New Source Review/Clean Air Act: Southern Environmental Law Center and Other Environmental Organizations Comment on Proposed EPA Rule Addressing "Begin Actual Construction"



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The Southern Environmental Law Center and 10 other environmental organizations submitted June 29th comments to the United States Environmental Protection Agency ("EPA") addressing the proposed rule entitled:

Begin Actual Construction in the New Source Review ("NSR") Preconstruction Permitting Program ("Proposed Rule").

See 91 Fed. Reg. 26,958.

The other environmental organizations joining the comments include:

- Food & Water Watch
- Environmental Protection Network
- Sierra Club
- Kentucky Resources Council
- Environmental Integrity Project
- Environmental Defense Fund
- Earthjustice
- Clean Air Council
- Clean Air Task Force
- Natural Resources Defense Council

(Collectively, "SELC").

The Proposed Rule distinguishes between construction of a stationary source and construction of non-emitting components or structures.

Specifically, the proposed rule addresses the definition of "begin actual construction" in the NSR regulations.

The Clean Air Act NSR constitutes a preconstruction permitting program that establishes and documents air pollution emission limits from “major” sources of air pollution. The NSR regulations include two permitting programs:

- Nonattainment
- Prevention of Significant Deterioration

EPA’s Proposed Rule distinguishes 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.

EPA argues that previous 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.

SELC states by way of introduction that the Proposed Rule is contrary to the language and purpose of the Clean Air Act, and is illegal and arbitrary. Further, the organizations argue that the Proposed Rule:

- Does not reflect the best reading of the Act.
- Contradicts, misapplies, and ignores governing provisions of the statute.
- Arbitrarily weakens EPA’s existing approach – stated to not go far enough to begin with.
- Contradicts and reverses over four decades of consistent agency practice.
- Provides no reasoned justification for departing from longstanding practice.
- Will accelerate the siting of harmful projects, including data centers and power plants, that would have a range of detrimental environmental and public health effects.
- Preconstruction permitting protects communities by ensuring full consideration of harms to the environment and public health before construction begins.
- Grants permitting authorities and the public the right to oppose siting of stationary sources in a given location.
- Would allow construction of buildings, foundations, concrete walls, utility infrastructure, and other facility components, all before any statutorily required preconstruction permit is obtained and without full consideration of the health, environmental, and community impacts of a project.

Key components of SELC’s comments include:

- OVERVIEW OF EPA’S PROPOSAL
- EPA’s Proposed Regulatory Language
- Asserted Statutory Authority
- EPA’S PROPOSAL IS CONTRARY TO THE LANGUAGE OF THE CLEAN AIR ACT
- The Act Requires a Permit for Construction of Industrial Plants, Not Just Pollutant-Emitting Activities
- The Act Requires Preconstruction Review of Alternative Sites, Processes, and Impacts, Not Just Emissions
- EPA’s Focus on Pollutant-Emitting Activities Conflicts with the Act’s Definitions of BACT and LAER; Allowing Expanded Pre-Permit Construction Would Undermine the Purpose and Function of the BACT Analysis Required by the Act, Altering or Even Foreclosing the Feasibility of Control Technologies
- The Act Requires a Permit Before Construction Starts
- EPA’s Proposal Illegally and Arbitrarily Weakens EPA’s Existing Limits on Pre-Permit Construction
- EPA’S PROPOSAL IS CONTRARY TO JUDICIAL INTERPRETATION OF “BEGIN ACTUAL CONSTRUCTION”
- EPA’S PROPOSAL IS CONTRARY TO THE REGULATORY HISTORY
- The Proposal Contravenes All Past EPA Regulations and Policy Guidance on “Begin Actual Construction”

- EPA's Draft 2020 Guidance and September 2025 Letter to Maricopa County Air Quality Department Are Unlawful and Represent a Stark Departure from Prior Agency Practice
- EPA IGNORES THE POLICIES BEHIND STATUTORY DESIGN AND ERRONEOUSLY JUSTIFIES THE PROPOSAL BASED ON REGULATORY UNCERTAINTY AND ECONOMIC GROWTH RATIONALES
- EPA's Conclusory, Unsupported Regulatory Uncertainty, Flexibility & Economic Growth Rationales
- EPA's Proposal Erroneously States that Concerns about Equity in the Ground are Unwarranted, and There is Ample Support to Show that EPA's Proposal Would Inject Bias into Permitting Decisions
- EPA'S PROPOSAL IS UNLAWFUL AND ARBITRARY
- EPA's Proposal Fails to Hew to Principles of Reasoned Decision-making
- EPA's Proposal Creates Obscurity Rather than Clarity
- EPA May Not Lawfully Finalize the Proposed Definition of "Begin Actual Construction" for the Tribal NSR Program
- THE PROPOSAL WOULD CAUSE HARMS AND DENY THE PUBLIC LAWFUL RIGHTS
- Through the New Source Review Program, Congress Granted the Public Numerous Meaningful Substantive and Procedural Protections Against Increases in Local Air Pollution
- The Proposal Would Result in More Air Pollution and Environmental and Health Harms
- The Proposal Would Cause More Air Pollution by Violating the Review-First Framework Required by Congress
- The Proposal Will Increase Harms to the Public from Construction and PreConstruction, Which Will No Longer Be Able to Be Reviewed, Mitigated, or Prevented by Permitting Authorities
- The Proposal Harms Communities and the Public by Severely Undermining the Procedural Protections of the Clean Air Act
- The Proposal Will Harm the Public by Allowing Construction Before Alternatives Are Considered
- The Proposal Will Accelerate Harmful, Unlawful Data Center Construction
- The Proposal Will Harm the Public's Reliance Interests
- Impacts on State and Local Economies
- EPA MAY NOT RELY UPON AN EXECUTIVE ORDER TO JUSTIFY A PROPOSED ACTION THAT PLAINLY CONTRAVENES THE REQUIREMENTS OF THE CLEAN AIR ACT
- EPA Must Withdraw the Proposal Because Executive Policy Preferences Like "Burden Reduction" and "Deregulation" are Not Lawful Grounds for Circumventing Clean Air Act Protections

A copy of SELC's comments can be found here.