New Source Review/Clean Air Act: U.S. Senator Markey Letter to U.S. EPA Questioning "Begin Actual Construction" Guidance

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The United States Environmental Protection Agency ("EPA") issued a September 2nd Interpretive Letter addressing the definition of "Begin Actual Construction" in the Clean Air Act New Source Review ("NSR") regulations.

The September 2nd letter revises EPA's view of the phrase "Begin Actual Construction" under the Clean Air NSR regulations.

United States Senator Edward Markey (D - Massachusetts) subsequently transmitted a September 25th letter to EPA Administrator Lee Zeldin stating in part:

…Your recent reinterpretation of the Clean Air Act's New Source Review (NSR) permitting requirements will translate to direct harm to human health here in the United States. By allowing pre-construction activities for major polluting facilities—including data centers and associated power generation infrastructure—to proceed without securing the air quality permits required under federal law, you are greenlighting irreparable harm to our air, environment, and local communities.

The Senator requests that EPA immediately suspend implementation of the guidance.

The September 25th letter also asks that by October 6th EPA describe how it intends to proceed with changes to the NSR Permitting Program, posing the following questions:

1. With respect to the NSR permitting program, what has changed, who approved it, and where is it written? Please produce the guidance and the approval record.
2. What law or rule lets construction start before air permits are issued? Please produce any legal analysis on which you are relying.
3. What counts as "pre-construction" under your approach? Please identify what EPA is allowing (and not allowing) before permits are issued.
4. Which projects have proceeded under this new approach so far? Please identify any projects, including their location, expected emissions, controls, and permit status.
5. How will the public find out and be heard before ground breaks? Will you post each decision and modeling files and allow a comment period? How does EPA's adoption of its new approach comply with the Administrative Procedure Act?

6. If pollution ends up higher than expected—or a project later triggers NSR—what happens? Will you stop operations, require retrofits, and assess penalties?

A copy of the September 25th letter can be downloaded here.