollutant”—40 CFR 51.165(a)(1)(xxxvii), 51.166(b)(49), and 52.21(b)(50).

<sup>4</sup> 42 United States Code (U.S.C.) 7475(a)(1); CAA section 165(a)(1).

<sup>5</sup> 42 U.S.C. 7502(c)(5); CAA section 172(c)(5).

A new stationary source is subject to major NSR requirements if its potential to emit a regulated NSR pollutant exceeds statutory emission thresholds.<sup>6</sup> If such emissions exceed the applicable threshold, the NSR regulations define the source as a “major stationary source.”<sup>7</sup> An existing major stationary source triggers major NSR permitting requirements when it undergoes a “major modification,” which occurs when a source undertakes a physical change or change in method of operation (*i.e.*, a “project”) that would result in 1) a significant emissions increase from the project, and 2) a significant net emissions increase from the source (*i.e.*, the increase in emissions from the project and a source-wide “netting” analysis that considers creditable emission increases and decreases occurring at the source as a result of other projects over a 5-year contemporaneous period).<sup>8</sup> For this two-step process, the NSR regulations define what emissions rate constitutes “significant,” *i.e.*, more than de minimis, for each NSR pollutant.<sup>9</sup>

In many cases, these requirements of the major NSR program (or equivalent requirements) are adopted through rulemaking by a State, local, Tribal, or other authorized reviewing authority, and the reviewing authority submits a SIP revision including these program requirements to the EPA for approval (the EPA is proposing in this action to revise the regulations at 40 CFR 51.165 and 51.166 that provide the minimum requirements of these programs). Upon the EPA approving the State or local permit program in the SIP, the reviewing authority becomes the NSR “permitting authority” for sources within its jurisdictional boundaries and the approved rules become

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<sup>6</sup> For PSD, the statute uses the term “major emitting facility” which is defined as a stationary source that emits, or has a potential to emit, at least 100 tons per year (tpy) of “any air pollutant” if the source is in one of the listed source categories or at least 250 tpy if the source is not. 42 U.S.C. 7479(1); CAA section 169(1). For NNSR, the applicability threshold for a major stationary source is 100 tpy, although lower thresholds may apply depending on the degree of nonattainment and the pollutant. 40 CFR 51.165(a)(1)(iv)(A).

<sup>7</sup> Definition of “major stationary source”—40 CFR 51.165(a)(1)(iv), 51.166(b)(1)(i), and 52.21(b)(1)(i).

<sup>8</sup> Definition of “major modification,” “project,” and “net emissions increase” – 40 CFR 52.21(b)(2)(i), (b)(52), and (b)(3).

<sup>9</sup> Definition of “significant”—40 CFR 51.165(a)(1)(x), 51.166(b)(23), and 52.21(b)(23).

federally enforceable. When a State, local, Tribal, or other agency lacks an EPA-approved program, either the EPA issues the major NSR permits based on its regulations at 40 CFR 52.21, or a State, local, or Tribal reviewing authority issues the major NSR permits on behalf of the Agency by way of a delegation of Federal authority to implement this provision.

New sources and modifications that do not require a major NSR permit may instead require a minor NSR permit prior to construction. Minor NSR requirements are approved into a SIP, Tribal Implementation Plan (TIP), or Federal Implementation Plan (FIP) to achieve and maintain the NAAQS.<sup>10</sup> The CAA and the EPA's regulations are less prescriptive regarding the minimum minor NSR program requirements. Therefore, reviewing authorities generally have flexibility in designing their minor NSR programs. Minor NSR permits are almost exclusively issued by State, local, and other authorized reviewing authorities, although the EPA issues minor NSR permits for most areas of Indian country where Tribes have not developed TIPs or requested delegation to administer minor NSR air permitting programs for their jurisdictions.<sup>11</sup>

### *B. The EPA's Initial NSR Implementing Regulations*

In June 1978, the EPA promulgated implementing regulations for the PSD program enacted by the 1977 CAA Amendments (the “1978 PSD Regulations”).<sup>12</sup> The 1978 PSD Regulations contained a “source applicability” provision that specified that “[n]o major stationary source or major modification shall be *constructed* unless the requirements of paragraphs (j) through (r) of this section, as applicable, have been met... .”<sup>13</sup> The 1978 PSD Regulations did not include a definition of the term “constructed,” but

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<sup>10</sup> 42 U.S.C. 7410(a)(2)(C); CAA section 110(a)(2)(C).

<sup>11</sup> Tribes that developed TIPs or requested delegation to administer the minor NSR program within their jurisdictions include the St. Regis Mohawk Tribe in New York, the Mohegan Tribe of Indians in Connecticut, the Mashantucket Pequot Tribe in Connecticut, the Gila River Indian Community in Arizona, and the Southern Ute Indian Tribe in Colorado.

<sup>12</sup> 43 FR 26380, 26388 (June 19, 1978). The first set of regulations implementing the NNSR program enacted by the 1977 CAA Amendments were promulgated in January 1979. *See* 44 FR 3274 (January 16, 1979).

<sup>13</sup> 40 CFR 52.21(i)(1) (1978) (emphasis added); 43 FR 26406.

the term “construction” was defined to mean “fabrication, erection, installation, or modification of a source.”<sup>14</sup> The term “source” was then defined to mean “any structure, building, facility, equipment, installation, or operation (or combination thereof) which is located on one or more contiguous or adjacent properties and which is owned or operated by the same person (or by persons under common control).”<sup>15</sup> The EPA did not promulgate similar implementing regulations for the NNSR program at that time. Furthermore, the 1978 PSD Regulations defined the term “commence” as applied to construction of a major stationary source or major modification to mean that the “owner or operator has all necessary preconstruction approvals or permits and either” has:

- (i) Begun, or caused to begin, a continuous program of actual on-site construction of the source, to be completed within a reasonable time; or
- (ii) Entered into binding agreements or contractual obligations, which cannot be cancelled or modified without substantial loss to the owner or operator, to undertake a program of actual construction of the source to be completed within a reasonable time.<sup>16</sup>

This definition remains as the definition of “commence” in the major NSR regulations currently.

In neither the regulatory text nor in the accompanying preamble to the 1978 PSD Regulations did the EPA provide an explanation of the phrase “shall be constructed.” Moreover, the EPA did not identify what sort of physical on-site construction activities an owner or operator could permissibly undertake prior to receiving a PSD air permit. In an attempt to clarify these concepts, the EPA issued two guidance documents in 1978.

### *C. The EPA’s Initial Policy Guidance on Allowed and Prohibited Construction Activities*

In October 1978, the EPA issued a memorandum titled: “Source Construction Prior to Issuance of PSD Permit” (the “October 1978 Memo”).<sup>17</sup> In the October 1978

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<sup>14</sup> 40 CFR 52.21(b)(7) (1978); 43 FR 26404.

<sup>15</sup> 40 CFR 52.21(b)(4) (1978); 43 FR 26404.

<sup>16</sup> 40 CFR 52.21(b)(8) (1978); 43 FR 26404.

<sup>17</sup> U.S. Environmental Protection Agency. (1978). Memorandum by Edward Reich, Director, Division of Stationary Source Enforcement. Source Construction Prior to Issuance of PSD Permit, available at: <https://www.epa.gov/sites/default/files/2015-07/documents/source.pdf>.

Memo, the EPA clarified to what “extent a company can legally construct, prior to PSD permit issuance, a building which will house both PSD-affected and non-PSD affected facilities.” The October 1978 Memo stated that “[i]n general, a structure which is to house independent facilities, some of which are subject to PSD and some which are not, may be constructed before a PSD permit is issued only if the building is a necessary part of the PSD-exempt project and if it is in no way modified to specifically accommodate the PSD-affected facilities.” The October 1978 Memo provided two examples. In the first example, the October 1978 Memo stated that a facility involving the construction of steam boilers and diesel engines which are to be housed in the same building “... may begin construction on the building which will hold the boilers and diesel [engines], before the PSD permit is issued, as long as the drains, piping, footings for the diesel [engines], and any other installations necessary to accommodate the diesel [engines] are not installed until the permit is issued” because the steam boilers were exempt from PSD requirements while the diesel engines were not. In the second example, a case involving municipal waste treatment plants, the October 1978 Memo stated the following: “...the question on whether construction of all parts of the treatment facility must await permit issuance depends on the reliance of the treatment facility on the incinerator [which is subject to PSD review]. That is, if the sludge incinerator is an integral part of the wastewater treatment facility (the facility would not be built without an incinerator), the PSD permit must be obtained before any work can begin on any portion of the treatment plant.”

To support this conclusion, the EPA expressed concern that it would be “extremely difficult to deny issuance of a permit when it results in a completed portion of a project having to remain idle.”<sup>18</sup> The EPA reasoned that “in order to avoid any equity

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<sup>18</sup> *Id.* at 2.

arguments at a later time, it is better to prevent any construction now rather than have a ‘white elephant’ on our hands later on.”<sup>19</sup>

On December 18, 1978, the EPA issued a second memorandum on this topic titled: “Interpretation of ‘Constructed’ as it Applies to Activities Undertaken Prior to Issuance of a PSD Permit” (the “December 1978 Memo”).<sup>20</sup> This memo sought to clarify “where on the continuum from planning to operation of a major emitting facility does a company or other entity violate PSD regulations if it has not yet received a PSD permit.” The December 1978 Memo abandoned what it described as the EPA’s prior approach of “mak[ing] the determination on a case-by-case basis, after considering all of the facts of the individual situation,” and established national policy for defining allowable and prohibited activities before a source is considered “constructed” in the context of PSD permitting. The allowable activities were planning, ordering of equipment and materials, site-clearing, grading, and on-site storage of equipment and materials. The December 1978 Memo also clarified that “[a]ny activities undertaken prior to issuance of a PSD permit would, of course, be solely at the owner’s or operator’s risk.” Furthermore, the December 1978 Memo stated that “[a]ll on-site activities of a permanent nature aimed at completing a PSD source for which a permit has yet to be obtained are prohibited under all circumstances.” The EPA further explained that “[t]hese prohibited activities include installation of building supports and foundations, paving, laying of underground pipework, construction of permanent storage structures, and activities of a similar nature.”

While the December 1978 Memo established the EPA’s initial policy on this matter and provided specific examples on activities prohibited before permit issuance, it

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<sup>19</sup> *Id.*

<sup>20</sup> U.S. Environmental Protection Agency. (1978). Memorandum from Edward Reich, Director, Division of Stationary Source Enforcement. Interpretation of “Constructed” as it Applies to Activities Undertaken Prior to Issuance of a PSD Permit, available at: <https://www.epa.gov/sites/default/files/2015-07/documents/cnstrctd.pdf>.

also noted that the term “constructed,” as used in the CAA, is open to further interpretation by the Agency.

#### *D. The 1980 PSD Regulations and Current Definition of “Begin Actual Construction”*

In August 1980, the EPA codified the Agency’s 1978 policies in the NSR regulations, promulgating the definition of “begin actual construction” using some of the text reflected in prior policy guidance memorandums (the “1980 PSD Regulations”).<sup>21</sup> This regulatory definition has not been amended since and thus still exists as the current definition for “begin actual construction” in both the PSD and NNSR regulations. The definition delineates the point at which physical construction activities can begin at a facility. The definition is important for both regulatory compliance and operational planning, as it determines the point in time when a facility begins construction of a stationary source and may no longer proceed with construction-related activities until it obtains its NSR permit. The existing definition for “begin actual construction” can be found at 40 CFR 52.21(b)(11) and other parts of the EPA’s NSR regulations.<sup>22</sup>

Furthermore, the 1980 PSD Regulations also amended the “source applicability” provision, introduced a definition for “emissions unit,” and amended the definition of “construction.” The revised “source applicability” provision, titled “*Review of Major Stationary Sources and Major Modifications – Source Applicability and Exemptions*,” prohibited beginning actual construction without a permit.<sup>23</sup> The term emissions unit was defined as “any part of a stationary source which emits or would have the potential to emit any pollutant subject to regulation under the Act.”<sup>24</sup> The term “emissions unit” has since been expanded and is now used in various places throughout the 1980 PSD Regulations, including in the definition of “begin actual construction.” Lastly, in the 1980

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<sup>21</sup> 45 FR 52676, 52736 (August 7, 1980).

<sup>22</sup> Definition of “begin actual construction”—40 CFR 51.165(a)(1)(xv), 51.166(b)(11), appendix S to part 51, and section II.A.17.

<sup>23</sup> 40 CFR 52.21(i)(1) (1980); 45 FR 52738 (August 7, 1980).

<sup>24</sup> 40 CFR 52.21(b)(7) (1980); 45 FR 52736 (August 7, 1980).

PSD Regulations, the revised definition of “construction” is “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 a change in actual emissions.”<sup>25</sup> While revising the definition of “construction” in 1980, the EPA also substituted the newly introduced term “emissions unit” for “source,” which had been used in the 1978 PSD Regulations definition of “construction.”<sup>26</sup>

*E. Subsequent EPA Policy Guidance on “Begin Actual Construction”*

In April 1981, the EPA issued a “begin actual construction” site-specific determination through a letter regarding the “City of Detroit/General Motors Corporation; Central Industrial Park Project,” in which the Agency determined that “the cited demolition activities do not fall within the Federal definitions of ‘begin actual construction’ and are thus not prohibited by the Federal PSD or nonattainment regulations in question” (the “April 1981 Letter”).<sup>27</sup> More specifically, the EPA determined that the “PSD regulations do not prohibit the site clearing activities . . . without a permit, since the actions do not fall within the Federal definition of ‘begin actual construction.’” The letter further explained that the latter definition is consistent with the December 1978 Memo and was not affected by the 1980 PSD Regulations addition of the term “demolition” to the definition of “construction.”

In March 1986, the EPA signed an additional memorandum related to “begin actual construction” titled “Construction Activities Prior to Issuance of a PSD Permit

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<sup>25</sup> 40 CFR 52.21(b)(8) (1980); 45 FR 52736 (August 7, 1980).

<sup>26</sup> The EPA in 1980 also replaced the defined term “source” (as had been used in the 1978 PSD Regulations) with the term “stationary source.” In so doing, the EPA removed the elements “equipment,” “operation,” and “combination thereof” that had appeared in the old definition of “source,” elements which the D.C. Circuit determined to be unlawful in *Alabama Power Co. v. Costle*, 636 F.2d 323, 395-96 (D.C. Cir. 1979). See 40 CFR 52.21(b)(5) (1980); 45 FR 52736 (defining “stationary source” to mean “any building, structure, facility, or installation which emits or may emit any pollutant subject to regulation under the Act.”).

<sup>27</sup> U.S. Environmental Protection Agency. (1981). Letter from Valdas Adamkus, EPA Region 5 Acting Administrator, to Joseph Polito, Esq., “City of Detroit/General Motors Corporation; Central Industrial Park Project,” available at: <https://www.epa.gov/sites/default/files/2015-07/documents/indspark.pdf>.

with respect to ‘Begin Actual Construction’” (the “March 1986 Memo”).<sup>28</sup> The March 1986 Memo reiterated the December 1978 Memo policy and discussed the relevant 1980 PSD Regulations. The March 1986 Memo stated that, as used in the definition of “begin actual construction,” the term “emission unit” should be construed to “include any installations necessary to accommodate that unit.” Furthermore, the March 1986 Memo stated the following:

[B]efore issuance of the PSD permit, construction is prohibited on any emission unit or any installation designed to accommodate the emission unit. If the emissions unit (including any accommodating installation) is an integral part of the source or modification (i.e., the source or modification would not serve in accordance with its original intent, except for the inclusion on the emission unit), the PSD permit must be obtained before construction on the entire source commences.

Subsequent EPA guidance documents and letters reiterated and elaborated on the prior interpretations of the term “begin actual construction” and provided guidance to the EPA Regions and State air agencies. For example, a 1993 memorandum identified construction of a retaining wall and excavation for a specific scenario as a prohibited activity before obtaining an NSR permit (the “May 1993 Memo”).<sup>29</sup> More specifically, the May 1993 Memo stated that “[i]f the construction activity is an integral part of the PSD source or modification, the source must obtain a PSD permit prior to undertaking that construction.” The May 1993 Memo reasoned that “[c]onstruction of a retaining wall is considered an activity under ‘begin actual construction’ because it is of a permanent nature.” Although the EPA had previously recognized site clearing and grading to be allowed prior to obtaining a permit, in this case the Agency considered “excavation activities” to be prohibited because they “are costly, they significantly alter the site, are

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<sup>28</sup> U.S. Environmental Protection Agency. (1986). Memorandum from Edward Reich, Director, Stationary Source Compliance Division, Office of Air Quality Planning and Standards (OAQPS). Construction Activities Prior to Issuance of a PSD Permit with Respect to “Begin Actual Construction,” available at: <https://www.epa.gov/sites/default/files/2015-07/documents/begin.pdf>.

<sup>29</sup> U.S. Environmental Protection Agency. (1993). Memorandum from John Rasnic, Director, Stationary Source Compliance, OAQPS. Construction Activities at Georgia Pacific, available at: <https://www.epa.gov/sites/default/files/2015-07/documents/cnstrctn.pdf>.

an integral part of the overall construction project, and are clearly of a permanent nature.” In the May 1993 Memo, the EPA reiterated the Agency’s concern that a “permitting authority would be placed in a very difficult position when denying issuance of a permit when it results in a completed portion of a project having to remain idle.”

Additionally, a 1995 letter provided a response to the Minnesota Pollution Control Agency stating that the “EPA agree[d] with Minnesota that site clearing and grading are not prohibited by [the regulatory definition of ‘*begin actual construction*’]” but that this definition “prohibited (permanent and/or preparatory) preconstruction activities... [and] would include any construction that is costly, significantly alters the site, and/or [is] permanent in nature” (the “December 1995 Letter”).<sup>30</sup> The December 1995 Letter also stated that exemptions to “allow construction of footings for emissions units without a PSD permit in cold weather states ... is not authorized under the Act or the Federal PSD rules.” In support of this conclusion, the EPA reasoned that “absent a prohibition on any costly, significant or permanent preconstruction,” sources could “defeat” the “preconstruction requirement or its enforcement by making a costly, substantial, and/or permanent investment” and then “later argue that retrofitting of PSD requirements or a denial of the permit would unreasonably interfere with their investment.”

#### *F. The EPA’s Request for Comment in 1996*

In 1996, the EPA proposed numerous changes to the Agency’s NSR rules (the “1996 Proposed Rule”).<sup>31</sup> These did not include any amendments to the definition of “begin actual construction.” But at that time, the EPA took note of the fact that “[s]everal industry members” of the CAA Advisory Committee’s Subcommittee on NSR Reform had “recommended that the EPA change the NSR regulations to enable sources to engage

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<sup>30</sup> U.S. Environmental Protection Agency. (1995). Letter from John Seitz, Director, EPA OAQPS, to Mr. Charles Williams, Commissioner, Minnesota Pollution Control Agency, available at <https://www.epa.gov/sites/default/files/2015-07/documents/19951213.pdf>.

<sup>31</sup> 61 FR 38250 (July 23, 1996).

in a broader range of activities prior to receipt of an NSR permit in cases involving modifications to existing sources.”<sup>32</sup> These members, the EPA stated, had “asserted that it was unnecessary and inappropriate to prohibit preliminary activities to achieve the statutory purpose of requiring a permit before construction begins,” and that “such prohibitions caused delay and added expense for no good purpose.”<sup>33</sup> Recognizing that there was a “wide difference of opinion on these issues,” the EPA solicited comment on the matter.<sup>34</sup>

To “assist in formulating comments,” the EPA set forth a summary of the Agency’s interpretation of the CAA and policy. The EPA stated that the CAA “plainly bars construction without a permit.” A policy rationale for this understanding, the EPA argued, is that if “companies were given unlimited ability to place ‘equity in the ground’ by constructing plants before a permit is issued, permitting authorities’ discretion in making permit decisions may be compromised, and the ability of EPA and citizens to challenge the permit that is eventually issued may likewise be undermined.”<sup>35</sup>

The EPA proposed no revision of the definition of “begin actual construction” in the Agency’s regulations on the grounds that the “regulations and EPA’s longstanding policy clearly identify the scope of prohibited preconstruction activities.” The EPA said those “current regulations and policies” would “remain in effect regardless of today’s request for comment.”<sup>36</sup> The EPA demonstrated the Agency’s willingness to consider revisions to the definition of “begin actual construction” in rulemaking by soliciting public comments on all aspects of this issue, but ultimately did not alter its reading of the CAA or pursue amendment of the regulations on this topic.

### *G. Tribal NSR Rule*

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<sup>32</sup> *Id.* at 38270.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> 61 FR 38270-71 (July 23, 1996).

<sup>36</sup> *Id.* at 38271

In July 2011, the EPA promulgated a final rule titled “Review of New Sources and Modifications in Indian Country” (the “Tribal NSR Rule”).<sup>37</sup> In the Tribal NSR Rule, the EPA created two air permitting regulatory programs for Indian Country: the Tribal Minor NSR and the Tribal Nonattainment NSR programs. The Tribal Minor NSR program applies to new and modified minor stationary sources and to minor modifications at existing major stationary sources throughout Indian country where there is no EPA-approved TIP in place. The Tribal Nonattainment NSR program applies to new and modified major sources in areas of Indian country that are designated as nonattainment areas.

In May 2014, the EPA finalized amendments to the Tribal NSR Rule that defined the term “begin construction” and revised the definition of the term “commence construction” for purposes of the Tribal minor NSR program.<sup>38</sup> The term “begin construction” was defined to include a list of preparatory activities that are not considered to be construction activities: “engineering and design planning, geotechnical investigation (surface and subsurface explorations), clearing, grading, surveying, ordering of equipment and materials, storing of equipment or setting up temporary trailers to house construction management or staff and contractor personnel.” The term “commence construction” was revised to be similar to the definition of “commence” in the Federal regulations for the PSD program.<sup>39</sup>

#### *H. Draft EPA Guidance Memorandum in 2020*

In March 2020, in a draft guidance memorandum (the “March 2020 Memo”), the EPA described a revised interpretation of the definition of “begin actual construction” in

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<sup>37</sup> 76 FR 38748 (July 11, 2011).

<sup>38</sup> 79 FR 31035 (May 30, 2014).

<sup>39</sup> 40 CFR 52.21(b)(9).

the Agency's regulations and solicited public comment on that interpretation.<sup>40</sup> In the March 2020 Memo, the EPA stated the following:

[T]he Agency's current interpretation... is considered by many industry stakeholders to be overly and unnecessarily restrictive. Some have asserted that, due to this interpretation, projects have been delayed and efforts to engage in construction pursuant to staged schedules (*e.g.*, which seek to take account of seasonal conditions in cold-weather areas) have been frustrated.<sup>41</sup>

Under the revised interpretation of the EPA's regulations articulated by the Agency in the March 2020 Memo, "a source owner or operator may, prior to obtaining an NSR permit, undertake physical on-site activities – including activities that may be costly, that may significantly alter the site, and/or are permanent in nature – *provided* that those actions do not constitute physical construction *on an emissions unit*, as the term is defined in 40 CFR 52.21(b)(7)." Under this revised interpretation, in contrast to the March 1986 Memo, "an 'installation necessary to accommodate' the emissions unit at issue is *not* considered part of that emissions unit, and those construction activities that may involve such 'accommodating installations' may be undertaken in advance of the source owner or operator obtaining a major NSR permit."<sup>42</sup> The EPA emphasized in the March 2020 Memo that, under the Agency's regulations, there was a need to draw a distinction between an emissions unit and a major stationary source. During public comment on the March 2020 Memo, many commenters asked the EPA to provide guidance on how to distinguish between an emissions unit and stationary source. The EPA considered the public comments but ultimately did not issue, and does not presently intend to issue, a final version of the March 2020 Memo. For reasons described in this preamble, the EPA has instead chosen to propose revisions to the Agency's NSR

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<sup>40</sup> U.S. Environmental Protection Agency. (2020). Draft Memorandum from Anne Idsal, Principal Deputy Assistant Administrator for the Office of Air and Radiation. Interpretation of "Begin Actual Construction" Under the New Source Review Preconstruction Permitting Regulations, available at: [https://19january2021snapshot.epa.gov/sites/static/files/2020-03/documents/begin\\_actual\\_construction\\_032520\\_1.pdf](https://19january2021snapshot.epa.gov/sites/static/files/2020-03/documents/begin_actual_construction_032520_1.pdf).

<sup>41</sup> *Id.* at 2.

<sup>42</sup> *Id.* at 2-3.

regulations as they pertain to beginning actual construction of a new major stationary source or major modification of an existing major stationary source.

*I. The EPA's September 2025 Letter to Maricopa County Air Quality Department*

On September 2, 2025, the EPA sent a letter to the Maricopa County Air Quality Department (MCAQD) to address an MCAQD request for clarification on the interpretation of “begin actual construction” as it pertains to a project by TSMC Arizona Corporation (TSMC) (the “September 2025 Letter”).<sup>43</sup> In the September 2025 Letter, the EPA summarized the factual scenario presented as follows:

[T]his company proposes to construct the core and shell of a building that will eventually house emission units without contemporaneously beginning construction on any semiconductor manufacturing equipment that could be classified as an emissions unit. TSMC also states that this phase of construction will not include air pollution capture or control equipment or foundations for any emission units.

In a letter to MCAQD, TSMC stated that “[t]he core and shell itself is neither an emissions unit nor is it a capture device, as all of the emissions ultimately produced by the fab are captured through control devices and duct systems meticulously designed to maintain a cleanroom environment. As tool hookup completes, semiconductor manufacturing equipment can only then begin installation.”<sup>44</sup>

In its letter to the EPA, MCAQD stated that it “is inclined to agree with TSMC that if a structure contains no emissions unit(s) it is not a ‘source’ subject to CAA permitting authorities because it does not emit or have the potential to emit pollutants.” MCAQD stated its understanding that the building “shells” that TSMC sought to construct prior obtaining an NSR permit “are not specifically configured for emissions

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<sup>43</sup> U.S. Environmental Protection Agency. (2025). Letter from Aaron Szabo, EPA Assistant Administrator for the Office of Air and Radiation, to Philip McNeely, Director, MCAQD, available at: <https://www.epa.gov/system/files/documents/2025-09/tsmc-arizona-begin-actual-construction-epa-response-letter.pdf>.

<sup>44</sup> *Id.* at 2.

units (e.g., there is no piping, ventilation ductwork or specific foundation work for any emissions units.”<sup>45</sup>

After reviewing the provided information on TSMC’s proposed project and the applicable MCAQD regulations, the EPA concluded that “it is within MCAQD’s discretion to interpret its existing regulations to allow TSMC to undertake, prior to obtaining an NSR permit..., [construction of] the core and shell of a building, provided that the construction of this core and shell of a building does not involve the physical construction on an emissions unit or the laying of underground piping or construction of supports and foundations that are part of any emissions unit.” Regarding the interpretation discussed in the March 2020 Memo, the EPA said the following:

Consistent with the views expressed in the March 2020 Draft Guidance, the EPA continues to recognize that the definition of the term “begin actual construction” in EPA’s regulation prohibits “the initiation of physical on-site construction on an emissions unit” and that this does not prohibit initiation of physical on-site construction of those parts of a facility that do not qualify as an emission unit. The EPA also continues to view the 1986 Reich memo to have adopted an overly broad reading of the term “emissions unit” to suggest that it includes installations necessary to accommodate an emissions unit.<sup>46</sup>

The September 2025 Letter stated further that “[a]ny construction activities undertaken by TSMC prior to issuance of an NSR permit by MCAQD would be solely at TSMC’s risk, as MCAQD would retain the discretion to deny any subsequent application to construct a stationary source of air pollution (including emissions units) if the applicable criteria are not met.”<sup>47</sup>

#### *J. Need for Regulatory Action*

The EPA is initiating a rulemaking to revise the definition of “begin actual construction” to enhance clarity, regulatory certainty, and align the rule with statutory and policy directives. As noted in comments submitted to the EPA and discussed herein,

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<sup>45</sup> *Id.* at 3.

<sup>46</sup> *Id.* at 2.

<sup>47</sup> *Id.* at 3.

the current definition has created significant uncertainty and inconsistent interpretations, leading to burdens on permitting authorities and industry stakeholders, complicating compliance, and delaying projects. The proposed revisions aim to align the definition with the best reading of the CAA and implement recent Executive Orders focused on regulatory reform and burden reduction. By clarifying permitting requirements, the EPA seeks to improve the efficiency and effectiveness of the regulations in a manner consistent with the CAA. These changes are designed to mitigate uncertainties, reduce regulatory burdens, and balance economic growth and environmental protection by allowing owners and operators the opportunity, when appropriate, to begin construction on non-emitting components before obtaining an NSR permit without increasing air pollutant emissions resulting from the subsequent construction of a stationary source after such a permit is issued.

### **III. Legal Authority**

The statutory authority for this proposed action is CAA sections 110(a)(2)(C), 165, 172(a)(5), 173, and 301(a)(1).<sup>48</sup> These provisions in the CAA require that States and the EPA regulate “construction” of stationary sources of air pollution and prohibit “construction” without a permit. For both major and minor sources, CAA section 110(a)(2)(C) requires that SIPs contain a program to provide for “regulation of the modification and *construction* of any stationary source within the areas covered by the plan as necessary to assure that [NAAQS] are achieved.”<sup>49</sup> This program, commonly called NSR, must include the major source PSD and NNSR permit program requirements under parts C and D of title I of the CAA, which include sections 165, 172, and 173.<sup>50</sup>

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<sup>48</sup> 42 U.S.C. 7410(a)(2)(C), 7475(a), 7502(c)(5), 7503, 7601(a)(1).

<sup>49</sup> 42 U.S.C. 7410(a)(2)(C) (emphasis added); CAA section 110(a)(2)(C).

<sup>50</sup> For major sources located in attainment areas, one of the PSD provisions in Part C, CAA section 165(a), prohibits construction without a permit, stating that “[n]o major emitting facility on which construction is commenced after August 7, 1977, may be *constructed* in any area to which this part applies unless ... a permit has been issued for such proposed facility in accordance with this part ... .” 42 U.S.C. 7475(a) (emphasis added). The relevant NNSR provision in Part D, CAA section 172(c)(5), includes similar

Unless provided otherwise by statute, an agency may revise or rescind prior actions so long as it acknowledges the change in position, provides a reasonable explanation for the new position, and considers legitimate reliance interests in the prior position.<sup>51</sup>

CAA section 169(2)(C) defines the term “construction” for purposes of the part C PSD program to include “modification” but does not identify or define what constitutes construction of a source.<sup>52</sup> There is no definition of the term “constructed” in this section or any other section of the CAA. CAA section 169(2)(A) defines “commenced” as applied to construction of a major emitting facility as occurring when the owner or operator has obtained all necessary preconstruction approvals or permits and has done either of the following:

- (i) begun, or caused to begin, a continuous program of physical on-site construction of the facility; or
- (ii) entered into binding agreements or contractual obligations... to undertake a program of construction of the facility to be completed within a reasonable time.<sup>53</sup>

None of these provisions identify a specific point “on the continuum from planning to operation of a major emitting facility” when “construction” of such a source begins or the source may be considered “constructed.”<sup>54</sup> The definition of “commenced” does not do so because its function was to identify construction projects pending in 1977 that had progressed to the point that they were exempt from the newly enacted requirement to obtain a PSD permit. The first sentence of CAA section 165(a) requires a permit for a “major emitting facility on which construction is *commenced* after August 7,

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language: “plan provisions shall require permits for the *construction* and operation of new or modified major stationary sources anywhere in the nonattainment area in accordance with [CAA section 173].” 42 U.S.C. 7502(c)(5) (emphasis added).

<sup>51</sup> See, *FDA v. Wages & White Lion Invs., L.L.C.*, 145 S. Ct. 898, 917 (2025); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009); *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983); *Clean Air Council v. Pruitt*, 862 F.3d 1, 8 (D.C. Cir. 2017) (“Agencies obviously have broad discretion to reconsider a regulation at any time.”).

<sup>52</sup> 42 U.S.C. 7479(2)(C); CAA section 169(2)(C).

<sup>53</sup> 42 U.S.C. 7479(2)(A); CAA section 169(2)(A).

<sup>54</sup> December 1978 Memo at 1.

1977.”<sup>55</sup> As applied through this sentence in the CAA, the definition of “commenced” identifies the nature and extent of the construction activity a source owner or operator must have completed to avoid having to obtain an additional preconstruction approval under the PSD program after the source otherwise “has obtained all necessary preconstruction approvals or permits” under requirements other than the PSD program. This definition distinguishes between entering into contractual obligations and “physical on-site construction of the facility,” but it does not describe the type of activities that qualify as the latter.

The EPA’s December 1978 policy for identifying construction activities that are precluded without an NSR permit was based on the Agency’s view that the CAA provisions described above left a gap for the EPA to resolve the question of “where on the continuum from planning to operation of a major emitting facility does a company or other entity violate the PSD regulations if it has not yet received a PSD permit.”<sup>56</sup> The December 1978 Memo states that the “statute and regulations do not answer this question” and that the “term ‘constructed’ seems to be open to further interpretation by the EPA.”<sup>57</sup> In the December 1978 Memo, the EPA stated that the term “commenced” was “quite specifically defined in . . . Section 169(2)(A) of the Clean Air Act” but that this term served only the “purpose of deciding the threshold question of the applicability of the PSD regulations.”<sup>58</sup> The EPA further stated “we are not bound by [the statutory and regulatory definitions of “commence”] in deciding what activities may be conducted prior to receiving a necessary PSD permit.”<sup>59</sup>

Applying this discretion, the EPA adopted a policy in 1978 to prohibit “on-site activities of a permanent nature aimed at completing a PSD source for which a permit has

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<sup>55</sup> 42 U.S.C. 7475(a); CAA section 165(a) (emphasis added).

<sup>56</sup> December 1978 Memo at 1.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 2.

<sup>59</sup> *Id.*

yet to be obtained.” The EPA identified specific activities included in this formulation and said that this policy reflected the “most legally correct position.” But the December 1978 Memo did not explain how the CAA supported that conclusion.

The EPA essentially concluded in the December 1978 Memo that Congress had left a gap for the Agency to fill and made a policy decision on where to draw the line between construction that requires a permit and construction that does not. Two years later, in 1980, the EPA reflected this policy in the 1980 PSD Regulations by adding and defining the term “begin actual construction.” The 1980 PSD Regulations refined the 1978 policy by selecting the point on the continuum when “physical on-site construction activities of a permanent nature” are started “on an emissions unit.”<sup>60</sup> But the preamble to the 1980 PSD Regulations did not provide further justification for the conclusion that this policy was based on the most legally correct position.

The EPA added some detail to the Agency’s reading of the CAA in the 1996 Proposed Rule that proposed no amendment to the definition of “begin actual construction” but sought comment on the topic.<sup>61</sup> The EPA stated in the 1996 Proposed Rule that the CAA “plainly bars construction without a permit” and that it was “clear that core activities at an industrial site, such as the fabrication or installation of pollution-generating equipment, constitute ‘construction’ within the meaning of the Act.”<sup>62</sup> The EPA also acknowledged that “the statute does not address the details of the construction process, nor does it constrain the EPA’s discretion to fashion regulatory mechanisms to harmonize the needs of environmental protection and economic growth in a manner consistent with the legislative purpose.”<sup>63</sup>

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<sup>60</sup> 45 FR 52676, 52736 (August 7, 1980).

<sup>61</sup> 61 FR 38270-71

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 38271.

The focus of the March 2020 Memo was on improving the EPA’s interpretation of the text in the Agency’s regulations, and this action reflected the same understanding of the CAA that the Agency had described in 1978 and 1996. The EPA discussed the relevant parts of the CAA,<sup>64</sup> but again stated that “given that Congress provided neither a statutory definition of ‘constructed’ nor a meaningful definition of ‘construction,’ EPA has discretion to determine where on that ‘continuum’ it should draw a reasonable line.”<sup>65</sup> The EPA noted and did not question the Agency’s additional 1996 interpretative statement that construction requiring a permit is “the core activities at an industrial site, such as the fabrication or installation of pollution-generating equipment.”<sup>66</sup>

Under the *Chevron* doctrine, the U.S. Supreme Court maintained for several decades that regulatory agencies are implicitly authorized by statutory ambiguity to adopt permissible readings of the statute that effectuate the agencies’ reasonable policy goals.<sup>67</sup> But the Supreme Court recently altered its principles regarding review of agency interpretations of laws in *Loper Bright Enterprises v. Raimondo*.<sup>68</sup> The Court rejected its prior framework, which had required reviewing courts to defer to an agency’s interpretation of an ambiguous statute that it administers so long as that court agrees the agency’s chosen interpretation is a permissible one. In *Loper Bright*, the Court interpreted provisions in the Administrative Procedure Act (APA) and held that “courts need not and under the APA may not defer to an agency interpretation of the law simply because a statute is ambiguous.”<sup>69</sup> The Court concluded that “[c]ourts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority.”<sup>70</sup> In this opinion, the Court rejected the idea that ambiguity in a statute reflects

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<sup>64</sup> March 2020 Memo at 3-4.

<sup>65</sup> *Id.* at 13.

<sup>66</sup> *Id.* at 11

<sup>67</sup> *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984).

<sup>68</sup> 603 U.S. 369 (2024).

<sup>69</sup> *Id.* at 413.

<sup>70</sup> *Id.* at 412.

Congressional intent that an agency, as opposed to a court, resolve the resulting interpretive question.<sup>71</sup> Rather, the Court reasoned that all statutes have “a single, best meaning” that it is the responsibility of the courts to identify.<sup>72</sup> But with this new framework, the Court also recognized that “the statute’s meaning may well be that the agency is authorized to exercise a degree of discretion” and that there may be cases when “the best reading of a statute is that it delegates discretionary authority to an agency.”<sup>73</sup>

In *Loper Bright*, the Supreme Court observed that, to resolve ambiguities, “courts use every tool at their disposal to determine the best reading of the statute” and those include “traditional tools of statutory construction.”<sup>74</sup> One such tool is the “fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.”<sup>75</sup> A court may look to legislative history or other extrinsic material as an aid in statutory construction “only to the extent they shed a reliable light on the enacting Legislature’s understanding of otherwise ambiguous terms.”<sup>76</sup> The interpretation of an agency may be persuasive to the court based on “the thoroughness evident in its consideration, the validity of its reasoning, [and] its consistency with earlier and later pronouncements.”<sup>77</sup> The Supreme Court has also observed that “the informed judgment of the Executive Branch – especially in the form of an interpretation issued contemporaneously with the enactment of a statute – could be entitled to ‘great weight.’”<sup>78</sup>

To date, Federal courts have not identified a best reading of the NSR provisions in the CAA regarding the line between construction that requires a permit and construction

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<sup>71</sup> *Id.* at 399.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 394-95.

<sup>74</sup> *Id.* at 401-02

<sup>75</sup> *Util. Air Regulatory Group v. EPA*, 573 U.S. 302, 320 (2014).

<sup>76</sup> *Exxon Mobil Corp. v. Allapattah Servs.*, 545 U.S. 546, 568 (2005).

<sup>77</sup> *Loper Bright*, 603 U.S. at 402 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

<sup>78</sup> *Loper*, 603 U.S. at 388-89 (citing and quoting *U.S. v. Am. Trucking Ass’n*, 310 U.S. 534, 549 (1940); see also, *id.*, 603 U.S. at 402.

that does not. The U.S. Court of Appeals for the Third Circuit recently considered “what sort of construction triggers the need for a PSD permit,” but in a context involving restarting a stationary source that had been shut down.<sup>79</sup> In its decision, the Third Circuit held that the definition of “construction” in CAA section 169 does not allow the EPA to include resuming “operation” of a stationary source. Considering use of the term “construction” in CAA sections 165 and 169 together, the Third Circuit wrote that “[t]he type of construction that requires a PSD permit is construction commenced after 1977 that brings a major facility into existence,”<sup>80</sup> but the Third Circuit did not attempt to identify when such construction on a major facility starts.

In the March 2020 Memo describing the revised interpretation of the term “begin actual construction” in the NSR regulations, the EPA observed that the phrase “may be constructed” in CAA section 165(a) “might reasonably be construed as precluding the initiation of any construction activity prior to the issuance of a permit.” The EPA continued as follows: “On the other hand, the phrase could also reasonably be read to allow construction to proceed right up to the point of near completion, before the source would be considered to have been ‘constructed.’” While these observations were sound when made, the Supreme Court has since clarified that the EPA’s task is not to choose among permissible interpretations within an open range of this nature. To discern the “single, best” meaning for purposes of this rulemaking, a more thorough examination of the statute is required.

The statutory prohibition on construction without a permit requires answering two questions. The first is “what” the CAA requires a permit to construct. The second is “when” construction of that “what” begins. The EPA’s past efforts to define and interpret the phrase “begin actual construction” have addressed both questions, at least implicitly.

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<sup>79</sup> *Port Hamilton Refin. & Transp., LLLP v. EPA*, 87 F.4th 188, 194 (3rd Cir. 2023).

<sup>80</sup> *Id.*

The EPA has expressly sought to determine “where on the continuum from planning to operation of a major emitting facility” prohibited construction begins. This continuum across a sequence of events suggests a focus on the point in time “when” construction begins. But the EPA has also identified specific activities that are permissible prior to (or without) a permit, which partly addressed the “what” question.

Therefore, the EPA begins by examining “what” the CAA requires a permit to construct. The relevant provisions of the CAA require a permit prior to construction of a “stationary source” of air pollution. The PSD provision at CAA section 165 prohibits construction of a “major emitting facility” without a permit.<sup>81</sup> In turn, a “major emitting facility” is defined as “any of the following *stationary sources* of air pollutants” that emits more than 100 tpy or “any other source” that emits more than 250 tpy.<sup>82</sup> The latter definition lists categories of industrial facilities and thereby illustrates the type of facilities that Congress considered to be a stationary source in 1977, in the absence of a definition of “stationary source” in the CAA. In 1990, Congress added a definition of the term “stationary source” to the CAA. This term includes “generally any source of an air pollutant except those resulting directly from” engines and vehicles that are regulated as mobile sources under title II of the CAA.<sup>83</sup> The NNSR provision at CAA section 172(c)(5) requires a permit “for the construction and operation of new or modified major stationary sources.”<sup>84</sup> Likewise, the term “major stationary source” is used in at least two places in CAA section 173.<sup>85</sup> Since 1977, the CAA has defined the term “major stationary source” to mean “any stationary facility or source of air pollutants which directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant ... .”<sup>86</sup> CAA section 110(a)(2)(C) likewise requires a program to regulate

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<sup>81</sup> 42 U.S.C. 7475(a); CAA section 165(a).

<sup>82</sup> 42 U.S.C. 7479(1); CAA section 169(1) (emphasis added).

<sup>83</sup> 42 U.S.C. 7602(z); CAA section 302(z).

<sup>84</sup> 42 U.S.C. 7502(c)(5); CAA section 172(c)(5).

<sup>85</sup> 42 U.S.C. 7503(a)(1)(B), (c); CAA section 173(a)(1)(B), (c).

<sup>86</sup> 42 U.S.C. 7602(j); CAA section 302(j).

“construction of any stationary source.”<sup>87</sup> So, it is clear that, under the NSR program for major sources, the “what” that the CAA requires a permit to construct is a stationary source that emits air pollutions in amounts greater than specified thresholds.

The essential characteristic of a stationary source under these statutory provisions is that it emits air pollutants. The three statutory definitions described above each use a variation of the phrase “source of air pollutants.”<sup>88</sup> The definitions of “major emitting facility” and “major source” each identify a source as “major” based on tonnage thresholds of “any air pollutant” that the source “emits, or has the potential emit.”<sup>89</sup>

These provisions are best read to mean that the CAA does not require a permit for all activities that could be considered construction, consistent with the EPA’s longstanding interpretation. For major stationary sources, the statute clearly prohibits construction of the components of a facility that “emit” or are a “source” of air pollution without a permit but does not require a permit for construction of something that does not have that characteristic. Consistent with this reading, in 1996, the EPA stated that it was “clear that core activities at an industrial site, such as the fabrication or installation of pollution-generating equipment, constitute ‘construction’ within the meaning of the Act.”<sup>90</sup> Furthermore, these CAA provisions do not clearly displace traditional State authority to regulate land use and require general building permits for construction.<sup>91</sup>

In addition, CAA section 110(a)(2)(C) requires regulation of construction “as necessary” to protect the NAAQS.<sup>92</sup> This is not a mandate to regulate construction of something that does not emit air pollutants. While the decision on how much regulation is necessary is for a State to determine in the first instance in its plan, the EPA does not

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<sup>87</sup> 42 U.S.C. 7410(a)(2)(c); CAA section 110(a)(2)(c).

<sup>88</sup> 42 U.S.C. 7479(1), 7602(j), 7602(z); CAA sections 169(1), 302(j), 302(z).

<sup>89</sup> 42 U.S.C. 7602(j); *see* 42 U.S.C. 7479(1); CAA sections 302(j), 169(1) (using the phrase “emit, or have the potential to emit”).

<sup>90</sup> 61 FR 38270-71 (July 23, 1996).

<sup>91</sup> *See, Sackett v. EPA*, 598 U.S. 651, 679 (2023)

<sup>92</sup> 42 U.S.C. 7410(a)(2)(c); CAA section 110(a)(2)(c).

consider it clearly “necessary” to regulate something that does not emit air pollutants in order to protect the NAAQS.

The CAA provides less direct guidance on the question of “when” construction of something that emits air pollutants begins. There is no definition of the term “constructed,” and the definition of “construction” only makes clear that this term includes the “modification” of a facility that was previously constructed. The definitions of stationary source, major stationary source, and major emitting facility identify their essential characteristics as something that emits air pollutants, but these definitions do not provide insight on when construction begins on such sources or facilities. As discussed above, the definition of “commenced” does not function to identify permissible or prohibited construction in relation to the permit requirement.

Notwithstanding its role in Part C of title I of the CAA, the definition of “commenced” includes the following two categories of activities that fall on the continuum from planning to operation of a stationary source: “a continuous program of physical on-site construction of the facility” and entering into “binding agreements or contractual obligations ... to undertake a program of construction of the facility.”<sup>93</sup> These stages of construction occur after planning and before operation, thus neither at the beginning nor end of the continuum. Contracting will generally precede physical on-site construction because an owner or operator of a facility would typically need to hire construction services to begin physical on-site construction. While these parts of the definition of “commence” are not controlling on the question of “when” addressed in this proposed rule, they are part of the context of the NSR provisions.

While the EPA recognized the definition of “commenced” did not dictate which construction activities were permissible or prohibited prior to obtaining permit, the Agency nevertheless chose in 1980 to use a phrase from this definition (“physical on-site

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<sup>93</sup> 42 U.S.C. 7479(2)(A); CAA section 169(2)(A).

construction”) in the definition of “begin actual construction.” The EPA chose not to prohibit entering into contracts without a permit and had earlier stated that “planning” was permissible. Thus, the EPA’s initial interpretation, close in time to the 1977 enactment of the NSR provisions in the CAA, was that these provisions prohibited “physical on-site construction” without a permit but not the planning or contracting steps that would be expected to precede physical on-site construction.

The EPA suggested in the March 2020 Memo that the term “may be constructed” in section 165(a) of the CAA, when read in isolation, could support drawing the line of “when” construction begins to be a point near the completion of construction of a facility. At this point, the nature of the built structure should make clear that it is something that will generate and emit air pollutants. But other parts of the CAA support the EPA’s longstanding view that the NSR program is a “preconstruction” permitting program, meaning that a permit is required before construction begins. CAA sections 165(a)(4) and 173(a)(1) require a permitting authority to ensure that the proposed facility will apply advanced pollution control technology. It should be more cost-effective to install and integrate such pollution control technology into a pollutant-emitting facility before its construction is substantially completed.<sup>94</sup> In addition, under the PSD program, CAA section 167 empowers the EPA to “take such measures, including issuance of an order, or seeking injunctive relief, as necessary *to prevent* the construction or modification of a stationary source that does not conform to the requirements of [the PSD provision in Part C of Title I of the CAA].”<sup>95</sup>

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<sup>94</sup> This is consistent with the understanding of legislators that drafted these laws, as reflected in a report of the Interstate and Foreign Commerce Committee of the House of Representatives. H.R. Rep. No. 95-294 at 136 (1977) (describing hearing testimony that “it costs 25 percent less to build flue gas desulfurization systems as part of a new source at time of construction than to retrofit that same source after construction”).

<sup>95</sup> 42 U.S.C. 7477; CAA section 167. This provision has most frequently been applied by the EPA to support orders and civil actions to enjoin specific construction activities by individuals or corporations at a particular location, since “issuance of an order, or seeking injunctive relief” is expressly identified as included within “such measures” and the title to this section of the CAA is “Enforcement.” But the term “including” does not restrict “such measures” to only the issuance of orders and civil actions in court seeking an injunction. This provision also supports rulemaking by the EPA to “prevent” construction that does not conform to the requirements of the CAA.

Thus, in context, CAA section 165(a) should be read to require authorization for construction of a source of air pollution before construction starts, not when it is nearly complete.<sup>96</sup> But the nature of what is being constructed may be more ambiguous when construction-related activities begin on a particular site. Nevertheless, prohibiting physical construction of a source of air pollution without a permit requires identifying the nature of what is being constructed. That can be accomplished by considering the characteristics of the equipment or components being constructed that enable them to be identified as a source of air pollution and distinguished from something that is not.

The legislative history of the 1977 Amendments to the CAA does not shed additional light on the question of when construction that requires a permit begins on a stationary source.<sup>97</sup> The House, Senate, and Conference Committee reports associated with the enactment of the 1977 Amendments to the CAA do not speak to the point in the process of constructing a stationary source at which a permit must be obtained.<sup>98</sup> One notable takeaway from reviewing the discussion on the NSR permitting program in these reports is the emphasis on protecting air quality and promoting the development of pollution control technology.<sup>99</sup>

Congress more directly identified in the statutory text the purposes of Part C of title I of the CAA, which include “to insure that economic growth will occur in a manner consistent with the preservation of existing clean air resources.”<sup>100</sup> The Supreme Court has recognized that, in enacting the NSR program, “Congress sought to accommodate the conflict between the economic interest in permitting capital improvements to continue

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<sup>96</sup> See *United Sav. Assn of Tex. v. Timbers of Inwood Forest Assoc. Ltd.*, 484 U. S. 365, 371 (1988) (“A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.”).

<sup>97</sup> Pub. L. No. 95-95.

<sup>98</sup> *Id.*

<sup>99</sup> Rep. No. 95-127 at 18, 31-32; H.R. Rep. No. 95-294 at 145 (1977).

<sup>100</sup> 42 U.S.C. 7570(3).

and the environmental interest in improving air quality.”<sup>101</sup> Based on this opinion, the D.C. Circuit wrote that “there can be no doubt that EPA is entitled to balance environmental concerns with economic and administrative concerns, at least to a point.”<sup>102</sup>

Based on these considerations, the EPA views the best reading of the CAA to be that an NSR permit is required “when” physical construction on a site begins on equipment or components that have characteristics that identify them as something that will emit air pollution, as distinguished from equipment or components that will not. This reading integrates the EPA’s understanding of “what” the statute requires a permit to construct with the Agency’s interpretation shortly after the 1977 enactment of statute that a permit is required prior to beginning physical on-site construction (not before entering into contracts). This reading reflects the context-based understanding that the CAA requires an NSR permit at the beginning of physical construction of a stationary source and provides a means to identify when construction of a stationary source begins. Finally, this reading serves to balance economic growth with environmental protection by enabling owners and operators to advance project development without an NSR permit until the point of physical construction begins on the elements of a project that have the characteristics of a stationary source.

The EPA has not identified text in the NSR provisions of the CAA or discussion in the legislative history that suggests the Agency or States should prohibit construction on a site because it may be costly or permanent beyond a certain point to change course. What is material under the CAA is whether the construction is something that emits air pollution, not whether it may be costly to install additional controls or difficult to remove. The phrase “equity in the ground” does not appear in the NSR provisions of the CAA or

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<sup>101</sup> *Chevron*, 467 U.S.at 851.

<sup>102</sup> *New York*, 413 F.3d at 23.

legislative history from 1977. Nothing suggests that Congress was motivated by concern about the balance of power between regulators and permit applicants. The focus is on protecting air quality from increased emissions resulting from the construction and modification of stationary sources and stimulating improvement of pollution control technology without hampering economic growth. Regardless of its merits as a general matter, the EPA's prior objective to prevent owners from making costly investments before obtaining a permit was a policy choice not grounded in the CAA and not required by statute. The EPA did not previously identify a statutory foundation for this policy against owners placing "equity in the ground" before obtaining a permit. But if such "equity" is something that emits air pollutants, the provisions in the CAA described above require the EPA and States to prevent it from occurring before a permit is issued.

Owners or operators and permitting authorities should be mindful that engaging in some on-site construction activities that are allowed under this proposed rule prior to obtaining an NSR permit could otherwise be limited by other Federal, State, or local laws that may apply in certain circumstances. This could include compliance with other CAA requirements besides NSR, other environmental statutes administered by the EPA, and other types of permitting and licensing requirements within the jurisdiction of agencies other than the Agency. When applicable according to their terms, this may also include cross-cutting laws such as the Endangered Species Act or the National Historic Preservation Act. Compliance with such cross-cutting Federal laws is generally the responsibility of the Federal agency authorizing, funding, or carrying out such actions unless a non-Federal representative is designated to conduct such actions on behalf of the Federal agency. Furthermore, it will continue to be the responsibility of the owner and operator, and in some cases State and local permitting authorities, to ensure that their actions comply with all relevant and applicable Federal, State, and local laws. For example, occupational safety and health exposures relating to worker safety are regulated

under different authorities, such as the Occupational Safety and Health Act of 1970, and it is the responsibility of the owner and operator to ensure that acts such as this and any applicable regulations are also complied with.

#### **IV. Proposed Changes**

Based on the best reading of the statute described above and the rationale that follows in section V of this preamble, the EPA is proposing to change the Agency's policy (initially developed in 1978 and 1980) from requiring a permit to begin any construction that is of a permanent nature or costly to requiring a permit to begin only construction of components or equipment that emit air pollution. The Supreme Court recognized that agencies are free to change their existing policies if they acknowledge they are doing so, consider relevant factors including any serious reliance interests, and provide good reasons for the change.<sup>103</sup>

To implement this proposed change in policy, the EPA is reconsidering in this rulemaking some of the Agency's prior classifications of particular activities as construction that requires a permit. The EPA's objective in this rulemaking is to replace the text in the NSR regulations that focused on the permanent nature of construction with criteria that identify those characteristics of construction-related activities that enable owners, permitting authorities, and citizens to distinguish something that generates and emits air pollution from something that does not emit air pollution. Since clearing vegetation and leveling land could precede the construction of a variety of things that are not stationary sources of air pollution, the EPA proposes to continue to allow such construction-related activities to proceed absent an NSR permit. In some cases, man-made surfaces and structures placed on clear and level land may likewise be a prelude to something that does not generate or emit air pollution. But surfaces or structures may also

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<sup>103</sup> See *FDA v. Wages & White Lion Invs., LLC*, 604 U.S. 542, 567-69 (2025); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009).

exhibit distinctive characteristics that enable them to be identified as part of a source of air pollutant emissions. This rulemaking by the EPA proposes revised regulations based on such characteristics, which are intended to be objective and not dependent on the intent of the owner or operator.

The EPA does not propose to require a permit to build surfaces or structures that are capable of supporting multiple uses (*e.g.*, either a retail store or storage building that does not emit air pollution or a factory that does). However, the EPA proposes that a permit will be required before beginning on-site construction of components with the single purpose of serving a factory or other type of facility that generates air pollution, or configuring general components on a site in a way that has no other purpose but to support a source of air pollution.

However, the EPA also recognizes that it will be difficult to draw a line in a regulation that addresses every circumstance when construction begins of something that emits air pollutants. Thus, States and local reviewing authorities will need to exercise their judgment to resolve questions on a case-by-case, project-specific basis in accordance with general criteria in the regulations that the EPA is proposing here to implement this policy and the best reading of the statute.

The EPA is proposing to revise the Agency's regulations implementing the NSR program to distinguish between construction of a stationary source and construction of non-emitting components or structures, while removing restrictions on the latter on the grounds that these restrictions are not supported by the text in the statute or necessary to protect air quality. The EPA's goal is to more clearly allow entities that plan to build or modify stationary sources of air pollution to engage in construction of non-emitting components (*e.g.*, infrastructure to provide utility service to a site, concrete pads, foundations and other parts of buildings that are not specifically configured for emitting equipment, and office buildings) at their own risk, without altering requirements to

control air pollutant emissions from the stationary sources of air pollution that these owners or operators must obtain an NSR permit to construct. When the EPA states an entity may engage in construction of non-emitting components or structures “at their own risk,” it means that the owner or operator assumes the risk that it will not realize a return on its investment in pre-permit construction of components or structures that do not emit air pollution if a permit application is ultimately denied or an issued permit requires additional construction to reduce air pollutant emissions.

To accomplish this, the EPA is proposing to revise the current definition of “begin actual construction” and add a new definition of “pollutant-emitting activities” to identify which on-site construction activities an owner or operator of a stationary source of air pollution may lawfully undertake for purposes of the CAA before obtaining an NSR air permit. The EPA is also proposing to revise the definition of “begin construction” and “commence construction” in the Tribal NSR regulations at 40 CFR 49.152 and rename the term “begin construction” to “begin actual construction,” which are terms that apply to minor sources and minor modifications at existing major sources of air pollution located in Indian country. As described previously, these changes reflect the best reading of the CAA and provide greater flexibility for owners and operators to engage in construction activities that are allowed under the CAA prior to obtaining an NSR permit, while still protecting public health and welfare through the NSR air permitting requirements.

More specifically, the EPA is proposing to define “begin actual construction” in the NSR regulations at 40 CFR 51.165; 51.166; Appendix S to Part 51, and 40 CFR 52.21 as follows:

*Begin actual construction* means, in general, initiation of physical on-site construction of pollutant-emitting activities on a stationary source. This does not include the following: (1) Engineering and design planning; (2) geotechnical investigation (surface and subsurface explorations); (3) clearing vegetation, grading, surveying, soil compacting and stabilization (including associated pile driving), and excavating land (including blasting

or other removal of hardrock); (4) ordering of equipment and materials; (5) storing of equipment or setting up temporary trailers to house construction management or staff and contractor personnel; (6) paving surfaces. This list is not intended to be exhaustive. With respect to a change in method of operations, this term refers to those on-site activities other than preparatory activities which mark the initiation of the change.

The revised definition is intended to include a list of equipment, components, or processes excluded from the definition of "begin actual construction" to allow stakeholders to quickly and confidently recognize these listed construction-related activities as separate from the construction of a stationary source, thereby enabling owners or operators to begin these construction-related activities prior to obtaining an NSR permit. The EPA is soliciting comment on whether additional activities should be included in this exclusion list (recognizing it is not intended to be an exclusive list), if these revisions align with other existing NSR regulations, and any other general comments with this definition (*see* section VI of this preamble).

Additionally, the EPA is proposing to add a new definition of "pollutant-emitting activities" to the NSR regulations at 40 CFR 51.165; 51.166; Appendix S to Part 51, and 52.21 and define it as follows:

*Pollutant-emitting activities*, as used in 40 CFR 52.21(b)(6)(i) and (b)(11), include any equipment or component in a process or operation that emits or has the potential to emit a regulated NSR pollutant. Pollutant-emitting activities do not include the following: (1) office buildings; (2) retail stores; (3) buildings or structures designed for storage if the product or material to be stored therein is not capable of producing airborne vapors or particles; (4) concrete pads and building foundations, walls, and roofs that are not closed in on the interior side and do not have design elements (*e.g.*, piping, ductwork, wiring, anchor bolts) specifically and uniquely configured to serve or support any equipment or component in a process or operation that emits or has the potential to emit a regulated NSR pollutant; (5) equipment or components whose sole purpose is heating ventilation and air conditioning for human workspaces or spaces within a building used to store supplies related to the habitation of the building; (6) wiring, piping, and associated support structures that supply utility services (including electrical, water, wastewater, or telecommunications) to a property site or a building on a site; (7) sealed junctions or tie-ins within one process that may serve equipment or components in another process constructed at a later time. This list is not intended to be exhaustive. For purposes of this definition, classification as pollutant-

emitting is based on emissions from a process or operation after construction, not emissions of pollutants during the construction process.

The term “pollutant-emitting activity,” as used in the NSR regulatory definition of “building, structure, facility, or installation,” is used to determine whether an activity qualifies as a “building, structure, facility, or installation.”<sup>104</sup> Under the NSR regulations, a “stationary source means any building, structure, facility, or installation which emits or may emit a regulated NSR pollutant.”<sup>105</sup> Therefore, adding a definition for “pollutant-emitting activities” is crucial to determine if an activity meets the definition of “building, structure, facility, or installation” and therefore constitutes a stationary source. This proposed definition is intended to enhance clarity regarding the types of activities that may be classified as construction of a stationary source. This definition aims to provide regulatory certainty for stakeholders by more clearly delineating what construction-related activities on a stationary source are allowed prior to the issuance of an NSR permit. Additionally, and similar to the revisions in the definition of “begin actual construction,” the proposed additional definition includes a list of equipment or components of a process excluded from the definition of “pollutant-emitting activities.” This exclusion list is intended to enable stakeholders to quickly and confidently recognize these construction-related activities as separate from the construction of a stationary source, thereby enabling owners to begin construction activities on these excluded items prior to (or in some cases without) obtaining an NSR permit. The EPA also is soliciting comment on whether additional activities should be included in this exclusion list (recognizing it is not intended to be an exclusive list), if these revisions align with other existing NSR regulations, and any other general comments with this definition (*see* section VI of this preamble).

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<sup>104</sup> Definition of “Building, structure, facility, or installation”—40 CFR 51.165(a)(1)(ii)(A), 51.166(b)(6)(i), and 52.21(b)(6)(i).

<sup>105</sup> Definition of “stationary source”—40 CFR 51.165(a)(1)(i), 51.166(b)(5), and 52.21(b)(5).

Finally, the EPA is also proposing to revise the definition of “begin construction” and “commence construction” in the Tribal minor NSR regulations at 40 CFR 49.152 and rename the term “begin construction” to “begin actual construction” to have consistent definitions for the terms “begin actual construction” and “commence” or “commence construction” for all NSR programs governed by the EPA regulations. The EPA is also proposing to define the term “commence construction” in the Tribal minor NSR regulations at 40 CFR 49.152 to mirror the definition of “commence” in the major NSR Federal regulations and, therefore, would define it as follows:

*Commence construction* means, as applied to a new minor stationary source or minor modification at an existing stationary source subject to this subpart, that the owner or operator has all necessary preconstruction approvals or permits and either has: (i) Begun, or caused to begin, a continuous program of actual on-site construction of the source, to be completed within a reasonable time; or (ii) Entered into binding agreements or contractual obligations, which cannot be cancelled or modified without substantial loss to the owner or operator, to undertake a program of actual construction of the source to be completed within a reasonable time.<sup>106</sup>

## **V. Policy Rationale and Implications for Proposing Changes to Regulations**

In section III of this preamble, the EPA identifies what the Agency believes to be the best reading of the statute. That reading is not one that delegates to the EPA the discretion to determine “what” a permit is required to construct or “when” construction of a stationary source begins. If the EPA maintains this reading after considering public comments, the Agency must follow the Agency’s reading of how the statute answers these “what” and “when” questions, regardless of the Agency’s policy preferences.<sup>107</sup> That the law requires the proposed policy is a sufficiently good reason for the EPA to make a change. Nevertheless, there are other good reasons for the proposed change in policy, which the EPA articulates here for consideration.

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<sup>106</sup> The EPA regulatory definition of “commence” in the PSD regulations was proposed by the Agency in November 1977, finalized in June 1978, and remains as the existing, current definition in 40 CFR 52.21.

<sup>107</sup> *Loper Bright*, 603 U.S. at 401 (“In the business of statutory interpretation, if it is not the best, it is not permissible.”).

Requiring a permit prior to constructing something that does not emit air pollutants can unnecessarily delay projects and has been viewed as an unduly restrictive and burdensome part of the NSR air permitting program. In the 1996 Proposed Rule, the EPA took note of the fact that “[s]everal industry members” of the CAA Advisory Committee’s Subcommittee on NSR Reform had “recommended that EPA change the NSR regulations to enable sources to engage in a broader range of activities prior to receipt of an NSR permit in cases involving modifications to existing sources.”<sup>108</sup> Commenters expressed concerns about the definition of “begin actual construction” in response to the 1996 Proposed Rule and the 2017 *Federal Register* publication titled “Evaluation of Existing Regulations,” which sought input on the EPA regulations that may be appropriate for repeal, replacement, or modification.<sup>109</sup>

In response to the 2017 *Federal Register* publication, one commenter stated that the EPA should “revise the definition of ‘begin actual construction’ contained in 40 CFR 52.21(b)(11) to provide for greater ability for conducting certain construction activities that are of a permanent nature in advance of obtaining a permit.”<sup>110</sup> In support, the commenter added the following: “Facilities should, at their own risk, be able to conduct time-consuming construction activities, *e.g.* installing foundations and running underground utilities, in advance of obtaining an NSR/PSD construction permit where it remains obvious that the source for which a permit is being sought cannot operate. As a reference for how this can work, many States have already incorporated such common-sense allowances in their minor source permitting programs.”<sup>111</sup> Another commenter stated that: “[b]egin actual construction’ has, by policy, been extended to prohibit construction on ‘any installation necessary to accommodate the emissions unit.’ Sources

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<sup>108</sup> 61 FR 38270 (July 23, 1996).

<sup>109</sup> 82 FR 17793 (April 13, 2017).

<sup>110</sup> Curt Wells, Director, Regulatory Affairs, The Aluminum Association (March 31, 2017), DOC-2017-0001-0101 available at: <https://www.regulations.gov/comment/DOC-2017-0001-0101>.

<sup>111</sup> *Id.*

should be able to conduct early work up until the piece of equipment is actually emitting. This includes laying underground piping, excavating, bringing in fill to prepare the area where the emission unit(s) will sit, and other efforts until the point prior to installing the emissions unit.”<sup>112</sup> Another commenter stated the following:

EPA should redefine the term ‘begin actual construction’ in 40 CFR 52.21(b) (11) to allow non-emitting activities (*e.g.*, pouring foundations, electrical preparations) to begin before the final permit is issued. We believe this would hasten the commencement of major projects as permit applicants would be willing to assume the risk of stranding an investment in some of these preparatory, non-emitting activities in order to mitigate the effects of a potential lost construction season.<sup>113</sup>

Finally, one commenter stated that “[g]iven the length of time it takes to be issued NSR [p]ermits, preconstruction activities on non-emitting activities can help expedite construction (particularly in parts of the country with severe weather) and should be allowed at the manufacturers’ own risk even though they may be related to the NSR affected emissions units.”<sup>114</sup>

Furthermore, during the public comment period for the March 2020 Memo, the EPA received a total of 44 comments either in support or opposition. Several commenters on the March 2020 Memo contended that the revised policy reflected in the March 2020 Memo should be adopted through the notice and comment rulemaking process and not in a guidance memorandum.<sup>115</sup> For example, one commenter argued the policy change in the March 2020 Memo would fundamentally change existing requirements governing

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<sup>112</sup> Kyle B. Isakower, Vice President, Regulatory and Economic Policy, American Petroleum Institute (March 31, 2017), DOC-2017-001-0126 available at: <https://www.regulations.gov/comment/DOC-2017-0001-0126>.

<sup>113</sup> Robert L. Stout, Jr. Vice President and Head of Regulatory Affairs, BP America, Inc. (March 31, 2017), DOC-2017-0001-0125 available at: <https://www.regulations.gov/comment/DOC-2017-0001-0125>.

<sup>114</sup> Leslie S. Ritts, Counsel, The National Environmental Development Association’s Clean Air Project (March 31, 2017), DOC-2017-0001-0161 available at: <https://www.regulations.gov/comment/DOC-2017-0001-0161>.

<sup>115</sup> Comment letters from the following: (1) Frank Kohlasch, Climate Director, Minnesota Pollution Control Agency (May 11, 2020); (2) David Baron, Attorney, Earth Justice. John Walke, Clean Air Director, Natural Resource Defense Council. Sanjay Narayan, Managing Attorney, Sierra Club Environmental Law Program (May 11, 2020); (3) Eric Stuart, Vice President, Environment Policy, Steel Manufacturers Association (May 11, 2020); and (4) Wayne Nastri, Executive Officer, South Coast Air Quality Management District (May 8, 2020).

when construction can begin on a major source project and therefore cannot be adopted without following the rulemaking procedures specified in CAA section 307(d).<sup>116</sup>

Another commenter urged the EPA “to update the interpretation of the regulatory definition of the term ‘begin actual construction’ in 40 CFR 52.21(b)(11) to allow owners/operators to engage in a broader range of preparatory activities they might desire to undertake for the purpose of ensuring projects are positioned to move forward in an expedient manner, prior to obtaining a New Source Review (NSR) permit.”<sup>117</sup> Several commenters on the March 2020 Memo also requested regulatory clarity on how to distinguish between an emissions unit and major stationary source.<sup>118</sup>

After considering these comments and whether the EPA could provide guidance on how to differentiate between an emissions unit and stationary source, rather than attempting to provide such guidance in a final version of the March 2020 Memo, the Agency is proposing to revise the regulations to more clearly distinguish between construction that is prohibited by the CAA without a permit and construction that is not. Revising the NSR regulations will enable the EPA to provide greater clarity on the construction activities that are permissible under the CAA prior to obtaining an NSR permit (or without such a permit) and address the longstanding concerns of stakeholders that considered the NSR regulations unnecessarily restrictive.

These proposed changes would better reflect the best reading of the statute (discussed in section III of this preamble) and effectuate congressional intent to preserve and maintain air quality while facilitating economic growth. Allowing owners or

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<sup>116</sup> Ursula Nelson and Ali Mirzakhali, Co-Chairs, NACAA Permitting and NSR Committee (May 11, 2020).

<sup>117</sup> James R. Plosay, Manager, Air Permits Program, Alaska Department of Environmental Conservation (April 17, 2020).

<sup>118</sup> Comment letters from the following: (1) American Chemistry Council, American Forest & Paper Association, American Fuel & Petrochemical Manufacturers, American Petroleum Institute, American Wood Council, National Oilseed Processors Association, Portland Cement Association, Air Permitting Forum, and Auto Industry Forum (May 11, 2020); (2) Ram Singhal, Vice President of Technology & Environmental Strategy, Flexible Packaging Association (May 11, 2020); (3) Alec Davis, Executive Director, Illinois Environmental Regulatory Group (May 11, 2020); (4) Catharine Fitzsimmons, Chief, Iowa Air Quality Bureau (May 11, 2020); and (5) Plastics Industry Association (May 11, 2020).

operators to engage in construction activities on components that do not emit or have the potential to emit a regulated NSR pollutant(s) (*i.e.*, are not pollutant-emitting activities) before or during the permit application process may help enhance the overall project planning and management process, expedite completion of construction projects, and streamline permitting to allow for faster timelines between construction and operation of a stationary source of air pollution. These flexibilities do not authorize permit writers to allow a constructed stationary source to emit more air pollutants than would otherwise be allowed under the terms of any NSR permit. The general public also benefits from the overall economic development that is promoted by enabling businesses wishing to invest in new projects to complete them more efficiently. For example, some owners or operators may seek to construct in locations where construction must be planned around seasonal conditions. If constructing something that does not emit air pollutants, the owner or operator might be able to complete that phase of the project before seasonal conditions preclude it and then complete the permitting process before starting on the equipment and components that emit air pollutants.<sup>119</sup>

The proposed changes also recognize that the NSR provisions in the CAA are not intended to regulate decisions by businesses to accept economic risk. This rulemaking proposes to enable owners and operators of stationary source to make their own decisions about the degree of economic risk they are willing to bear from the possibility that an NSR permit application is ultimately denied or the possibility that completed construction may need to be reworked to comply with the conditions in an issued permit.

The EPA's existing regulations attempt to delineate when on the continuum from planning to operation of a major emitting facility a permit is required. But the structure of

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<sup>119</sup> Permit applicants that choose to expedite projects by undertaking on-site construction activities that are allowed in advance of CAA permit issuance retain the obligation to follow a schedule that complies with other applicable laws that protect health and welfare, as discussed above.

these regulations, and their interpretations, has led to ambiguity and inconsistent results that the EPA seeks to eliminate in this proposed rule.

To do so, the EPA proposes to amend the NSR regulations to more clearly distinguish between things that are stationary sources and things that are not (answering the “what” requires a permit question described in section III of this preamble), rather than distinguishing between emission units and stationary sources. The EPA also proposes to more clearly identify “when” construction of that “what” begins.

In 1980, the EPA chose to identify “physical on-site construction” as the point on the continuum when the construction of stationary source begins and used that phrase (from the statutory definition of “commenced”) in the regulatory definition of “begin actual construction.” But not all physical on-site construction activities were prohibited – only physical onsite construction activities “on an emissions unit which are of a permanent nature.” Forty years later, in the March 2020 Memo, the EPA emphasized how this definition creates the need to distinguish between an “emissions unit” and a “major stationary source.” But the EPA’s existing NSR regulations define both a stationary source and an emissions unit as something that emits air pollutants. The definition of emissions unit is “any part of a stationary source that emits or would have the potential to emit any regulated NSR pollutant.”<sup>120</sup> The EPA defines a stationary source as “any building, structure, facility, or installation which emits or may emit a regulated NSR pollutant.”<sup>121</sup> Further, the EPA’s regulations define a “building, structure, facility, or installation” to include a collection of “pollutant-emitting activities” that meet three specific characteristics: all of the pollutant-emitting activities belong to the same

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<sup>120</sup> Definition of “Emissions unit” – 40 CFR 51.165(a)(1)(vii), 51.166(b)(7), and 52.21(b)(7).

<sup>121</sup> Definition of “Stationary source”—40 CFR 51.165(a)(1)(i), 51.166(b)(5), and 52.21(b)(5).

industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control).<sup>122</sup>

Given that all of these definitions include activities or things that emit air pollutants, the only unique feature in the definition of emissions unit is that it is a “part” of a stationary source (not the whole source). The current regulations do not anywhere suggest there could be a part of stationary source that is not an emissions unit. Under these regulations, something that does not emit is not an emissions unit or a stationary source. Therefore, it is understandable why commenters on the March 2020 Memo asked the EPA to provide more guidance to distinguish between an emissions unit and a stationary source. In addition, some comments on the March 2020 Memo indicated that the relevant provision that prohibits the construction of a stationary source does not use the term “emissions unit.” For these reasons, the EPA proposes to more clearly identify the characteristics of a stationary source and when construction of such a source begins, rather than attempting to further define an emission unit.

Because of the current form and function of the two existing definitions of “stationary source” and “building, structure, facility, or installation,” the EPA prefers adding a definition of “pollutant-emitting activities” over amending the definition of “emissions unit.” The existing definition of “emissions unit” serves an important function of distinguishing between new and existing emission units for purposes of determining how to calculate the increase in emissions from a modification to an existing source to determine if that modification requires a permit. The EPA is thus concerned that adding to that definition a list of construction-related activities that do not need an NSR permit prior to construction may have the unintended effect of causing confusion as to which

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<sup>122</sup> Definition of “Building, structure, facility, or installation”—40 CFR 51.165(a)(1)(ii)(A), 51.166(b)(6)(i), and 52.21(b)(6)(i).

projects require an NSR permit, rather than clarifying which construction-related activities constitute construction of a stationary source and which do not.

The proposed text identifies specific activities that are permissible without a permit but uses more general text to address activities that are prohibited. The EPA prefers this approach to ensure the regulations are adaptable to the broad range of stationary facilities across various industry sectors that may emit regulated NSR pollutants. However, the EPA is also considering whether to add more specific text to the NSR regulations to prohibit the construction of components that have characteristics unique to a source of air pollutants.

In the past, various stakeholders have submitted comments or requested further clarification on whether an industry-specific construction activity is allowed prior to “beginning actual construction” under the EPA’s NSR air permitting regulations. For example, the refinery industry has suggested “tie-ins” as an activity that should be allowed before a modification to an existing source needs to obtain an NSR permit. To address this concern, the EPA has included specific text in the proposed definition of “pollutant-emitting activities” to address this topic (*i.e., see (7.) in the proposed definition of pollutant-emitting activities*) and clarify that “tie-ins” can be undertaken prior to obtaining an NSR permit for a process that may be constructed at a later time. The EPA is soliciting comment on adding industry-specific activities, such as tie-ins, into the exclusion list to the definition and if any other industry-specific activities should be considered (*see section VI of this preamble*).

In the proposed revised definitions, the EPA’s focus is on whether “what” is being constructed is something that emits air pollutants and no longer focuses on whether the thing being constructed is permanent in nature or costly to change. The primary rationale that the EPA provided for the policy of requiring sources to obtain an NSR permit prior to undertaking any on-site construction activity “of a permanent nature” was first

articulated in the October 1978 Memo. There, the EPA expressed concern that it would be “extremely difficult to deny issuance of a permit when it results in a completed portion of a project having to remain idle.”<sup>123</sup> “Therefore,” the EPA reasoned, “in order to avoid any equity arguments at a later time, it is better to prevent any construction now rather than have a ‘white elephant’ on our hands later on.”<sup>124</sup> The EPA has since reiterated this position in subsequent guidance and a proposed rulemaking.<sup>125</sup>

Underpinning these concerns about an owner or operator being allowed to place “equity in the ground” by engaging in costly and permanent on-site construction activities prior to receiving an NSR permit is the presumption that, in doing so, the owner or operator would gain “leverage” in the permitting process. That is to say, in such circumstances, the permitting authority might feel compelled to issue a permit that was not as stringent in its terms as it otherwise would have been, or no permit at all.

However, in addition to not comporting with the best reading of the statute (as discussed in section III of this preamble), the EPA no longer believes that this original rationale provides a sound policy basis for precluding *any* activity “of a permanent nature” regardless whether that activity involves construction of something that emits air pollution. While the EPA’s concerns over potential “equity” arguments may have had supported the Agency’s policy at the inception of the NSR permitting program in 1978, when both the Agency and State permitting authorities lacked experience in implementing the program, the Agency does not believe that such concerns are currently

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<sup>123</sup> October 1978 Memo at 2.

<sup>124</sup> *Id.*

<sup>125</sup> *See, e.g.*, May 1993 Memo at 2 (A “permitting authority would be placed in a very difficult position when denying issuance of a permit when it results in a completed portion of a project having to remain idle.”); December 1995 Letter at 2 (“[A]bsent a prohibition on any costly, significant or permanent preconstruction,” sources could “defeat” the “preconstruction requirement or its enforcement by making a costly, substantial, and/or permanent investment” and then “later argue that retrofitting of PSD requirements or a denial of the permit would unreasonably interfere with their investment.”); 61 FR 38270 (“If . . . companies were given unlimited ability to place ‘equity in the ground’ by constructing plants before a permit is issued,” then a permitting authority’s “discretion in making permit decisions may be compromised” and the “ability of EPA and citizens to challenge the permit that is eventually issued may likewise be undermined.”).

warranted given that permitting authorities have been implementing the NSR permitting program for nearly 50 years. Several permitting authorities commented in support of this position in response to the March 2020 Memo. NSR permitting authorities must continue to apply the applicable permitting criteria (such as determining BACT and LAER) for a new or modified stationary source based on the permit application submitted, without regard to the preparatory activities an applicant may conduct on the site of the eventual stationary source. The EPA also received comments in response to the March 2020 Memo that doing otherwise would divest States of their responsibility for safeguarding natural resources within their borders. Importantly, the revisions being proposed in this action are not intended to, and should not be construed as, establishing any equity or reliance arguments on the part of owners, operators, or permit applicants in the permitting process. In all instances, owners or operators accept risk for the actions they may take in advance of obtaining a permit. Owners or operators cannot expect that any site activities prior to permitting will alter or influence the BACT analysis for an emissions unit or other elements of a permitting decision. Permit applicants that choose to undertake on-site construction activities in advance of permit issuance do so at their own economic risk that a permit may be denied or issued with unanticipated conditions on operations, potentially resulting in a lost investment or increased construction costs. In sum, the EPA's focus of the proposed revisions is on the best reading of the CAA and reflection of current source construction needs and expectations.

The revisions, if finalized, should also ensure that construction of stationary sources and pollutant-emitting activities are restricted until the permit authority has finalized the environmental safeguards required by the NSR program. Notably, to meet the requirements of the CAA, the permitting authority must retain the discretion to deny any subsequent NSR permit application to construct a stationary source of air pollution if the applicable criteria are not met. Since the EPA cannot foresee all situations when a

construction-related activity might constitute “begin[ning] actual construction” on a stationary source, the proposed rule, if finalized, is expected to afford reviewing authorities discretion to apply relevant provisions on a case-by-case basis. Reviewing authorities may consult with the EPA for case-by-case advice on applicability determinations. No matter how costly or permanent it may be, any on-site construction or preparatory activity that a permit applicant undertakes prior to receiving a final NSR permit remains a risk for the owner or operator. A permit applicant may not use time and resources expended on construction prior to obtaining an NSR permit to justify the reviewing authority decision on any applicable BACT or LAER determinations and/or to grant the final NSR air permit. Furthermore, if changes to the design of the permit applicant’s proposed stationary source are necessary to meet these control technology requirements or any other requirements of the permitting process (such as demonstrating that emissions from the stationary source will not cause or contribute to violations of air quality standards), the permitting authority may require the permit applicant to meet the requirements of such conditions in the final air permit, even if it means modifying or rebuilding permanent or costly structures that the permit applicant has built prior to obtaining a permit. As such, the EPA is requesting comment on whether regulatory text should be added to prohibit permitting authorities from considering economic losses from the permit applicant if a valid permit cannot be issued (*see* section VI of this preamble).

Permitting authorities must continue to apply the applicable permitting criteria to determine emissions limitations for a new proposed major stationary source or major modification based upon the BACT and LAER standards, without regard to the preparatory construction activities an applicant may conduct on the site. Accordingly, the permitting authority, in conducting an analysis of BACT and LAER should not include the cost of any adjustments or modifications to already constructed portions of the facility necessary to install any control device or technology when determining the cost of the

controls. Owners or operators will not be allowed and cannot expect that any preparatory construction activities prior to permit issuance will alter or influence the BACT and LAER analysis for the stationary source or any other elements of the permitting decision. An applicant cannot use equity and resources expended to claim cost infeasibility or otherwise influence the BACT or LAER determinations.

Considering this, these proposed revisions should not allow greater emissions of air pollution from the operation of new or modified stationary sources than under existing rules. The definitions proposed herein do not change any requirements of the NSR permit programs pertaining to the control of air pollutant emissions resulting from the construction or operation of stationary sources. The proposed revisions are also not intended to relieve owners or operators of stationary sources from the requirement to obtain permits for new construction or modifications. Rather, the purpose of the proposed rule is to streamline the ability of the owners and operators of stationary sources that already require NSR permits to meet construction milestones by clarifying activities that may occur without a permit before construction on a stationary source begins. In other words, the proposed revisions are intended to reduce overall regulatory burdens associated with delay without a corresponding increase in relevant emissions or reductions in air quality.

The EPA's implementing regulations at 40 CFR 51.166(a)(6) provide permitting authorities with approved PSD programs up to three years to submit any required revisions to the PSD program requirements in a SIP. While the EPA establishes regulations that set minimum national stringency standards, State, local, or Tribal governments are not restricted from considering revisions to their EPA-approved plans that may include setting more stringent rules to meet the needs of such State, local, or Tribal air quality programs.<sup>126</sup> The EPA is also soliciting comments on whether revisions

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<sup>126</sup> 40 CFR 51.165(a)(1) and 51.166(b).

to existing approved plans reflecting the proposed changes (if finalized) should be required and if this provision (40 CFR 51.166(a)(6)), which is only in the PSD regulations, should be added into the NNSR provision in 40 CFR 51.165 (*see* section VI of this preamble).

Under CAA section 110(l), the EPA may not approve a revision to a State plan “if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress.”<sup>127</sup> Since the proposed revisions do not affect emissions, revisions to State plans that incorporate the proposed changes are not expected to interfere with attainment or reasonable further progress and, thus, CAA section 110(l) should not be implicated in any forthcoming SIP submission. If these proposed regulatory changes are finalized, any revisions to the Federal PSD regulations will automatically apply to the EPA and all permitting authorities that implement a PSD program that does not reference 40 CFR 52.21 as of a specific date.<sup>128</sup> Similarly, Appendix S to Part 51 contains the NNSR program requirements applicable in Indian country and applicable to other areas designated as nonattainment where an NNSR SIP has not yet been approved by the EPA. Thus, if these proposed regulatory changes are finalized, any revisions to Appendix S will immediately apply, as of the effective date in the final rule, to the EPA and all permitting authorities who implement regulations pursuant to this Appendix.

## **VI. Request for Comments**

The EPA solicits comments on all aspects of this proposed action. In particular, the EPA seeks input on the following questions, which are not intended to preclude commenters from addressing other considerations. When addressing one of the particular questions below in a comment, or specific part of a comment, the EPA requests that commenters identify the question number to which they are responding.

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<sup>127</sup> 42 U.S.C. 7410(l).

<sup>128</sup> Where the EPA has only delegated authority to implement a date-specific version of 40 CFR 52.21, the delegation agreement would need to be updated to incorporate the revisions in this rulemaking.

*Question #1:* Are the proposed revisions appropriately aligned with other definitions within the NSR regulations, and might they have unintended impacts on other NSR requirements?

*Question #2:* Should the list of equipment, components, and processes excluded from “begin actual construction” and “pollutant-emitting activities” be included in the definitions of “emissions units” or “stationary source”? Which approach is preferable, and why?

*Question #3:* What additional activities should be included in the exclusion list for “begin actual construction” and “pollutant-emitting activities,” and what are the reasons for their inclusion?

*Question #4:* Are the proposed revisions too general or too specific? What suggestions do you have for enhancing clarity and certainty in these regulations?

*Question #5:* What industry-specific construction activities, such as refinery tie-ins, should or should not be allowed prior to the issuance of an NSR permit?<sup>129</sup> How might allowing these activities impact construction timelines, permitting timelines, regulatory compliance, enforcement, air pollution emissions, public health and welfare, and other permitting concerns for any industry sector?

*Question #6:* What are the expected economic benefits for industry (including small businesses) and for State and local economies of allowing specified construction activities to proceed prior to NSR permit issuance? Please provide supporting data and information that substantiates your response.

*Question #7:* Should the EPA add regulatory text to explicitly prohibit permitting authorities from considering economic losses for permit applicants if a valid permit cannot be issued? Should those economic losses include the cost of modifying or

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<sup>129</sup> Refinery “tie-ins” are connection points for new equipment or piping system to an existing refinery’s infrastructure. A “tie-in” does not involve any construction on an unpermitted emissions unit.

rebuilding specific facility components that were built without an NSR permit because they were initially considered not to generate or emit air pollutants but are later determined to require modification to enable the components or equipment that do produce emissions to meet NSR permitting requirements? Would such text help ensure that permitting authorities do not consider equity already invested or by permit applicants in determining the conditions in a permit or whether a final permit should be issued for a stationary source of air pollution or not?

*Question #8:* Should the EPA require revisions to existing approved plans to reflect any final revisions to the Agency's regulations if these proposed changes were to be finalized?

*Question #9:* Should the EPA's implementing regulations at 40 CFR 51.166(a)(6), which provide permitting authorities up to three years to submit required revisions to PSD program requirements in a SIP, be added to the NNSR planning requirement regulations in 40 CFR 51.165?

*Question #10:* Does the EPA articulate the best interpretation of the CAA in this proposal? Is there additional statutory text, history, or judicial precedent that the EPA should consider?

*Question #11:* Have any parties taken actions in reliance on the current regulations, and do such parties have interests that would be affected by the proposed changes?

## **VII. Statutory and Executive Order Reviews**

### *A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review*

This proposed action is a significant regulatory action that was submitted to the Office of Management and Budget (OMB) for review. Any changes made in response to Executive Order 12866 review have been documented in the docket. As discussed above, these proposed revisions should not allow greater emissions of air pollutants from the

construction, modification, or operation of new or modified stationary sources. The definitions proposed herein do not change any requirements of the NSR permit programs pertaining to the control of emissions resulting from the construction or operation of stationary sources. The proposed revisions are also not intended to relieve owners or operators of stationary sources from requirements to obtain permits for new construction or modification of a stationary source. Rather, the purpose of the proposed rule is to streamline the ability of the owners and operators of stationary sources that already require NSR permits to meet construction milestones by clarifying activities that may occur without a permit before construction on a stationary source begins.

*B. Executive Order 14192: Unleashing Prosperity Through Deregulation*

This proposed action would be an Executive Order 14192 deregulatory action. This proposed rule is expected to reduce burden by increasing flexibility to begin construction of non-emitting components or structures before an NSR permit is obtained.

*C. Paperwork Reduction Act (PRA)*

This proposed action does not impose any new information collection burden under the PRA. OMB has previously approved the information collection activities contained in the existing regulations and has assigned OMB control numbers 2060-0003 for the NSR permitting programs. The revisions to the regulations proposed in this action do not directly change any of the information collection activities previously approved by OMB.

*D. Regulatory Flexibility Act (RFA)*

I certify that this proposed action will not have a significant economic impact on a substantial number of small entities under the RFA. This proposed action will not impose any requirements on small entities. Instead, the proposed rule revisions expand the range of permissible construction on non-emitting components or structures, and provide opportunity for owners or operators to expedite construction timelines before obtaining

an NSR permit. This proposal also does not directly impose any requirements on the entities involved in these processes (including permitting authorities, permittees, and the members of the public). Owners or operators, at their own risk, may complete construction on non-emitting components or structures that might result in an economic impact. However, the revisions to the definition do not require any owners or operators to do anything additional before obtaining an NSR permit. As such, the EPA does not believe the increased flexibility to engage in some types of construction before obtaining an NSR permit will result in a significant economic impact on a substantial number of small entities.

*E. Unfunded Mandates Reform Act (UMRA)*

This proposed action does not contain an unfunded mandate of \$100 million or more as described in UMRA, 2 U.S.C. 1531-1538, and does not significantly or uniquely affect small governments. The proposed action imposes no enforceable duty on any State, local, or Tribal governments or the private sector. Nonetheless, if this rulemaking is finalized as proposed, the EPA expects that some authorized State, local, and Tribal reviewing authorities will want to revise their NSR permitting program provisions to incorporate the Agency's revised definitions. States that choose to revise their existing SIP-approved programs would need to submit a SIP revision to the EPA for review and approval.

*F. Executive Order 13132: Federalism*

This proposed action does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

*G. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments*

This proposed action proposes to revise regulations applicable to stationary sources in Indian country, but it does not have Tribal implications of the nature specified in Executive Order 13175. The proposed regulatory revisions do not impose substantial direct compliance costs on Tribal governments and do not preempt Tribal law. The EPA has reviewed this proposed rule in accordance with the requirements of Executive Order 13175 and has determined that this proposed rule, if finalized, will not have substantial direct effects on Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes. The EPA is currently the reviewing authority for most PSD and NNSR permits issued on Tribal lands. At this time, two Indian Tribal governments have approved TIPs that authorize the Tribe to administer the PSD and NNSR programs within their jurisdiction. The proposed revisions are not expected to impose direct burdens on Tribal authorities. Thus, Executive Order 13175 does not apply to this action. However, because of Tribal interest on this proposed rule and consistent with the EPA Policy on Consultation with Indian Tribes, the EPA will offer consultation with Tribes.

*H. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks*

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that the Agency has reason to believe may disproportionately affect children, per the definition of “covered regulatory action” in section 2-202 of the Executive Order. This action is not subject to Executive Order 13045 because it does not concern an environmental health risk or safety risk. Furthermore, since this action does not concern human health risks, the EPA's Policy on Children's Health also does not apply.

*I. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use*

This proposed action is not a “significant energy action” because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The purpose of this proposed rule is to provide additional flexibility for owners and operators to engage in construction on non-emitting components or structures before obtaining a final NSR permit and beginning actual construction of a stationary source of air pollution. The EPA does not expect these activities to adversely affect energy suppliers, distributors, or users.

*J. National Technology Transfer Advancement Act (NTTAA)*

This rulemaking does not involve technical standards.

**VIII. Statutory Authority**

The statutory authority for this action is provided by 42 U.S.C. 7401 *et seq.*

## **List of Subjects**

### *40 CFR Part 49*

Environmental protection, Administrative practice and procedure, Air pollution control, Indians, Indians-law, Indians-tribal government, Intergovernmental relations, New source review.

### *40 CFR Part 51*

Environmental protection, Administrative practice and procedure, Air pollution control, Intergovernmental relations, New source review, Preconstruction permitting.

### *40 CFR Part 52*

Environmental protection, Administrative practice and procedure, Air pollution control, Incorporation by reference, Intergovernmental relations, New source review, Preconstruction permitting.

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**Lee Zeldin,**  
Administrator.

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