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New Source Review/Clean Air Act: Environmental Organizations Letter Challenging U.S. Environmental Protection Agency Guidance Addressing "Begin Actual Construction"

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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 revised EPA's view of the phrase "Begin Actual Construction" under the Clean Air Act NSR regulations.

The September 2nd letter arguably narrowed the scope of the phrase "begin actual construction."

Three environmental organizations transmitted an October 30th letter to EPA Administrator Lee Zeldin challenging the federal agency's September 9th press release announcing the position, stating in part:

... In reality, there is no new EPA guidance document or rule allowing pre-permit construction. The link to "new guidance" in the above quote takes the reader to a page that says EPA "is providing guidance on a case-by-case basis and intends to propose and finalize a rule in 2026 that would revise the definition of 'begin actual construction' in EPA's NSR regulations." EPA's intent to propose a new rule does not qualify as new guidance, and any case-by-case thoughts that EPA is providing is not nationwide guidance and does not have the force of law. Permitting authorities and permit applicants should not be misled into believing that EPA can weaken the Act's restrictions by issuing a press release or sending letters to permitting agencies.

The organizations transmitting the letter include:

- Earthjustice
- Natural Resources Defense Council
- Sierra Club

(Collectively, "Earthjustice").

Earthjustice further states that EPA does not have the authority to allow any substantial onsite construction to start on major new polluting facilities without permits mandated by the Clean Air Act. They argue that the Clean Air Act does not limit the requirement for a preconstruction permit to:

... only an 'emission unit' in isolation.

The Clean Air Act is noted to bar pre-permit construction of "a major emitting facility" and "new or modified major sources" as opposed to just emission units.

Additional points put forth in the letter include:

- In non-attainment areas pre-construction review must also weigh impacts from construction and location of the facility, as opposed to just the emission unit.
- A permitting agency in a non-attainment area must determine that the benefits of the proposed source significantly outweigh the environmental and social costs imposed as a result of its location, construction, or modification.
- In attainment areas, in advance of any public hearing on whether to grant a construction permit, the agencies must weigh impacts of growth projected for the area and of emissions from facility construction activity on the site.

Earthjustice argues that EPA's approach would unlawfully allow construction to commence at the facility site and for significant impacts to already occur before the required analyses have been conducted and subjected to a public hearing.

The rationale for pre-construction permitting is stated to also be designed to avoid bias in favor granting a permit merely because an applicant has already invested substantial time and money in site construction before the permitting decision.

A copy of the Earthjustice letter can be found [here](#).