UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

JOINT COMMENTS OF ENVIRONMENTAL AND PUBLIC HEALTH GROUPS[1] ON THE EPA CLEAN AIR ACT RULEMAKING PROPOSAL, "BEGIN ACTUAL CONSTRUCTION IN THE NEW SOURCE REVIEW (NSR) PRECONSTRUCTION PERMITTING PROGRAM," 91 FED. REG. 26,958 (MAY 13, 2026)

Submitted via email and regulations.gov on June 29, 2026 by
the Natural Resources Defense Council
Docket No. EPA–HQ–OAR–2025–0618

INTRODUCTION

On May 13, 2026, the U.S. Environmental Protection Agency ("EPA") published a Clean Air Act rulemaking proposal in the Federal Register, entitled "Begin Actual Construction in the New Source Review ("NSR") Preconstruction Permitting Program." *See* 91 Fed. Reg. 26,958 (May 13, 2026) ("Proposal"). The Proposal indicates that "EPA is proposing to revise the definition of 'begin actual construction' and add a new definition for 'pollutant-emitting activities'" in the Part 51 regulations. *Id.* at 26,960. EPA also proposes to "add the prohibition on beginning actual construction without a permit and relevant definitions to the NNSR applicability procedures" of Part 51. *Id.* "Finally, the EPA is proposing to revise the definition of 'begin construction' and 'commence construction' in the Tribal NSR regulations . . . 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." *Id.* The Proposal argues that "EPA is proposing revisions to the Agency's NSR air permitting regulations to remove . . . 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." *Id.*

EPA's Proposal is contrary to the language and purpose of the Clean Air Act, and it is illegal and arbitrary. The Proposal does not reflect the best reading of the Act. It contradicts, misapplies, and ignores governing provisions of the statute. And it arbitrarily weakens EPA's existing approach, that itself does not go far enough to begin with, because that approach also fails to reflect the best reading of the Act. The Proposal further contradicts and reverses over four decades of consistent agency practice, and EPA provides no reasoned justification for departing from longstanding practice. The Proposal would 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. It also grants permitting authorities and the public the right to oppose siting of stationary sources in a given location. EPA's Proposal would allow construction of buildings, foundations, concrete walls, utility infrastructure, and other facility components, all before any statutorily required

[1] The undersigned organizations are the Natural Resources Defense Council, Clean Air Task Force, Clean Air Council, Earthjustice, Environmental Defense Fund, Environmental Integrity Project, Kentucky Resources Council, Southern Environmental Law Center, Sierra Club, Environmental Protection Network, and Food & Water Watch ("Commenters").

preconstruction permit is obtained and without full consideration of the health, environmental, and community impacts of a project.

I. OVERVIEW OF EPA'S PROPOSAL[2]

A. EPA's Proposed Regulatory Language

In this Proposal, EPA is attempting to revise the definition of "begin actual construction" and add a new definition of "pollutant-emitting activities" to create a category of activities that facilities may undertake before obtaining an NSR air permit. *See, e.g.,* 91 Fed. Reg. at 26,969. In the Proposal, both "begin actual construction" and "pollutant-emitting activities" are terms "revised" or artificially created by EPA to allow some construction activities at major facilities without a preconstruction permit, in violation of the Clean Air Act. *Id.*

EPA proposes to define "pollutant-emitting activities" as including "any equipment or component in a process or operation that emits or has the potential to emit a regulated NSR pollutant" and includes a non-exhaustive list of processes or operations that would not be included in this definition, specifically:

> (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.

Id at 26,970. EPA also solicits comment on whether additional activities should be included in this exclusion list. *See infra* Section IX (providing a response to EPA Question #3). As EPA admits, "[t]he proposed text identifies specific activities that are permissible without a permit but uses more general text to address activities that are prohibited," though the Agency claims to be "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." 91 Fed. Reg. at 26,972.

[2] The section headers and internal references in these comments are intended to guide the reader, and do not limit the scope of the content of the comments. Additionally, while we include footnotes to cite to authorities where relevant throughout these Comments, we also submit several volumes of attachments/exhibits through regulations.gov and via email for ease of reference and to populate the record.

B. Asserted Statutory Authority

EPA claims Sections 110(a)(2)(C), 165, 172(c)(5),[3] 173, and 301(a)(1)[4] provide statutory authority for this Proposal but admits that "[t]hese provisions in the CAA require that States and the EPA regulate 'construction' of stationary sources of air pollution and prohibit 'construction' without a permit." 91 Fed. Reg. at 26,965; 42 U.S.C. §§ 7410(a)(2)(C), 7475(a), 7502(c)(5), 7503, 7601(a)(1). Notwithstanding this admission, EPA does not identify a statutory provision that specifically authorizes this Proposal. The closest EPA appears to get is Section 110(a)(2)(C), which the Agency says "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 [National Ambient Air Quality Standards (NAAQS)] are achieved.'" *Id*. at 26,965/2 (emphasis in original).

But that language provides no basis for allowing construction of any components of a major stationary source prior to obtaining an NSR permit. EPA's Proposal attempts to separate the statutory prohibition on construction into two parts, what the Clean Air Act requires a permit to construct, and when construction of that "what" begins. *Id.* at 26,967. EPA looks to Sections 165, 172(c)(5), and 173, and concludes that "the 'what' that the CAA requires a permit to construct is a stationary source that emits air pollutions in amounts greater than specified thresholds." *Id*. But the Agency provides no statutory authority for equating stationary sources with narrowly defined "pollutant-emitting activities."

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." *Id.* at 26,968. But the Agency acknowledges that "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." *Id*. To justify this Proposal, EPA selectively highlights one of multiple purposes included in the statute, 42 U.S.C. § 7470(3), and a couple of cases that discuss the NSR program generally, but none of these authorities remotely address this specific statutory interpretation issue. *See id*. EPA identifies *no* specific statutory authority that requires or authorizes what EPA is proposing, specifically to allow *any* construction activities except when construction begins on what the agency considers "pollutant-emitting activities."

II. EPA'S PROPOSAL IS CONTRARY TO THE LANGUAGE OF THE CLEAN AIR ACT (Response to EPA Question #10)

This Section demonstrates that EPA's present Proposal is contrary to the text of the Clean Air Act, and illegally and arbitrarily weakens EPA's existing approach that itself doesn't go far enough to begin with.

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[3] EPA initially appears to mistakenly refer to section 172(a)(5)—which does not exist—rather than 172(c)(5). 91 Fed. Reg. at 26,965.

[4] Though the proposal mentions section 301(a)(1) once, EPA provides no explanation for why this provision of the Clean Air Act provides statutory authority for this proposal. Nor could it, as section 301(a)(1) is merely the Act's Housekeeping Provision, which authorizes regulations "necessary to carry out [the Administrator's] functions under this chapter," but provides no substantive authority of its own.

A. The Act Requires a Permit for Construction of Industrial Plants, Not Just Pollutant-Emitting Activities

In seeking to limit the requirement for a preconstruction permit to only construction of pollutant-emitting activities, the proposed rule violates the plain language of the Clean Air Act. The Act's PSD provisions bar construction of "a major emitting facility" without a preconstruction permit, not just pollutant-emitting activities within such a facility. 42 U.S.C. § 7475(a). The Act defines "major emitting facility" as any of a number of listed types of "stationary sources" with the potential to emit 100 tons per year or more of any air pollutant, including a variety of industrial "plants" and "facilities," including (for example) kraft pulp mills, iron and steel mill plants, Portland Cement plants, petroleum refineries, phosphate rock processing plants, and "any other source with the potential to emit" 250 tons per year or more of any air pollutant. *Id.* § 7479(a). These terms plainly refer to industrial plants in their entirety.

Likewise, the Act's nonattainment new source review provisions require permits for "the construction and operation of new or modified major stationary sources." *Id.* § 7502(c)(5). None of these provisions limit the permitting requirement to construction of "pollutant-emitting activities" or even contain such a phrase. The statute refers to construction of sources and facilities. *See, e.g.*, *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 308–09 ("It is unlawful to construct or modify a 'major emitting facility' in 'any area to which [the PSD program] applies' without first obtaining a permit. [42 U.S.C.] §§ 7475(a)(1), 7479(2)(C).").

EPA thus lacks authority to let a company spend hundreds of thousands or even millions of dollars constructing an industrial plant without obtaining an NSR permit as long as the work does not involve construction of what the agency now considers a "pollutant-emitting activity." So adamant was Congress on this score that it required the Administrator to take measures "**to prevent the construction or modification of a major emitting facility** which does not conform to the requirements of this part **or which is proposed to be constructed** in any area" designated attainment or unclassifiable and not subject to a SIP that meets the requirements of Part C. 42 U.S.C. § 7477 (emphasis added). And Section 304(a)(3) of the Act authorizes citizen suits "against any person **who proposes to construct** or constructs any new or modified major emitting facility without a permit required under part C of subchapter I (relating to significant deterioration of air quality) or part D of subchapter I (relating to nonattainment)." *Id*. § 7604(a)(3) (emphasis added). Again, these statutory provisions refer to suits against construction of a major "emitting facility," not "pollutant emitting activities," and to barring "proposed" construction.

Nor is the term "stationary source" defined by reference to "pollutant-emitting activities." In 42 U.S.C. § 7602(z), Congress broadly defined "stationary source" to mean "any source of an air pollutant" except certain transportation and nonroad engines. As shown in 42 U.S.C. § 7479(a), Congress equated stationary sources to "plants" and "facilities." In 42 U.S.C. § 7602(j), Congress also equated the terms "major stationary source" and "major emitting facility." The "ordinary meaning of the term 'facility' is some collection of integrated elements which has been designed and constructed to achieve some purpose," not merely a single element or activity within a facility. *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 860 (1984).

Congress knew how to specify applicability of the Act to individual emission points and activities within a plant. For example, Section 179(b)(2) provides that "[i]n applying the emissions offset requirements of [Section 173] to new or modified sources or emissions units for

which a permit is required under [part D], the ratio of emission reductions to increased emissions shall be at least 2 to 1." 42 U.S.C. § 7509(b)(2). This passage shows Congress meant "sources" to constitute a facility, and contrasts that with "emissions units" with the disjunctive, "or." The Proposal fails to even discuss this statutory provision or grapple with its implications for the proposed exclusion; this demonstrates that the Proposal is arbitrary and capricious and does not represent the best reading of the Act. *See Loughrin v. United States*, 573 U.S. 351, 358 (2014) ("We have often noted that when 'Congress includes particular language in one section of a statute but omits it in another'—let alone in the very next provision—this Court 'presume[s]' that Congress intended a difference in meaning." (quoting *Russello v. United States*, 464 U. S. 16, 23 (1983)). Likewise, in Section 7511a(c)(7), the Act provides that whenever any change at a particular type of source "results in any increase (other than a *de minimis* increase) in emissions of volatile organic compounds from any discrete operation, unit, or other **pollutant emitting activity at the source**," the increase will "not be considered a modification" if certain conditions are met. 42 U.S.C. § 7511a(c)(7) (emphasis added). The Proposal fails to even discuss this statutory provision or grapple with its implications for the proposed exclusion; this further demonstrates that the Proposal does not represent the best reading of the Act and is arbitrary and capricious.

Similarly, Congress in 1990 added to the Nonattainment New Source Review section a special provision for offsetting emission increases "from rocket engine and motor firing . . . **at an existing or modified major source** that tests rocket engines or motors." 42 U.S.C. § 7503 (emphasis added). The foregoing provisions make clear that a "pollutant emitting activity" is not a "source" in and of itself, but rather something that happens **at** a source. The Proposal fails to even discuss this statutory provision or grapple with its implications for the proposed exclusion; this further demonstrates that the Proposal does not represent the best reading of the Act and is arbitrary and capricious.

The Act requires permits for construction or modification of new emitting facilities and sources—not individual or discrete units or emitting activities within such facilities and sources. 42 U.S.C. §§ 7475(a), 7502(c)(5), 7503(a). *See Loughrin,* 573 U.S. at 358.

Finally, we note that in *Chevron*, the Supreme Court upheld EPA's adoption of a plantwide definition of "source" for purposes of allowing netting of emission increases and decreases from different parts of the plant. *Chevron*, 467 U.S. at 842–866. Although the Supreme Court in *Loper* reversed *Chevron*'s analytical approach of deferring to EPA's reasonable statutory interpretation, it left *Chevron*'s outcome in place as statutory *stare decisis*. *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412 (2024). Moreover, in the 1990 amendments to the Act, Congress codified *Chevron*'s result by expressly authorizing netting of emissions increases within a plant. *See, e.g*., 42 U.S.C. §§ 7511a(c)(6). Congress thereby made clear that it meant a "source" for purposes of the NSR programs to encompass an entire plant. *See also infra* Section III.

B. The Act Requires Preconstruction Review of Alternative Sites, Processes, and Impacts, Not Just Emissions

The Proposal is also based on the false premise that the Act's NSR permit programs are concerned only with ensuring that emissions from "pollutant-emitting activities" meet the Act's emissions-related requirements, such as Best Available Control Technology ("BACT"), compliance with NAAQS and increments, Lowest Achievable Emissions Rate ("LAER"), and

offsets. In reality, the Act requires preconstruction review of not just emission controls and air quality impacts, but **also** of impacts of construction and location of the facility.

For a nonattainment NSR permit, the permitting agency must determine that "**an analysis of alternative sites, sizes, production processes,** and environmental control techniques for such proposed source demonstrates that **benefits of the proposed source significantly outweigh the environmental and social costs imposed as a result of its location, construction, or modification**." 42 U.S.C. § 7503(a)(5) (emphasis added). Thus, in deciding whether to issue a permit, and if so on what terms, the permitting agency must look not just at pollutant-emitting activities in isolation, but also at alternatives sites and the environmental and social costs imposed due to the source's location and construction. The requirement for such analyses would be flouted if the owner could start major construction work at its preferred location before the permitting agency completed its analysis of alternative sites, sizes, and processes, along with the environmental and social costs imposed as a result of its location and construction. The inclusion of these requirements clearly shows that Congress meant for the permitting process to address more than just emissions from pollutant-emitting activities, and that a thorough analysis of siting impacts (**beyond** just air quality) be completed and the permit issued before any construction could be commenced at the applicant's preferred site location. Further, the statute's language forecloses any suggestion that the required analyses can somehow be limited to pollutant-emitting activities. Among other things, the analysis must consider alternative "sites," "sizes," and "production processes," as well as environmental and social costs imposed as a result of the source's location, construction, or modification. *Id*.

Likewise, for PSD permits, no major facility may be constructed unless "there has been an analysis of any air quality impacts projected for the area as a result of growth associated with such facility." *Id.* § 7475(a)(6). The growth referred to here is not growth due to new direct emissions from the proposed facility (which is addressed elsewhere in the statue). Rather, the reference is to population and industrial growth in the area that is expected due to the increase in jobs, traffic, and economic activity generated by locating a major new source or facility in the area. *See, e.g.*, 40 C.F.R. § 51.166(o).[5] The Act also requires EPA to adopt rules for PSD permitting that must require, among other things, "an analysis of the …**terrain, soils and vegetation, and visibility at the site of the proposed major emitting facility and in the area potentially affected by the emissions** from such facility for each pollutant regulated under this chapter which will be emitted from, **or which results from the construction or operation of, such facility**, **the size and nature of the proposed facility**… and such other factors as may be relevant in determining the effect of emissions from a proposed facility on any air quality control region." 42 U.S.C. § 7475(e)(3)(B) (emphasis added). Further, "[t]he results of such analysis **shall be available at the time of the public hearing on the application for such permit."** *Id.* § 7475(e)(3)(C) (emphasis added). Interested persons must be allowed to submit oral or written presentations on, among other things, **"alternatives"** to the proposed source. *Id.* § 7475(a)(2) (emphasis added); *see also* 40 CFR § 51.166(q)(2)(v).

Further, Congress conditioned construction on a prior showing "that emissions **from construction or operation** of such facility **will not** cause, or contribute to, air pollution in excess of any" NAAQS or increment. 42 U.S.C. § 7475(a)(3) (emphasis added). In other words,

[5] *See also* U.S. EPA, New Source Review Workshop Manual at D.9 (Draft October 1990) ("NSR Workshop Manual").

Congress wanted a preconstruction assurance that the construction process itself would not cause or contribute to air quality violations—a requirement that would be flouted by allowing a facility to wait until after completion of most construction before doing the required air quality analysis.

Thus, Congress required a review of the potential impacts of construction at the facility site itself, of the size and nature of the proposed facility, of population and industrial growth expected due to the facility's siting, and alternatives to the proposed source. It further required that information on the foregoing be a subject for the public hearing preceding the permitting decision. The statutory language plainly requires that these matters will be reviewed and considered by the permitting authority before a permit is issued and before construction starts on any part of the facility. Yet the proposed rule would unlawfully allow construction to commence at the facility site, and for a substantial portion of its impacts to already occur before the required analysis has been conducted and subjected to permitting authority review, preparation of a draft permit for public comment, and a public hearing about the draft permit and proposed construction. For all these reasons, EPA is wrong in asserting that its proposed rule would still ensure the "the same degree of public health and welfare protection provided through the NSR permitting requirements." 91 Fed. Reg. at 26,960/2. To the contrary, the Proposal would allow substantial facility construction to proceed without first undergoing the review of air quality, environmental, growth, and other impacts that the same construction must now undergo and address before being allowed to proceed.

All of the above arguments about the aforementioned statutory provisions were presented to the Agency previously, when EPA in 2020 planned to authorize unlawful construction to commence prior to obtaining required preconstruction permits under the Act.[6] And yet the Proposal ignores these previously submitted arguments about relevant statutory language. This shows further that the Proposal does not represent the best reading of the Act and is arbitrary and capricious.

In sum, EPA cannot, consistent with the Act, allow any construction activity with respect to any part of a major source or facility before a preconstruction permit has been issued for the entire source or facility. The statute in no way limits the required reviews of alternatives and additional impacts to just pollutant-emitting activities, a phrase that appears nowhere in the pertinent statute. Moreover, EPA's proposed rule would impermissibly render such required reviews pointless by allowing construction of the vast majority of a facility before the reviews are conducted.

C. 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

EPA's focus on "pollutant-emitting activities" erroneously presupposes that emissions from such activities are not impacted by the design of the rest of a plant. The Proposal violates the Clean Air Act because the Act prohibits granting a PSD permit unless "the proposed facility

[6] Letter from Earthjustice, NRDC & Sierra Club, to New Source Review Grp., U.S. EPA (May 11, 2020) (commenting on Draft Memorandum from Anne L. Idsal to Reg'l Air Div. Dirs., Interpretation of "Begin Actual Construction" Under the New Source Review Preconstruction Permitting Regulations (Mar. 25, 2020)), https://www.regulations.gov/document/EPA-HQ-OAR-2025-0618-0014; *see infra* Part IV.B.1.

is subject to the best available control technology for each pollutant subject to regulation under this chapter emitted from, or which results from, such facility." 42 U.S.C. § 7475(a)(4). The Act defines BACT as:

> an emission limitation based on the maximum degree of reduction of each pollutant subject to regulation under [the Act] emitted from or which results from any major emitting facility, which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such facility **through application of production processes and available methods, systems, and techniques.**

Id. § 7479(3) (emphasis added).

EPA's NSR Workshop Manual[7] explains that control mechanisms may be either (1) "*Inherently Lower-Emitting Processes/Practices*, including the use of materials and production processes and work practices that **prevent** emissions and result in lower 'production-specific" emissions;' (2) "*Add-on Controls*, such as scrubbers, fabric filters, thermal oxidizers and other devices that **control** and **reduce** emissions after they are produced;" or (3) a combination of the two mechanisms.[8]

Thus, the BACT analysis extends to production processes to reduce emissions that have the effect of reducing emissions, not just pollutant-emitting activities. Moreover, either process-driven or add-on control mechanisms sometimes require specific features in a building footprint or shell or in the utility infrastructure. In evaluating an applicant's BACT analysis, a permitting agency may find that additional emissions control mechanisms are necessary. However, if those non-emitting components are constructed before the agency and the public have evaluated the sometimes-complex BACT analysis conducted by the permit applicant, that construction could physically and economically limit feasible control options. As a result, facilities could circumvent BACT requirements through pre-permit construction.

The federal Environmental Appeals Board ("EAB") has long recognized that the "required use of BACT to minimize emission of air pollutants" is central to the Clean Air Act's PSD program. *In re General Motors, Inc.*, 10 E.A.D. 360, 363 (EAB 2002) (citing *In re Steel Dynamics*, 9 E.A.D. 165, 172 (EAB 2000); *In re Encogen Cogeneration Facility*, 8 E.A.D. 244, 247 (EAB 1999)). "The BACT analysis is one of the most critical elements of the PSD permitting process," and "the permitting authority's analysis must in all circumstances give effect to the purpose of BACT, which is to promote the use of the best technologies as widely as possible." *Id.* at 363–64 (internal citations omitted). Thus, by enabling construction that fundamentally changes BACT analyses, the Proposal undercuts the entire PSD program.

EPA has long prescribed a rigorous process to identify BACT. It can be the case that applicants do not identify the required control measures, with the results of the BACT analysis later corrected by the permitting agency, sometimes with the help of public comments that raise

[7] Although styled a draft, the NSR Workshop Manual was never finalized but has been consistently used by EPA and state agencies.
[8] NSR Workshop Manual at B.10 (emphases added).

errors in the analysis. Therefore, the NSR permitting process must not allow pre-permit construction because that can alter the feasibility of available control technologies.

What follows is a description of the BACT analysis methodology, which is integral to NSR permits; the relevance of implementation costs; and a brief overview of how pre-permit construction of non-emitting components could impede implementation and alter the feasibility of both production processes and techniques that reduce emissions and add-on emission control technologies. Commenters then explain why the Proposal's repeated refrain of the developer assuming the economic risk of the potential need to change already built structures would not effectively preserve the integrity of the BACT requirement.

1. Identifying BACT for a facility that would be a major source of emissions requires a rigorous BACT analysis as part of the NSR permitting process.

The Clean Air Act, specifically the PSD program, prohibits construction of any major emitting facility to which the program applies unless "the proposed facility is subject to the best available control technology for each pollutant subject to regulation under this chapter emitted from, or which results from, such facility." 42 U.S.C. § 7475(a)(4). The covered pollutants are the "regulated NSR pollutants," defined at 40 CFR § 52.21(b)(50), including nitrogen oxides, fine particulate matter, sulfur dioxide, and other pollutants known to cause health and environmental injuries.

Thus, to maintain the integrity of the PSD program, the permitting agency and the public must be able to ensure that the applicant properly follows the EPA's process to determine BACT. Ultimately, the integrity of the Clean Air Act depends on the final NSR permit requiring the facility to install the emissions control mechanisms identified through the EPA's methodology. As apparent from the description below, the analysis requires expertise, and therefore BACT might be correctly identified only after the applicant's conclusions are rigorously vetted by the permitting agency and the public.

Over 35 years ago, EPA guidance established the top-down BACT analysis methodology used to this day.[9] EPA's NSR Workshop Manual set forth the following five steps for conducting the top-down method:

1. "Identify All [available] Control Technologies,"[10]
2. "Eliminate Technically Infeasible Options,"[11]
3. "Rank Remaining Control Options by Control Effectiveness,"[12]
4. "Evaluate [the] Most Effective Controls and Document Results,"[13] and
5. "Select BACT."[14]

[9] Memorandum from John Calcagni to Directors, EPA Air Quality Management Division, Transmittal of Background Statement on "Top-Down" Best Available Control Technology (BACT) (June 13, 1989), https://www.epa.gov/sites/default/files/2015-07/documents/topdawn.pdf [hereinafter 1989 EPA BACT Guidance].
[10] NSR Workshop Manual at B.6–7.
[11] *Id.* at B.6.
[12] *Id.*
[13] *Id.*
[14] *Id.*

Understanding common points of failure in a BACT analysis helps demonstrate why a proper interpretation of the NSR process does not allow any pre-permit construction, and why that could interfere with the selection of control technologies. To complete Step 1, the analyst must apply the "broadest sense" of availability, *see In re Knauf Fiber Glass*, *GmbH*, 8 E.A.D. 121, 129–30 (EAB 1999), and understand the technology well enough to effectively identify comparable facilities.

Step 2 is more involved, requiring the applicant to first determine if a control technology has been demonstrated in practice at a similar source to be successful at controlling a type of emission.[15] Sometimes an applicant or reviewer ends the Step 2 analysis there. However, EPA has long been clear that technology need not be demonstrated in practice. Instead, Step 2 next requires the analyst to ascertain whether a control technology is "available" and "applicable."[16] Technology is considered "available" if it is commercially available. If the technology is "soon to be deployed (e.g., is specified in a permit) on the same or a similar source type," EPA considers it to be "applicable," regardless of whether the facility has been built.[17]

Public comments have identified errors in proposed NSR permits in which BACT analyses improperly eliminated options at Step 2 because technologies were not yet demonstrated in practice. In one such project, the permit for a proposed Allegheny Energy Center in Pennsylvania was appealed in part because of a faulty BACT analysis, and the applicant ultimately withdrew the permit application.[18] The permit for a power plant in Homer City, Pennsylvania is currently being challenged, in part for a similar BACT error.[19]

However, if options are effectively foreclosed before the public comment period because permitting focuses exclusively on pollutant-emitting activity, that would create a disincentive to public participation, reducing the likelihood of such errors being caught, and resulting in a violation of the Act's NSR permitting requirements for BACT.

Permit appeals that remanded permits for BACT errors highlight the importance of refraining from any construction that could prematurely limit feasibility of installing pollution controls required to achieve BACT. For example, the Fifth Circuit heard a dispute regarding whether the Texas Commission on Environmental Quality ("TCEQ") erred by permitting higher NO_x and CO limits as BACT for the Port Arthur LNG plant than had been permitted for the Rio Grande LNG plant (which would have used identical compressors); TCEQ argued that because the Rio Grande plant was never constructed, the limits were not achieved in practice. *Port Arthur Cmty. Action Network v. Texas Comm'n on Env't Quality*, 147 F.4th 560, 564 (5th Cir. 2025).

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[15] Letter from David Garcia, EPA, to Tonya Miller, TCEQ, TCEQ Docket 2021-0942-AIR and SOAH Docket 582-22-0201 on Initial Application for Permit Nos. 158420, PSDTX1572, and GHGPSDTX198 for the Port Arthur LNG, LLC – Port Arthur LNG Facility in Jefferson County, Texas, Enclosure, at 4 (Aug. 31, 2022) [hereinafter "2022 TCEQ Letter"], https://www.epa.gov/system/files/documents/2022-09/2022%20BACT%20Clarification.pdf.
[16] *Id.* at 4.
[17] *Id.*
[18] Env't Integrity Project, *Protecting Communities, Groups Defeat Dirty Gas-Fired Allegheny Energy Center* (Nov. 13, 2023), https://environmentalintegrity.org/news/protecting-communities-groups-defeat-dirty-gas-fired-allegheny-energy-center/.
[19] Notice of Appeal, Clean Air Council v. Pa. Dep't of Env't Prot., No. 2025-135-L (Pa. Env't Hearing Bd. Dec. 18, 2025), https://cleanair.org/wp-content/uploads/Notice-of-Appeal__Plan-Approval-No.-32-00457A.pdf.

Another example is the EAB's remand of the PSD permit for *In re Steel Dynamics* because the Indiana Department of Environmental Management selected combustion controls as BACT for NO_x emissions from a reheat furnace without thoroughly analyzing the cost-effectiveness (part of Step 4) of a selective catalytic reduction system ("SCR") in its BACT analysis. 9 E.A.D. 165, 165 (EAB 2000) As described in the subsections below, switching to an SCR as BACT could require a significantly different construction footprint and infrastructure, and allowing pre-permit construction by the steel company would have fundamentally altered the analysis of cost-effectiveness.

The Clean Air Act cannot function without a proper BACT analysis. The requirements are not a suggestion. "'[T]he existence of a similar facility with a lower emissions limit creates an obligation for the permit applicant and permit issuer to consider and document whether the same emission level can be achieved at the proposed facility.'" *In re Miss. Lime Co.*, 15 E.A.D. 349, 365, 366 (EAB 2011) (quoting *In re Indeck-Elwood, LLC*, 13 E.A.D. 126, 183 (EAB 2006)). Congress did not contemplate a facility evading required, lower emissions limits by virtue of pre-permit construction rendering a control technology infeasible. Moreover, the potential impacts of undermining the BACT determination process would undermine the intent of the Clean Air Act in ways that stretch far beyond an individual permit. "Congress intended BACT to perform a technology-forcing function," improving emissions control technology over time.[20]

2. *Pre-permit construction of building shells, utility infrastructure, and other "non-emitting" components could significantly increase the costs of some control technologies, causing them to be eliminated from consideration as BACT because they would be deemed infeasible or not cost-effective.*

After technological feasibility is established, Step 4 of the top-down BACT analysis examines "collateral energy, environmental, and economic impacts . . . beginning with the 'top' control option. Consideration of these collateral impacts 'operates primarily as a safety valve whenever unusual circumstances specific to the facility make it appropriate to use less than the most effective technology.'" *In re Knauf Fiber Glass*, 8 E.A.D. at 131 (citing *In re Columbia Gulf Transmission Co.*, 2 E.A.D. 824, 827 (Adm'r 1989)).

Thus, a control technology may be eliminated as BACT at Step 4 of the analysis if the economic impacts analysis indicates that the control is not cost-effective.[21] The NSR Workshop Manual provides two measures of cost-effectiveness, both of which are used to determine economic impacts. The first is the average cost-effectiveness, which is the "total annualized costs of control divided by the annual emission reductions."[22] Next is the incremental cost-effectiveness, which calculates the cost-per-ton of additional emissions reductions achievable by adopting the next most stringent control mechanism.[23] The incremental cost is calculated as the difference in annual costs of two control technologies divided by the difference in annual tons of controlled emissions between those control technologies.[24]

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[20] 1989 EPA BACT Guidance, at 5.
[21] NSR Workshop Manual at B.32.
[22] *Id.* at B.36.
[23] *Id.* at B.41.
[24] *Id.* at B.41–44.

"The principal purpose of the cost analysis is to determine if there are significant cost differences between the applicant and other sources that have adopted the control technology under review." *In re General Motors*, 10 E.A.D. at 365 (citing NSR Workshop Manual at B.31). The analysis also examines whether "costs of pollution removal are disproportionately high when compared to the cost of control for that particular pollutant and source in recent BACT determinations." *Id.* (quoting NSR Workshop Manual at B.32). Thus, even if a control technology is BACT for similar sources, there may be an exception for a particular source if factors that make the cost of implementation at that source excessive, rendering it economically infeasible. "Cost effectiveness (dollars per ton of pollutant reduced) values above the levels experienced by other sources of the same type and pollutant, are taken as an indication that unusual and persuasive differences exist with respect to the source under review."[25]

However, the Proposal could drive up the costs of installing a control if the control requires different infrastructure or a larger footprint than resulting from construction conducted before the NSR permit is issued and the BACT analysis completed. A control technology may have been BACT absent the existing construction, but if installation requires demolition and rebuilding of existing construction, that could significantly increase both the average annualized cost and the incremental cost of using that control mechanism at the source under review. The cost at that new source would be "disproportionately high when compared to the cost of control for that particular pollutant and source in recent BACT determinations," and the source operator would be allowed to employ a less stringent control.[26]

Each subsequent source constructed under the Proposal could bring about similar, harmful outcomes if project developers consistently **and strategically** choose to construct non-emitting components with configurations that increase the cost of installing the more effective control measures. The Proposal gives no consideration to this eventuality and the incentives that the Proposal actively creates for site developers to engage in such gamesmanship of staged construction and the NSR permitting requirements. As a result, an exception for unusual circumstances would instead become the rule, undermining the purpose of the legally required BACT analysis: the most effective, feasible control of emissions and technology-forcing implementation. Such a result violates the Clean Air Act.

3. A legally-sound BACT determination requires consideration of alternative production processes and other features inherent to the construction of non-emitting components.

The definition of BACT makes clear that BACT can include inherently lower polluting "production processes"—not just emission controls. 42 U.S.C. §7479(3).[27] For example, BACT for CO_2 emissions can include a more energy efficient production process that would reduce emissions from fossil fuel onsite power generation.[28]

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[25] NSR Workshop Manual at B.31–32.
[26] *See id.* at B.32.
[27] NSR Workshop Manual at B.10, B.13–16.
[28] *See, e.g.*, U.S. EPA, PSD and Title V Permitting Guidance for Greenhouse Gases 30–31 (March 2011) [PSD Guidance for GHGs]; *see also In re Knauf Fiberglass, GMBH*, 8 E.A.D. 121, 129 (EAB 1999).

EPA's PSD Guidance for GHGs explicitly states that:

> In circumstances where there are varying configurations for a particular type of source, the applicant should include in the application a discussion of the reasons why that particular configuration is necessary to achieve the fundamental business objective for the proposed construction project. The permitting authority should determine the applicant's basic or fundamental business purpose or objective based on the record in each individual case.[29]

The permitting agency may consider "options that would change aspects (either minor **or significant**) of an [applicant's] proposed facility design in order to achieve pollutant reductions" if the changes do not "fundamentally redefine the nature of the source" by changing "the applicant's purpose or objective for the proposed facility."[30]

The permitting agency thus needs to carefully review "the applicant's proposed design in order to discern which design elements are inherent for the applicant's purpose and which design elements may be changed to achieve pollutant emissions reductions without disrupting the applicant's basic business purpose for the proposed facility."[31] This is not a casual inquiry. There are numerous potential design changes to the non-emitting structures in a major stationary source that could increase process- and energy-efficiency, thereby reducing emissions. Any of these changes may therefore be BACT. This legally required review must occur before construction of non-emitting components because such review must include evaluating the primary design of the facility, including its layout. If the permitting agency finds that alterations to the design would reduce emissions without fundamentally redesigning the source or by changing its primary purpose, then those changes are BACT. Unless the applicant can provide a compelling reason, such as atypical implementation costs unique to that particular source, as discussed in the above subsection, then the more efficient design is legally required as BACT.[32]

One example of the facility design and layout itself potentially being BACT is in the production of iron and steel products. There, metal is often heated, undergoes a process, and then needs to be reheated. The reheating process is energy intensive. Measures that reduce the amount of time and distance the metal must travel to reach the reheater could significantly reduce how much it cools before reheating, thereby lowering the energy consumed by the reheating process and the corresponding emissions. Material scientists have identified multiple ways to significantly improve efficiency and reduce heat loss during steel processes, including using continuous casters.[33] Some of the methods could require changes to a facility's design and layout, altering the necessary building shell.[34]

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[29] PSD Guidance for GHGs at 27.
[30] *Id.* at 26 (emphasis added).
[31] *Id.*
[32] *See id.*
[33] *See generally* Jiacheng Cui, *et al.*, *Research Progress on Energy-Saving Technologies and Methods for Steel Metallurgy Process Systems—A Review*, 18 Energies 2473 (2025).
[34] *See id.*

Data centers with behind-the-meter energy generation may also have the potential for significant efficiency improvements from non-emitting components selected as BACT. Under the Proposal, the GPUs, data storage, and layout of the data center portion of the facility could be installed before a final BACT analysis. Yet, inherently lower energy processes and non-emitting equipment might be available and required as BACT since they may reduce emissions while preserving the applicant's purpose and objectives for the project. However, the permitting agency's related BACT analysis would be fundamentally constrained, and multiple options rendered infeasible if pre-permitting of non-emitting components were allowed.

Overall, the BACT definition shows that Congress intended the permitting process to focus not just on pollutant-emitting activities, but also on production processes and systems at a plant. Therefore, the definition of BACT further forecloses EPA's proposal to require permitting only prior to construction of pollutant-emitting activities. Congress plainly directed that the BACT analysis and determination be made **before** construction. 42 U.S.C. § 7475(a).

Under EPA's Proposal, a source could defer conducting its BACT analysis until after most or all of a plant's production processes and systems are built already. The Proposal does not remedy this problem by stating that the source owner proceeds with such construction at its own risk. *See, e.g.*, 91 Fed. Reg., at 26,969, 26,971-73; *infra* Section II.C.5. As discussed below, by the time the permitting authority has determined that BACT is a different type of production process than the one already built, the BACT mandate and ban on pre-permit construction will have been violated already.

Similarly, for nonattainment NSR, the Act requires proposed sources to comply with LAER, defined as the more stringent of the most stringent SIP emission limitations for such class or category of source and the most stringent emission limitation achieved in practice by such class or category. 42 U.S.C. §§ 7501(3), 7503(a)(2). The Act further defines "emission limitation" as a requirement "which limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis, including any requirement relating to the operation or maintenance of a source to assure continuous emission reduction**."** *Id.* § 7602(k). LAER thus encompasses process modifications as well as add-on emission controls.[35] And as previously noted, an NNSR permit cannot be issued unless "an analysis of **alternative sites, sizes, production processes**, and environmental control techniques for such proposed source demonstrates that benefits of the proposed source significantly outweigh the environmental and social costs imposed as a result of its location, construction, or modification." 42 U.S.C. § 7503(a)(5) (emphasis added). Thus, consideration of alternative plant sites, sizes, and production processes is integral to the NNSR permitting process and must occur before a construction permit can be issued. These requirements would be flouted by allowing construction of all components of a plant, other than pollutant-emitting activities, before a permit is issued.

4. Several control technologies may require significantly larger or otherwise different physical footprints and utility hookups than would be constructed before the permitting agency finalizes the BACT analysis.

The physical realities of pollution control mechanisms mean that pre-permit construction of non-emitting units could interfere with the installation and implementation of many air

[35] NSR Workshop Manual at G.3.

pollution control mechanisms, making their use infeasible as BACT. These constraints include the physical footprint required, limited ability to route ducts carrying emissions to control devices, and incompatible utility infrastructure.

Air pollution control mechanisms typically require space within a building's shell to accommodate the control device itself, the installation of additional components, and maintenance access. Such devices necessary to control emissions include baghouses for particulate matter, selective catalytic reduction ("SCR") units for nitrogen oxides, and thermal oxidizers for volatile organic compounds, plus flares, etc. These devices all require physical footprint at a facility in addition to the emissions units they are intended to control. These control devices vary significantly in size as well as how they integrate into their controlled emission unit depending on the emissions characteristics of the specific emissions unit that each is meant to control and the quantity of emissions they are intended to control.

In addition to the required space for the control device itself, some controls need additional equipment for proper operation. For example, SCR requires additional tankage to hold the aqueous ammonia critical to the functionality of the control system. If a facility needs to increase the capacity of its SCR system, it may no longer have adequate space for a larger ammonia tank. Additionally, if this tank is not considered an emissions unit, it could, hypothetically, be constructed prior to the permit being issued. Should this happen, it would heavily pressure the regulator not to require any adjustments that may cause the tank to be torn down and rebuilt at a larger size even if the adjustments should have been required after the BACT analysis was finalized.

An operator might even conduct a faulty BACT analysis leading to the mistaken conclusion that no pollution controls are technically feasible for a particular emissions unit. Then they would leave no space for any control equipment within a building shell. This puts undue pressure on the regulator to accept the control technology (or lack thereof) proposed in the permit application stage, regardless of the appropriateness of that technology as BACT. Otherwise, the permitting agency would cause the applicant to incur significant extra costs rebuilding to accommodate the space requirements for what may be *legally required* control technologies. Essentially, locking a project into a specific footprint also locks in the control that the developer initially planned, even if that option would not have been BACT.

Other space considerations include the need for room for the control devices to be accessed, inspected, maintained, and repaired by a facility's staff. Even if a piece of control equipment that was required to be resized after regulatory review could physically fit in the originally designed footprint, there may be inadequate space for maintenance access. If this space was already constructed and no longer able to be adjusted without significant expense, the larger equipment could be installed but leave significantly less access space than would have otherwise been provided, making it both difficult to maintain the control equipment and potentially posing an increased safety risk to the facility employees.

Additionally, adequate headspace is required to route an individual process to either its own dedicated control systems or to a unified group control system. This is the case for many VOC emissive processes, or smaller combustion-related processes that vent to a unified stack. Commenters have seen this limitation preventing controls for some processes in facilities that are

already constructed, including the Synthomer facility in Pennsylvania.[36] Adequate space within the plant did not exist to route batch resin processes to a unified control device with centralized continuous emissions monitoring systems, leaving numerous processes without effective emission controls. The preconstruction permitting stage is the best time to avoid such constraints but can be effective only if the review is conducted before any construction on the facility (including non-emitting parts) commences; otherwise, the existing non-emitting building shell would create the obstacle to efficiently routing ducts from emission units.

The Proposal also could limit control technology options by permitting a developer to construct utilities hookups for a facility before the permitting agency completes the final BACT determination. Water, natural gas, and electrical hookups all need to be correctly sized to the needs of a facility. The maximum draw of electricity and water may otherwise be locked in and unable to be raised in a cost-effective manner to allow for increased demand from control equipment that is required to achieve BACT, as determined by the final BACT analysis after the analysis in the application is reviewed by the agency, including consideration of public comments. However, any post-construction changes to these hookups could represent a significant cost to the operator of the proposed facility, thereby rendering legally required BACT infeasible or not cost-effective when it otherwise would have been had unlawful construction not occurred prior to NSR permitting.

In all the potential scenarios outlined in this section, the potential cost of necessary modifications to pre-permit construction could both fundamentally and illegitimately change the cost-effectiveness component of the BACT analysis and unduly pressure the regulator to avoid enforcing necessary alterations to a facility's pollutions controls.

5. *The Proposal's assertion that investment in pre-permit construction is at the developer's own risk cannot cure the Proposal's illegality with respect to the Clean Air Act's NSR requirements.*

In the Proposal, EPA asserts that facility owners will conduct pre-permit construction at their own risk, and therefore, permitting agencies will not be influenced by developers' "equity in the ground" if developers invest significant expenses in pre-permit construction. 91 Fed. Reg. at 26,973. EPA's position is simply not credible. Notably, the Proposal does not and cannot back this claim with any evidence or support from actual state, local or tribal permitting agencies. *Id.* But more fatally, EPA's position does not prevent the Act's NSR requirements from being violated by such construction.

If a developer constructs portions of a facility in a manner that constrains the BACT options, as discussed above, then such construction conflicts with the Act's provisions requiring BACT to apply when a facility is constructed. 42 U.S.C. § 7475 provides that:

> "No major emitting facility on which construction is commenced after August 7, 1977, may be constructed in any area to which this part applies unless . . . the proposed facility

[36] Allegheny Cnty. Health Dep't, Technical Support Document for Title V Operating Permit No. 0058-OP24, Synthomer Jefferson Hills LLC 8–18, 23–56, 58–60 (Mar. 14, 2024), https://www.alleghenycounty.us/files/assets/county/v/1/government/health/documents/air-quality/synthomer-tvrv-draft.pdf.

is subject to the best available control technology for each pollutant subject to regulation under this chapter emitted from, or which results from, such facility."

If BACT includes requirements for the non-emitting components of the facility, then construction that is not in compliance with BACT has already violated the Act. Tearing down and rebuilding the facility to comply with BACT does not change the fact that the proposed redefinition of "begin actual construction" would have foreseeably allowed the violation of the Act.

Also, the claim that the permitting agency will not be influenced once a developer has invested millions of dollars in a facility's construction, including in potentially non-complying, inefficient computer components for a data center, is not credible. *See infra* Section V.B. First, as explained above, the sunk costs and the costs of demolition and rebuilding fundamentally alter the cost-efficiency component of the BACT analysis. The expense of changing the facility once the non-emitting components are in place might even be significantly higher than the initial construction. These factors relate to core cost-effectiveness elements of the legal BACT analysis, distorting those elements and **changing** the outcome of the BACT analysis due to the unlawful pre-permit construction allowance in the Proposal.

Second, EPA irrationally states that it "does not believe that such concerns [involving equity in the ground] are currently warranted given that permitting authorities have been implementing the NSR permitting program for nearly 50 years." 91 Fed. Reg. at 26,973. This defense of the Proposal is irrational and question-begging: permitting authorities have been implementing the NSR program for nearly 50 years under a regime that does not reflect the illegal approach in the Proposal and therefore has not presented the real-world pressures and biases from allowing tens or hundreds of millions of dollars in sunk construction costs to occur prior to NSR permitting. This nearly 50-year history cuts against the Proposal in this regard, not in favor of it.

Fundamentally, EPA offers zero record support for a mere assertion that ignores the economic and political realities of promised multi-million-dollar investments in communities. *See infra* Section V. Nor does EPA explain how fifty years of experience with public and industry pressure and being forced to deal with economic realities makes permitting agencies suddenly callous to equity arguments. *See infra* Section V.B. Realistically, it becomes extremely unlikely that a permitting agency would insist that a developer demolish and rebuild multi-million-dollar construction that has occurred already at a facility, in order to achieve lawfully required BACT or LAER after-the-fact. The reality is that the Proposal would flout Congress's purpose in requiring NSR permitting and modern air pollution controls, thereby violating the Clean Air Act.[37]

D. The Act Requires a Permit Before Construction Starts

EPA's Proposal correctly states that in directing that no major emitting facility may be "constructed" without a permit, Congress meant to require a permit before construction starts.

[37] South Coast Air Quality Management District, Comment Letter on Draft Guidance: Interpretation of "Begin Actual Construction" Under the New Source Review Preconstruction Permitting Regulations 4–5 (May 8, 2020), https://www.regulations.gov/document/EPA-HQ-OAR-2025-0618-0022.

See, e.g., 91 Fed. Reg. at 26,960/3. EPA's supporting reasons are set out in the Proposal at *e.g.,* 91 Fed. Reg. at 26,968/1-2. Among other things, the Act's PSD provisions explicitly require a permit for the "proposed" facility, and condition construction on the "proposed" facility being subject to BACT. 42 U.S.C. § 7475(a)(1), (4). The section of the Act requiring PSD construction permits is titled "Preconstruction Requirements." *Id.* § 7475. The Administrator must provide notice of the permit application to the Federal Land Manager for any lands within a class I area which may be affected by emissions from the "proposed" facility, and that manager must consider whether a "proposed" major emitting facility will adversely impact air quality-related values. *Id.* § 7475(d)(2)(A), (B); s*ee also id.* § 7475(d)(2)(C), (D).

The Act's repeated references to requirements and evaluations for the "proposed" facility make clear that Congress meant to require completion of the permitting process and issuance of a permit before construction begins. That conclusion is fortified by the provisions of 42 U.S.C. § 7477 that require EPA to "take such measures, including issuance of an order, or seeking injunctive relief, as necessary to prevent the construction or modification of a major emitting facility which does not conform to the requirements of this part." *See also* 42 U.S.C. § 7604(a)(3) (authorizing citizen suits "against any person who proposes to construct . . . any new or modified major emitting facility without a permit" required under PSD and nonattainment NSR provisions of the Act).

EPA states that "[s]ince clearing vegetation and leveling land could precede the construction of a variety of things that are not stationary sources of air pollution, the [Agency] proposes to continue to allow such construction-related activities to proceed absent an NSR permit." 91 Fed. Reg. at 26,969/2. That is a deeply flawed and arbitrary rationale. Under EPA's approach, a proposed source's owner whose avowed plan is to clear land of an old growth forest so as to locate a major emitting industrial plant there could do so without a construction permit merely because the site clearing might have facilitated locating some other kind of non-polluting activity there. Such a contorted rationale conflicts sharply with the Act's NSR provisions and EPA's statutory duty under 42 U.S.C. § 7477 "to prevent the construction or modification of a major emitting facility which does not conform to the requirements of this part." Congress' direction to bar pre-permit construction is further shown in the Act's requirement 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 PSD permit "has been issued" in accordance with Part C of the Act. *Id.* § 7475(a). The Act defines "commenced" as follows in 42 U.S.C. § 7479(2):

> (2)(A) The term "commenced" as applied to construction of a major emitting facility means that the owner or operator has obtained all necessary preconstruction approvals or permits required by Federal, State, or local air pollution emissions and air quality laws or regulations and either has (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, which cannot be canceled or modified without substantial loss to the owner or operator, to undertake a program of construction of the facility to be completed within a reasonable time.
>
> (B) The term "necessary preconstruction approvals or permits" means those permits or approvals, required by the permitting authority as a precondition to undertaking any activity under clauses (i) or (ii) of subparagraph (A) of this paragraph.

The above provisions speak clearly that Congress prohibited construction to be commenced on a major emitting facility after August 7, 1977, unless a PSD permit has been issued for such facility. Congress further specified that construction is "commenced" for purposes of these provisions if the owner has either "begun, or caused to begin, a continuous program of physical on-site construction of the facility" or entered into binding agreements or contractual obligations to do so. *Id.* § 7479(2)(A). Thus, Congress confirmed that the "construction" prohibited by Section 7475(a) absent a PSD permit encompassed a program of "**on-site construction of the facility**"— not work limited to an "pollutant-emitting activity". And Congress plainly did not contemplate that construction could commence until all necessary permits and approvals had been obtained.

Contrary to EPA's assertion, nothing in the statutory text limits application of the above-quoted provisions to either pre-August 7, 1977, sources or to determining when the clock starts for commencing construction after permit issuance. To the contrary, Section 7475(a) expansively provides that "no" major emitting facility on which construction is commenced **after** the August 1977 date "may be constructed" without a permit. *Id*. § 7475(a). EPA's assertion that the statute's prescription that no major facility "may be constructed" in Section 7475(a) might somehow be read as allowing for some construction at the facility defies the plain meaning of the statute and its purpose. And the definitions in Section 7479 apply "for purposes of this part"— not just for the two purposes cited by EPA. *Id*. § 7479.

As to nonattainment NSR, the Act provides that "permits to construct and operate may be issued if" the permitting agency makes a number of determinations, all of which are to be made with respect to the "proposed" source. 42 U.S.C. § 7503(a)(1)– (5). Further, one of these determinations is that "the proposed source is required to comply with the lowest achievable emission rate," a term that is itself defined in part by reference to the "proposed" source. 42 U.S.C. §§ 7503(a)(2), 7501(3). All of the foregoing, as well as EPA's own longstanding interpretation, discussed *infra* Section IV, make clear that nonattainment NSR permits must be obtained before construction starts. And as noted elsewhere in these comments, the requirement for a preconstruction permit applies to the whole source, not just "pollutant-emitting activities" within the source.

E. EPA's Proposal Illegally and Arbitrarily Weakens EPA's Existing Limits on Pre-Permit Construction

As explained in detail above, the best reading of the Act forecloses EPA's Proposal to limit the requirement for a preconstruction permit to only pollutant-emitting activities within a facility or source. Even if the statute did not so clearly foreclose EPA's Proposal, the Proposal would be unlawful and arbitrary because it baselessly weakens EPA's longstanding existing limits on pre-permit construction. The history of EPA's adoption and interpretation of its current rules limiting pre-permit construction is set out in Section IV of these comments. That discussion is incorporated by reference here. Among other things, EPA's longstanding existing PSD rules provide that "[n]o new major stationary source or major modification …shall begin actual construction" without a permit. 40 C.F.R. § 51.166(a)(7)(iii). The rules define "begin actual construction" as follows:

> Begin actual construction means, in general, initiation of physical on-site construction activities on an emissions unit which are of a permanent nature. Such activities include, but are not limited to, installation of building supports and foundations, laying of

> underground pipework, and construction of permanent storage structures. With respect to a change in method of operation this term refers to those on-site activities, other than preparatory activities, which mark the initiation of the change.

Id. § 51.166(b)(11). "Emissions unit" is defined as "any part of a stationary source that emits or would have the potential to emit any regulated NSR pollutant. *Id.* § 51.166(b)(7).

For more than 40 years, EPA has interpreted these rules as barring pre-permit construction of the entire source or modification if the emission unit is an integral part of that source or modification. EPA first took this position in an October 1978 memo.[38]

The agency reiterated that position in a 1986 memo that stated as follows:

> [B]efore issuance of the PSD permit, construction is prohibited on any emissions unit or on any installation designed to accommodate the emissions 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 inclusion of the emissions unit), **the PSD permit must be obtained before construction on the entire source commences**.[39]

The 1986 Reich Memo also defined "emissions unit" to include "any installations necessary to accommodate that unit."[40]

EPA offers no lawful or rational basis for abandoning these longstanding interpretations. As discussed elsewhere in these comments, EPA's stated rationales for the change are inconsistent with the statute, unsupported, and irrational. *See infra* Section V. The agency cites no change in the past four decades that justifies weaker limits on pre-permit construction.

If anything, EPA's existing rules and interpretation do not go far enough to implement the statutory prohibition on pre-permit construction. By barring only construction on an "emissions unit" prior to permit issuance, EPA's existing rules conflict with the Act for the same reasons as EPA's new Proposal to bar only construction of "pollutant-emitting activities." As explained in other parts of these comments, the Act's bar on pre-permit construction is not confined to construction on pollutant-emitting activities or emissions units. Rather, the bar extends to any construction on entire plants, mills, refineries, industrial operations, and parts and portions thereof. Likewise, EPA's current policy allows activities such as site clearing, grading, and some demolition without a permit, an approach inconsistent with the Act's requirements for preconstruction evaluation of air quality impacts, additional impacts, alternative sites, and environmental costs as a result of a source's location, construction, or modification. *See supra* Section II.B. Thus, to fully comply with the Act, EPA must expand, rather than narrow, the scope of activities that its rules prohibit before a nonattainment NSR or PSD preconstruction permit is issued.

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[38] U.S. EPA, Memorandum by Edward Reich on Source Construction Prior to Issuance of PSD Permit (Oct. 1978) at 2, https://www.epa.gov/sites/default/files/2015-07/documents/source.pdf. [hereinafter the "October 1978 Memo"]
[39] U.S. EPA, Memorandum from Edward Reich on Construction Activities Prior to Issuance of a PSD Permit with Respect to ''Begin Actual Construction" 2–3 (March 1986) (emphasis added), https://www.epa.gov/sites/default/files/2015-07/documents/begin.pdf [hereinafter the "1986 Reich Memo"].
[40] *Id.* at 2.

III. EPA'S PROPOSAL IS CONTRARY TO JUDICIAL INTERPRETATION OF "BEGIN ACTUAL CONSTRUCTION" (Response to EPA Question #10)

Courts have also adhered to the Act's text and repeatedly recognized that the Act regulates the construction of major stationary sources and facilities, not merely a subset of "pollutant-emitting activities," as the Proposal now suggests. As the Supreme Court has explained, "[i]t is unlawful to construct or modify a 'major emitting facility' . . . without first obtaining a permit." *Util. Air Regul. Grp.*, 573 U.S. at 308–09 (citing 42 U.S.C. §§ 7475(a)(1), 7479(2)(C)). The statutory prohibition thus attaches to construction of the facility itself—not to the construction of a pollutant-emitting activity within the facility, as the Proposal now contends.

The Supreme Court has likewise recognized that a "stationary source" or "facility" refers to an integrated whole. In *Chevron U.S.A. Inc. v. NRDC*, the Court explained that the "ordinary meaning" of "facility" is "some collection of integrated elements which has been designed and constructed to achieve some purpose." 467 U.S. at 860. Read together, these authorities confirm that the statutory inquiry turns on whether construction of a major emitting facility has commenced, rather than whether a supposedly discrete construction step or activity qualifies as "pollutant-emitting" in isolation.

EPA's proposed new approach illegally conflicts with the statute and judicial interpretation of the Act, and illegally and arbitrarily weakens EPA's existing approach that itself doesn't go far enough to begin with. By treating construction of structures integral to a source or facility as relevant to the commencement of construction, EPA recognized that major emitting facilities consist of interconnected components that function together as a single source. The Proposal's focus on whether a particular activity is itself "pollutant-emitting" departs from both the statutory text and the Supreme Court's understanding of a stationary source or facility as an integrated whole.

IV. EPA'S PROPOSAL IS CONTRARY TO THE REGULATORY HISTORY (Response to EPA Question #10)

A. The Proposal Contravenes All Past EPA Regulations and Policy Guidance on "Begin Actual Construction"

EPA's proposed modification to the definition of "begin actual construction" is inconsistent with over forty years of the Agency's own practice, as EPA itself concedes. *See, e.g.*, 91 Fed. Reg. at 26,969 (acknowledging its change in position). For over four decades, the Agency has consistently required an owner or operator to obtain an NSR permit before it can "begin actual construction" on a new major stationary source or a major modification of an existing source, meaning "in general, initiation of physical on-site construction activities on an emissions unit which are of a permanent nature." 40 C.F.R. § 52.21(b)(11). A longstanding regulatory history, including EPA regulations, guidance memoranda, and letters to permitting authorities, confirms EPA's consistent interpretation of "begin actual construction," from which it now departs.

1. 1978 PSD Regulations & Subsequent Guidance

The concept of "begin actual construction" traces to EPA's initial implementation of the PSD program following the 1977 Clean Air Act Amendments. In the 1978 PSD regulations, EPA

prohibited construction of a major stationary source or major modification unless PSD requirements had been satisfied. 40 C.F.R. § 52.21(i)(1) (1978). The regulations defined "construction" broadly as the "fabrication, erection, installation, or modification of a source." *Id.* § 52.21(b)(7). At the same time, EPA adopted the definition of "commence," which remains in the regulations today, requiring that a source obtain all necessary preconstruction approvals and either begin a continuous program of actual on-site construction or enter binding contractual commitments to do so. *Id.* § 52.21(b)(8).

To clarify its 1978 NSR regulations, EPA issued two separate memoranda. In October 1978, EPA issued a memorandum titled: "Source Construction Prior to Issuance of PSD Permit." (the "**October 1978 Memo**").[41] The October 1978 Memo responded to a request for guidance on the extent to which a company could legally construct a wastewater treatment plant that was subject to PSD review because it would be equipped with a sludge incinerator.[42] EPA answered clearly: "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."[43] That is, construction on *any part* of the facility may only begin if the treatment facility could be operated without the incinerator. EPA based its conclusion on the fact 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. Therefore, in order to avoid any equity arguments at a later time, it is better to prevent any construction now rather than to have a 'white elephant' on our hands later on."[44]

In December 1978, EPA issued a second memorandum, "Interpretation of 'Constructed' as it Applies to Activities Undertaken Prior to Issuance of a PSD Permit." (the **"December 1978 Memo**").[45] The December 1978 Memo expressly defined what construction activities were permitted before a facility secured a PSD permit. The Memo stated that allowable activities included "planning, ordering of equipment and materials, site-clearing, grading, and on-site storage of equipment and materials."[46] It further clarified:

> "**All on-site activities of a permanent nature aimed at completing a PSD source** [including but not limited to installation of building supports and foundations, paving, laying of underground pipe work, construction of permanent storage structures] **for which a permit has yet to be obtained are prohibited under all circumstances**."[47]

2. 1980 PSD Regulations & Subsequent Agency Interpretation: Codification of the Modern "Begin Actual Construction" Definition

In its 1980 PSD Regulations, EPA promulgated the definition of "begin actual construction," codifying the policy described in the 1978 memoranda. The 1980 PSD regulations defined "begin actual construction" as "initiation of physical on-site construction activities on an

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[41] *See* October 1978 Memo, *supra* note 38.
[42] *Id.*
[43] *Id.* at 2.
[44] *Id*.
[45] U.S. EPA, Memorandum from Edward Reich on Interpretation of "Constructed" as it Applies to Activities Undertaken Prior to Issuance of a PSD Permit (Dec. 18, 1978), https://www.epa.gov/ sites/ default/ files/ 2015-07/ documents/ cnstrctd.pdf.
[46] *Id*. at 2.
[47] *Id*. at 2 (emphasis added).

emissions unit which are of a permanent nature." 45 Fed. Reg. 52,676, 52,736 (Aug. 7, 1980). This remains the current definition of "begin actual construction" in both the PSD and NSR rules. From 1980 to 2026, this definition remained codified.

The 1980 PSD Regulations also defined "emissions unit" to mean "any part of a stationary source which emits or would have the potential to emit any pollutant subject to regulation under the Act," and defined "construction" as "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." *Id*.

In March 1986, EPA issued a memorandum, "Construction Activities Prior to Issuance of a PSD Permit with Respect to 'Begin Actual Construction'," clarifying the meaning of an "emissions unit," as used in the definition of "begin actual construction" in the 1980 regulations ("**1986 Reich Memo**").[48] Specifically, the memorandum differentiates an "emissions unit" from "a major emitting facility," i.e., major stationary source, to clarify "at what point in construction planning or construction activities a PSD permit is required."[49] EPA further states:

> "before the issuance of the PSD permit, construction is prohibited on any emission unit or on any installation designed to accommodate the emissions 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 inclusion of the emissions unit), the PSD permit must be obtained before construction on the entire source commences."[50]

This interpretation is consistent with the policy reflected in all previous guidance documents, and EPA's longstanding regulatory definitions of "source" and "facility," which encompass more than just individual emissions units. *See* 40 C.F.R. §§ 51.165(a)(1)(i)–(ii), 51.166(b)(5)–(6)(i). "Stationary source means any building, structure, facility, or installation which emits or may emit a regulated NSR pollutant." *Id.* § 51.165(a)(1)(ii). "Building, structure, facility, or installation means all of the pollutant-emitting activities which belong to the same 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)." *Id.* § 51.165(a)(1)(ii)(A).

The EPA's Draft 1990 NSR Workshop Manual has long been the model for the Agency's recommended methodology for determining BACT.[51] The manual consistently discusses the preconstruction review requirements in terms of the "proposed source" or "proposed facility."[52] It defines "stationary source" as encompassing "all pollutant-emitting activities which belong to

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[48] U.S. EPA, Memorandum from Edward Reich, Director, Stationary Source Compliance Division, Office of Air Quality Planning and Standards, Construction Activities Prior to Issuance of a PSD Permit with Respect to ''Begin Actual Construction," 2–3 (March 1986) (emphasis added), https://www.epa.gov/sites/default/files/2015-07/documents/begin.pdf [hereinafter 1986 Reich Memo].

[49] *Id.* at 2–3.

[50] *Id.*

[51] U.S. EPA, *New Source Review Policy and Guidance Document Index* (Feb. 26, 2026), https://www.epa.gov/nsr/new-source-review-policy-and-guidance-document-index.

[52] NSR Workshop Manual at 4 ("No source or modification subject to PSD review may be constructed without a permit.").

the same industrial grouping, are located on contiguous or adjacent properties, and are under common control."[53]

In 1993, EPA applied its interpretation of "begin actual construction" to a proposed plant in West Virginia (the "**May 1993 Memo")**.[54] The Agency concluded that the proposed excavation of a 40-foot-deep pit and construction of a retaining wall were construction activities prohibited before the issuance of an NSR permit.[55] Although it had allowed site clearing and grading prior to obtaining a permit in the past, here it concluded that "excavation activities in this case . . . are costly, they significantly alter the site, are an integral part of the overall construction project, and are clearly of a permanent nature."[56] Consistent with EPA's longstanding rationale, the Agency explained that permitting authorities should not be confronted with permit decisions after an applicant has already made substantial, irreversible investments that could create pressure to approve the project regardless of environmental impacts.[57]

In a 1995 letter (the **"1995 Seitz Letter"**), EPA responded to the Minnesota Pollution Control Agency to again say that "begin actual construction" "[p]rohibited (permanent and/or preparatory) preconstruction activities" including "any construction that is costly, significantly alters the site, and/or permanent in nature," and denied Minnesota's request for a cold-weather exemption to be granted for the construction of footings.[58] EPA denied the request because it found that "such an exemption is **not authorized under the Act** or the Federal PSD rules."[59]

Not only has the Agency consistently reiterated its understanding of "begin actual construction," but the Agency has also never amended this understanding in the intervening decades. For instance, in 1996, EPA proposed numerous amendments to the Agency's NSR regulations; notably, these did not include any revisions to the definition of "begin actual construction." 61 Fed. Reg. 38,250, 38,270 (July 23, 1996).

However, based on industry views that NSR should allow a broader range of pre-permit activities, EPA solicited comment on the matter. *Id*. Even so, EPA did not alter its interpretation of "begin actual construction," and the 1980 regulations remained operative. *Id.* at 38,271 (stating that the "current regulations and policies" would "remain in effect regardless of today's request for comment.").

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[53] *Id.*
[54] *See* U.S. EPA, Memorandum from John B. Rasnic on Construction Activities at Georgia Pacific (May 13, 1993), https://www.epa.gov/sites/default/files/2015-07/documents/cnstrctn.pdf.
[55] *Id.* at 3.
[56] *Id.*
[57] *Id.* at 2 (stating that "the 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").
[58] *See* Letter from John S. Seitz, Dir., EPA Off. of Air Quality Planning & Standards to Charles W. Williams, Comm'r, Minn. Pollution Control Agency 2–3 (Dec. 13, 1995), https://www.epa.gov/sites/default/files/2015-07/documents/19951213.pdf.
[59] *Id*. at 3 (emphasis added).

B. 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

1. The Draft 2020 Guidance

In March 2020, EPA issued a draft of a guidance memorandum (the **"2020 Draft Guidance"**) announcing it would no longer follow the interpretation reflected in the 1980 PSD Regulations and subsequent guidance, marking a departure from 40 years of consistent agency practice.[60] Instead of barring construction "on any emission unit or any installation designed to accommodate an emissions unit," as EPA historically did, the 2020 Draft Guidance adopted a "revised interpretation" of "begin actual construction" as defined in 40 C.F.R. § 52.21(b)(11).[61] Under this revised interpretation, a source owner or operator could "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 activities do not constitute physical construction on an emissions unit."[62]

The 2020 Draft Guidance marked a clear departure from prior Agency interpretations, and from the existing definition of "begin actual construction," as stated in the 1980 PSD Regulations and subsequent guidance**.** It directly repudiated the 1986 Reich Memo by saying that "an 'installation necessary to accommodate' the emissions unit at issue is *not* considered part of that emissions unit," significantly increasing the range of construction activities that may take place before permitting.[63]

The 2020 Draft Guidance justified its departure on two grounds that are repeated in the present Proposal: first, that EPA's existing interpretation "failed to give meaning to the distinction between emissions unit and major stationary source," and second, that "equity in the ground" concerns were no longer warranted.[64] As explained in comments submitted by ENGOs at the time,[65] incorporated by reference here, and elsewhere in these comments, these justifications were meritless then and are meritless now.

Although EPA solicited comment on the 2020 Draft Guidance, the guidance was never finalized.

2. EPA's Application of the Draft 2020 Guidance

In September 2025, EPA applied the Draft 2020 Guidance in a letter to the Maricopa County Air Quality Department relating to TSMC Arizona Corporation's proposal to construct "the core and shell of a building that will eventually house emissions units without contemporaneously beginning construction on any semiconductor manufacturing equipment that

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[60] *See* Draft Memorandum from Anne L. Idsal, Principal Deputy Assistant Adm'r, U.S. EPA Off. of Air & Radiation, to EPA Reg'l Air Div. Dirs., Interpretation of "Begin Actual Construction" Under the New Source Review Preconstruction Permitting Regulations 2–3 (Mar. 25, 2020), https://19january2021snapshot.epa.gov/sites/static/files/2020-03/documents/begin_actual_construction_032520_1.pdf.

[61] *Id.* at 2, 15.

[62] *Id.* at 2 (emphasis omitted).

[63] *See id.* at 2–3, 12.

[64] *Id.* at 14, 18–19.

[65] *See supra* note 6.

could be classified as an emissions unit."[66] Responding to Maricopa County Air Quality Department's request for clarification on the meaning of "begin actual construction," EPA distinguished between "construction on an emissions unit" and "construction on those parts of a facility that do not qualify as an emissions unit."[67] On that basis, EPA concluded that allowing construction of the core and shell—without first obtaining a preconstruction permit—constituted a permissible interpretation of the regulations.[68] EPA found 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 emission unit or the laying of underground piping or construction of supports and foundations that are part of any emissions unit.[69] These justifications are erroneous.

V. EPA IGNORES THE POLICIES BEHIND STATUTORY DESIGN AND ERRONEOUSLY JUSTIFIES THE PROPOSAL BASED ON REGULATORY UNCERTAINTY AND ECONOMIC GROWTH RATIONALES

A. EPA's Conclusory, Unsupported Regulatory Uncertainty, Flexibility & Economic Growth Rationales

EPA justifies the Proposal on the grounds that the current interpretation of "begin actual construction" unnecessarily delays project development, creates regulatory uncertainty, and impedes economic growth. In explaining the policy rationales behind the Proposal, EPA asserts that the current regulatory definitions of "begin actual construction" "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)." 91 Fed. Reg. at 26,960. EPA contends that the Proposal will "address the longstanding concerns of stakeholders that considered the NSR regulations unnecessarily restrictive" and "facilitat[e] economic growth." *Id.* at 26,971–72.

Contrary to the EPA's baseless assertion, economic growth has continued and prospered alongside this policy for decades. By EPA's own accounting, from 1970 to 2019 emissions of six key pollutants fell 77% while GDP grew 285% and private-sector jobs rose 223%.[70] Forty years of mandatory preconstruction review have coincided with sustained growth and employment, so the premise that the current sequencing holds the economy back has no empirical footing and EPA provides none.

The Proposal and the accompanying rulemaking docket lack even the most basic evidence of such alleged "uncertainties, delays and regulatory burdens" associated with EPA's longstanding, stronger interpretation of when source owners "begin actual construction." Nor does the Proposal or docket contain facts or evidence to support EPA's rhetoric in the press release for the Proposal ("For years, EPA's definition of 'Begin Actual Construction' has

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[66] *See* Letter from Aaron Szabo, Assistant Adm'r, U.S. EPA Off. of Air & Radiation, to Philip McNeely, Dir., Maricopa Cnty. Air Quality Dep't 1 (Sep. 2, 2025), https://www.epa.gov/system/files/documents/2025-09/tsmc-arizona-begin-actual-construction-epa-response-letter.pdf.
[67] *Id.* at 2.
[68] *Id.* at 3.
[69] *Id.*
[70] *See, e.g.*, U.S. EPA, *The Clean Air Act and the Economy*, https://www.epa.gov/clean-air-act-overview/clean-air-act-and-economy (last accessed June 22, 2026).

imposed constraints on economic development and American ingenuity by slowing down parts of construction projects that pose no impact to human health or the environment.").[71] The press release offers the preposterous claim that the Proposal will "cut[] unnecessary red tape" and thereby "allow the reshoring of manufacturing," but provides no explanation of why Congressionally-required New Source Review procedures are "unnecessary" nor any broader analysis of the Proposal's impact on manufacturing.[72]

The benefit of the supposed regulatory flexibility of the Proposal is minimal to private firms *unless* one assumes that allowing construction at an earlier stage influences whether and how permits are issued, favoring sunken investments. *See* 91 Fed. Reg. at 26,960 (alleging that the Proposal would "provid[e] greater flexibility"). If allowing construction earlier does *not* influence the likelihood of whether a permit is issued or under what terms—then private firms will be likely to begin construction only when they are certain that a permit will be issued and when they are certain of the controls/terms that will be required. Standard sequential investment theory[73] implies that when a firm faces high uncertainty over an irreversible investment, waiting will usually dominate. Firms are unlikely to build early if denial is possible since they will have sunk capital into a stranded project if the permit is denied.[74] Therefore, in situations where permit issuance is genuinely unknown, the option to begin building early carries little to no value: it will rarely be utilized. In situations where permit issuance is very likely, requiring the firm to wait only imposes modest timing costs. Either the option does little, and the rule is unjustified, or it provides value to firms by influencing permit outcomes in violation of the Clean Air Act.

EPA fails to explain why the proposal is needed. EPA fails to provide evidence that current permitting timelines are overly burdensome and fails to consider alternatives available to permitting authorities such as general permits and permit-by-rules. EPA also fails to consider that the longest permitting timelines accrue in complex cases where owners and operators would face significant risk in beginning construction before the permit has been approved.

Many states have already adopted streamlined procedures for lower emitting sources and noncomplex projects, including "permit-by-rule" procedures. These "permit-by-rule" procedures can allow sources to meet their permitting requirements quickly and as easily as submitting a notification letter to the permitting authority. *See, e.g.*, Ohio Admin. Code 3745-31-30; 30 Tex. Admin. Code § 106; Ga Comp. R. & Regs. 391-3-1-.03. EPA's Federal Minor New Source Review program for tribal areas also authorizes a general permit for certain types of sources. A general permit is "a permit document that contains standardized requirements that multiple stationary sources can use" that may be issued for "categories of emissions units or stationary sources that are similar in nature, have substantially similar emissions, and would be subject to the same or substantially similar permit requirements. 81 Fed. Reg. 70944, 70947 (Oct. 14, 2016). EPA explains that the benefit of general permits is that they "offer a cost-effective means of issuing permits and provide a quicker and simpler mechanism for permitting minor sources than the source-specific permitting process." *Id.* EPA fails to explain why use of general permits

[71] Press Release, U.S. EPA, EPA Proposes Redefining "Begin Actual Construction" to Remove Unnecessary Impediments to Building and Advance Economic Progress, https://www.epa.gov/newsreleases/epa-proposes-redefining-begin-actual-construction-remove-unnecessary-impediments.
[72] *Id.*
[73] *See, e.g.*, Avinash Dixit, *Investment and Hysteresis*, 6 J. Econ. Persp. 107 –32 (1992).
[74] *Id.*

and permit-by-rule cannot satisfy the objective to provide greater flexibility to firms in more straightforward permitting decisions. Where projects are more complex, firms would favor waiting before making irreversible investments and accruing costs with unknown chances of return (so here the option to begin construction early has little to no value). In any case, major NSR permits can be issued in mere months, and minor permits can issue in even less time—and EPA fails to explain why this timing is an obstacle to economic growth.[75]

EPA claims that this action is not intended to change permit outcomes, explaining: "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." 91 Fed. Reg. at 26,973. If that is the true outcome (which, as explained in Section V.B., is unlikely), the Proposal in most cases will not add significant value to owners/operators. If that is not the case, then EPA's Proposal is contrary to the statute and arbitrary and capricious for inserting impermissible criteria into the permit decision and for having effects that EPA has not considered or dealt with.

In relying extensively and exclusively on fact-free assertion and rhetoric about uncertainties, delays and burdens, *id.* at 26,960, the Proposal follows the dismal example of a deregulatory report dating to the first term of President Trump that targeted the NSR safeguards by flatly mischaracterizing their statutory purpose and requirements: "New Source Review (NSR) is a preconstruction permitting program intended to ensure that new and modified stationary sources of air pollution do not significantly degrade air quality."[76] That characterization was erroneous then, and it remains so, now. The broader purposes of the NSR program (in areas meeting and not meeting national clean air health standards) include: application of best available control technology, or lowest achievable emission rate control technology; air quality impact analyses to ensure national health standards will not be violated in areas with safe air already; protection of air quality in national parks and wilderness areas; adoption of air quality monitoring; and offset of remaining emissions following application of LAER controls in areas with unsafe air quality, in increasing offset ratios, generally in the same nonattainment area, with some exceptions. *See* 42 U.S.C. §§ 7475, § 7503. The purposes also include ensuring that alternatives to proposed sources and impacts on local communities

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[75] *See* Letter from Ohio Env't Prot. Agency to Kareena Wasserman, Kimberly Clark (Mar. 19, 2025) (stating that permits are approved 60–120 days after application for simple cases and 120–180 days after application for complex cases); Ala. Dep't of Env't Mgmt., *Air Permitting*, https://adem.alabama.gov/air/air-permitting (last visited June 24, 2026) (stating that permits will be issued within 4-6 weeks for simple cases and 120 days of receipt of a complete application for major sources); Ark. Dep't of Energy and Env't, *Air Permitting* at 2 (June 2021), https://adeq.state.ar.us/poa/enterprise-services/pdfs/air-permitting-introductory-guide.pdf (stating that general permits will be issued in 30 days, and minor and major permits in 3 to 6 months); Ga. Env't Prot. Div., *Permitting Program Frequently Asked Questions*, https://epd.georgia.gov/air-protection-branch/air-branch-programs/permitting-program/permitting-program-frequently-asked (last visited June 24, 2026) (stating that PSD construction permits for major sources are issued in 6 or more months, while permits for minor sources are issued within 120 days); Ind. Dep't of Env't Mgmt., *Timeframes and Fees*, https://www.in.gov/idem/airpermit/resources/timeframes-and-fees/ (last visited June 26, 2026) (stating that minor New Source permits are issued in 120 days and major New Source permits are issued in 270 days, both subject to an extension of 45 days if a public hearing is held for the permit).

[76] U.S. EPA, Final Report on Review of Agency Actions That Potentially Burden the Safe, Efficient Development of Domestic Energy Resources Under Executive Order 13783 (Oct. 25, 2017), at 2 (emphasis added) ("13783 Report").

(including from growth) are adequately considered, weighed and addressed. *Id.* §§ 7475(a)(2), (a)(6), 7503(a)(5).

Like the Proposal, the 13783 Report founded its attacks on the NSR program on rhetoric and assertion, not facts and proof subject to public scrutiny. The Trump EPA's 13783 Report, for example, contended that "[i]n some circumstances, the NSR process discourages the construction of new facilities or modifications of existing ones that could result in greater environmental improvements.[77] There was not so much as a footnote or any other evidence to back up this claim; it was raw assertion.

The only support the 2026 Proposal provides for its policy rationales are barebones citations to industry commenters' allegations of burden and uncertainty. 91 Fed. Reg. at 26,971. For instance, in its Proposal, EPA cites to comments from various industry stakeholders suggesting that the definition of "begin actual construction" should be revised to "provide for greater ability for conducting certain construction activities that are of a permanent nature," or "hasten the commencement of major projects." *Id.* Beyond parroting industry concerns, EPA provides no support for its own and industry groups' conclusory allegations. "If an agency relies on a regulated party's analysis to justify its decision, it must either critically review that analysis or perform its own." *Affirmed Energy, LLC v. FERC*, 166 F.4th 1070, 1083 (D.C. Cir. 2026); *see also Susquehanna Int'l Grp. v. SEC*, 866 F.3d 442, 447 (D.C. Cir. 2017) (rejecting agency's "unquestioning reliance" on analysis by regulated entity). EPA has failed to do so here.

The Clean Air Act's mission is not to advance "economic growth" or "allow the reshoring of manufacturing.[78] EPA is attempting to upend protective regulations issued under a statute intended "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare." 42 U.S.C. § 7401(b). EPA asserts that the aim of the Proposal is 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." 91 Fed. Reg., at. 26,960. This goal is flatly contrary to the plain language of the Act, which requires preconstruction permits for "the construction and operation of new or modified major stationary sources," 42 U.S.C. § 7502(c)(5). Further, a goal of the PSD and NNSR programs ensure that permitting decisions are "made only after careful evaluation of all the consequences of such a decision." 42 U.S.C. § 7470(5). A regulation that allows substantial construction prior to securing an NSR permit clearly evades this purpose of the PSD program. 42 U.S.C.§ 7470 (establishing the purpose of "assur[ing] that any decision to permit increased air pollution in any area to which this section applies is made only after careful evaluation of all the consequences of such a decision and after adequate procedural opportunities for informed public participation in the decisionmaking process."). Imagine the situation EPA lays out in the Proposal where, *see* 91 Fed. Reg. 26,969/2, "[s]ince 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." That is a deeply flawed and arbitrary rationale. Under EPA's

[77] *Id.* at 2–3.
[78] *See* 91 Fed. Reg. at 26971–72; Press Release, U.S. EPA, EPA Proposes Redefining "Begin Actual Construction" to Remove Unnecessary Impediments to Building and Advance Economic Progress, https://www.epa.gov/newsreleases/epa-proposes-redefining-begin-actual-construction-remove-unnecessary-impediments.

approach, a proposed source's owner whose avowed plan is to clear land of an old growth forest so as to locate a major emitting industrial plant there could do so without a construction permit merely because the site clearing might have facilitated locating some other kind of non-polluting activity there. Such a contorted rationale conflicts sharply with the Act's NSR provisions and EPA's statutory duty under 42 U.S.C. §7477, "to prevent the construction or modification of a major emitting facility which does not conform to the requirements of this part." By substituting EPA's policy preferences and professed concerns over economic growth, alleged delays and regulatory burden, 91 Fed. Reg. at 26,960, 26,971–72, for the statutory prescriptions, proscriptions, and purposes in the NSR programs, EPA acts unlawfully. *See Lead Indus. Ass'n v. EPA*, 647 F.2d 1130, 1150 (D.C. Cir. 1980) ("when Congress directs an agency to consider only certain factors in reaching an administrative decision, the agency is not free to trespass beyond the bounds of its statutory authority by taking other factors into account.")

EPA's focus on advancing alleged economic growth interests also completely disregards other statutory purposes of the PSD program including: **"**to protect public health and welfare from any actual or potential adverse effect" reasonably anticipated to occur "from air pollution or from exposures to pollutants in other media, which pollutants originate as emissions to the ambient air, notwithstanding attainment and maintenance of all national ambient air quality standards;" "to preserve, protect, and enhance the air quality in national parks, national wilderness areas, national monuments, national seashores, and other areas of special national or regional natural, recreational, scenic, or historic value;" and "to assure that emissions from any source in any State will not interfere with any portion of the applicable implementation plan to prevent significant deterioration of air quality for any other State." 42 U.S.C. §§ 7470(1), (2) and (4). EPA's Proposal unlawfully and arbitrarily ignores these central statutory goals, as well as explicit statutory requirements for the NSR program discussed in Section II above. *See supra* Section II.

EPA deployed a similar, badly incomplete presentation of the purposes of the Act's NSR permitting program when unsuccessfully defending its Routine Maintenance, Repair, and Maintenance Exclusion in 2005, and the D.C. Circuit reminded the agency of the more fulsome purposes of NSR:

> "The discussion in *New York I*, 413 F.3d at 12-13, and *WEPCo*, 893 F.2d at 909 (quoting H.R. REP. No. 95-294, at 211, (1977), *as reprinted in* 1977 U.S.C.C.A.N. 1077, 1290), of Congress's basic goals in enacting the 1977 amendments—to intensify the war against air pollution, to establish a permit program that struck a balance between economic and environmental interests, and to stimulate technology to control pollution—demonstrate the futility of EPA's endeavor."

See New York v. EPA, 443 F.3d 880, 889 (D.C. Cir. 2006) (per curiam).

EPA lacks any statutory authority to substitute its own policy preferences under the current administration for the plain language, purpose, and requirements of the Act. *Cf. id.*, *New York v. EPA*, 443 F.3d at 890 ("Although EPA might prefer market-based methods of controlling pollution, Congress has chosen a different course with NSR."); *Sierra Club v. EPA*, 294 F.3d 155, 161 (D.C. Cir. 2002) ("An agency may not disregard the Congressional intent clearly expressed in the text simply by asserting that its preferred approach would be better policy." (internal citation omitted).

B. 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

In support of its 2026 Proposal, EPA also states that it is no longer concerned with equity arguments, despite acknowledging that this was a central basis for EPA's 1980 definition of "begin actual construction." 91 Fed. Reg. at 26,973. EPA states that it "does not believe that such [equity in the ground] concerns are currently warranted given that permitting authorities have been implementing the NSR permitting program for nearly 50 years." *Id.* Similar to EPA's rationale in the Proposal, in response to EPA's 2020 request for comment on the 2020 draft guidance, a coalition of industry commenters also argued that "conducting preconstruction activities, which are done at the facility's own risk as to whether the permit will be issued, does not make it more or less likely that the permit will be granted." *Id.* EPA's position in its 2026 Proposal—and industry commenters' claims—are belied by EPA's own concerns voiced in the October 1978 Memo, which bears repeating: "It is extremely difficult to deny issuance of a permit when it results in a completed portion of a project having to remain idle. Therefore, in order to avoid any equity arguments at a later time, it is better to prevent any construction now rather than to have a 'white elephant' on our hands later on."[79] Contrary to EPA's assertion in the present Proposal, that compelling rationale has not been undermined by the mere fact that permitting authorities have been issuing NSR permits for more than 40 years. In fact, studies show that as irreversible investments accumulate, the practical and political costs of delaying, modifying, or rejecting a project increase, creating pressures that may influence subsequent regulatory decision-making.[80]

Further support for EPA's longstanding rationale regarding "equity in the ground" concerns came recently from the National Association of Clean Air Agencies (NACAA), the national, non-partisan, non-profit association of 156 state and local air pollution control agencies in 40 states, including 117 local jurisdictions, the District of Columbia and five territories.[81] In comments on EPA's 2020 Draft Guidance where EPA stated, as it does now, that equity concerns are no longer valid, NACAA said as follows:

> Based on the considerable experience and concerns of our members, NACAA disagrees with EPA's assessment. The "equity in the ground" issue remains a serious concern for state and local agencies. Once significant construction activities have begun on a facility, owners and operators become less willing and/or able to make any necessary design changes to implement the provisions of the NSR program, such as the inclusion of Best Available Control Technology emission controls and monitoring device installation. EPA's assertion in the guidance that any pre-permit construction is "at their own risk" does not obviate the ability of owners and operators to bring legal or political leverage to bear on the permitting decision. Many of the larger projects may involve public funds in

[79] October 1978 Memo, *supra* note 38.
[80] *See, e.g.*, Jeffrey E. Harris, Valuing Health Risks, Costs, and Benefits for Environmental Decisions: Environmental Policy Making: Act Now or Wait for More Information?, (1990), https://www.ncbi.nlm.nih.gov/books/NBK235529/ (describing the impact of waiting and sunken costs on regulatory decision-making).
[81] *About NACAA*, Nat'l Ass'n of Clean Air Agencies, https://www.4cleanair.org/about-nacaa/#our-membership (last visited June 28, 2026).

terms of tax incentives, bonds, grants or other funds which could be put at risk should the source decide to proceed down this path.

Furthermore, if an owner or operator is allowed to construct before a permit application is even submitted to the state or local permitting agency, construction could commence before the agency is even aware of what type of emission units are planned for a project. This could potentially affect the overall emissions of the project. If owners or operators are reluctant to make design changes due to the amount of "equity in the ground," an opportunity to reduce emissions through design and operability improvements could be lost.[82]

The Minnesota Pollution Control Agency (MPCA) likewise stated that allowing pre-permit construction would bias the process:

Many permitting efforts are already subject to political pressures related to the timing of permit issuance and the contents of permits. Hence, even a permitting authority that adopts EPA's proposed definition of "begin actual construction" could be placed at a disadvantage in high profile or publicly funded projects. For example, for a project that relies on any public funds, it would be difficult for a permitting authority to contradict "equity in the ground" arguments, even though the fault lies with the project proposer. In the best case, public opinion would likely harm the permitting authority as well as the project proposer.

While publicly-funded projects would create the most leverage over the permitting authority for the project proposer, the disadvantage provided by equity in the ground would extend to any project with a large perceived public benefit, such as the prospect of new jobs. Simply put, EPA's proposal gives the project proposer too much leverage over the permitting authority and the permitting process, contrary to EPA's stated opinions.[83]

MPCA also stated that allowing pre-permit construction would undermine public participation and public trust in the permitting process.[84]

The South Coast Air Quality Management District (SCAQMD) expressed concern that allowing pre-permit construction on non-emitting parts of a facility would create an equity in the ground undermining the BACT determination. SCAQMD noted that under EPA's Proposal, a "source may initiate construction of a source or facility—in potential contravention of the statute's language—before even applying for a permit to construct one or more emission units. So-called 'equity in the ground' must be understood, therefore, in the terms of the permit applicant who may deny, wrongly, that already constructed portions of a major facility are not in the scope of NSR or BACT review."[85] SCAQMD's comments flag the disturbing reality that permitting agencies will face when presented with a construction permit application after most of

[82] Letter from National Association of Clean Air Agencies (NACAA) to EPA, May 11, 2020, at 4, https://www.regulations.gov/document/EPA-HQ-OAR-2025-0618-0019.
[83] Letter from Minnesota Pollution Control Agency to EPA, May 11, 2020, at 4, https://www.regulations.gov/document/EPA-HQ-OAR-2025-0618-0018.
[84] *Id.* at 4–5.
[85] Letter from W. Nastri, South Coast Air Quality Management District to U.S. EPA, May 8, 2020, at 4-5, https://www.regulations.gov/document/EPA-HQ-OAR-2025-0618-0022.

a major facility as already been constructed. At that point, the already-built configuration of the facility will likely be treated by the source as a given, with the BACT analysis unlawfully limited to what can be done to the pollutant generating activity in isolation. SCAQMD also stated that allowing pre-permit construction would undermine the ability of EPA and the air district to obtain injunctive relief to prevent construction or modification of a facility as provided in 42 USC §7477.[86] Regardless of anything EPA says about the source assuming risk, allowing pre-permit construction of most of a facility will prejudice the ability of EPA and air districts to obtain effective injunctive relief. As SCAQMD noted, a policy authorizing per-permit construction "fails to recognize a core purpose" of 42 U.S.C. §7477—"to **prevent** a source from unilaterally acquiring 'equity in the ground' by investing in substantial construction before receiving a permit."[87]

EPA is wrong in asserting that nothing in the statute shows Congressional concern about "equity in the ground." As previously noted, Congress plainly defined "commence construction" by reference to (among other things) whether a source had made commitments of resources that could not be abandoned without substantial financial loss. Moreover, Congress set out in detail the elements of the demonstrations required to secure PSD and NNSR permits. Congress meant for those elements to be evaluated on the merits in an unbiased manner **before** the start of construction. Thus, the Act's provisions support EPA's longstanding reading of the statute as precluding pre-permit construction that would inevitably inject impermissible equity considerations into the permitting process.

EPA's assurances that permitting authorities shouldn't take "equity in the ground" into consideration when determining BACT/LAER may be very difficult to realize in practice. Permitting authorities take into consideration the cost of controls when making such decisions, but cost information may be generated by permit applicants who may provide higher costs that include retrofitting already built components rather than the lower cost of having built those controls during initial construction. Given information asymmetry, it would be difficult for permitting authorities to not inadvertently or unknowingly consider the economic losses to the permit applicant if those costs are included in the information the permit applicant is providing. Higher costs associated with retrofitting may weigh against more protective BACT/LAER determinations that would have otherwise been found cost-effective.

EPA has requested comment on whether it should insert regulatory text to prohibit permitting authorities from considering economic losses from the permit applicant if a valid permit cannot be issued due to pre-permit construction (EPA Question #7). 92 Fed. Reg. at 26,974/3. The discussion above shows how such a prohibition cannot possibly cure the illegality and arbitrariness of EPA's Proposal. Once much of a facility is already constructed without a permit, the Act will already have been violated, and the bias in favor of granting a permit will inevitably exist whether permitting officials openly acknowledge it or not.

However, if EPA will not withdraw the Proposal, it must adopt additional safeguards to prevent permitting authorities from unlawfully considering these economic losses. *At a bare minimum*, EPA must adopt regulatory text that explicitly prohibits regulatory authorities from

[86] *Id.* at 6-7.
[87] *Id.* at 7 (emphasis added).

considering economic losses if a permit cannot be issued. Such a provision must be binding and enforceable in order to have real effect. Barring permitting authorities from considering economic losses must extend to barring permitting authorities from considering the cost of modifying or rebuilding specific facility components requiring modification to enable emissions-producing units to meet NSR permitting requirements. As explained below, if permitting authorities are to consider such costs to businesses, they might issue less stringent protections on the basis of extra-statutory criteria, which would be a violation of the Clean Air Act.

Standing alone, such regulatory text is unlikely to guard against permitting authorities considering equity invested or economic losses to the permit applicant. As explained below, permitting authorities might associate investments already made into the project with community benefits like jobs, infrastructure, economic benefits, etc., that could be lost if they do not approve the permit on favorable terms. Economics and psychology literature has established, "[t]he sunk cost effect is manifested in a greater tendency to continue an endeavor once an investment in money, effort, or time has been made."[88] Permitting authorities may treat these co-benefits of the project as sunk costs if the investment already made supports them. They might thus have a bias to protect the investment already made (and the community benefits it might provide) and to consider less robustly the environmental and health harms during permit review. Biases are not rational and may withstand even instruction to ignore them. In order to guard against this very real cost, EPA must adopt additional safeguards to make sure that permitting authorities are truly disinterested parties and any common stake that the state/local government has in seeing the project succeed/seeing the project's investment protected is removed from the decision-making process altogether to prevent any bias from influencing the permit decision.

For the above reasons, each of EPA's policy rationales for the Proposal are arbitrary and unsupported by docket evidence or factual analysis. Instead of promulgating a regulation consistent with the policy and purposes of the Clean Air Act and NSR program, EPA attempts to steamroll industrial activity under the guise of the "best reading" of the statute.

VI. EPA'S PROPOSAL IS UNLAWFUL AND ARBITRARY

A. EPA's Proposal Fails to Hew to Principles of Reasoned Decision-making

The Proposal is unlawful because it does not reflect the best reading of the statute. And to the extent the Proposal is exercising discretion delegated to EPA, it is arbitrary and capricious for, among other reasons, failing to comply with the agency change-in-position doctrine.

On statutory interpretation, it is "the responsibility of the court to decide whether the law means what the agency says." *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 392 (2024) (quotation omitted). In interpreting the statute, "courts may . . . seek aid from the interpretations of those responsible for implementing particular statutes," and "interpretations issued contemporaneously with the statute at issue, and which have remained consistent over time, may be especially useful in determining the statute's meaning." *Id.* at 394. As explained in previous sections, the Proposal is counter to both the words of the statute and EPA's consistent and

[88] Hal R. Arkes & Catherine Blumer, *The Psychology of Sunk Cost*, 35 Org. Behav. and Hum. Decision Processes 124, 124 (1985).

contemporaneous interpretation of the Clean Air Act. *See supra* Sections II, IV. This new interpretation is flawed and due no respect as a result.

The EPA here must also comply with principles of reasoned decision-making. Courts "apply the same standard of review under the Clean Air Act as … under the Administrative Procedure Act." *Am. Lung Ass'n v. EPA*, 985 F.3d 914, 941 (D.C. Cir. 2021), *rev'd and remanded on other grounds sub nom*; *West Virginia v. EPA*, 597 U.S. 697 (2022) (quotation omitted); *see also* 42 U.S.C. § 7607(d)(1)(C). In other words, an agency action may not be arbitrary and capricious. An agency rule is "arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem," or counter to the evidence before the agency. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). An agency must also "examine the relevant data and articulate a satisfactory explanation for its action." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009). The Proposal has failed these requirements.

Where, as here, an agency is not writing on a "blank slate" but instead departing from decades of regulatory practice, it must also comply with the requirements of the agency-change-in-position doctrine. *Id.* at 515. Under that doctrine, an agency must (1) "display awareness that it *is* changing position," (2) "show that there are good reasons for the new policy," and, in some instances, (3) "provide a more detailed justification" where, as here, the "new policy rests upon factual findings that contradict those which underlay its prior policy" or there are "serious reliance interests that must be taken into account." *Id.* As explained above, EPA's Proposal has failed to show that there are good reasons to depart from its long-standing policies, and it has failed to provide a more detailed explanation for departing from prior factual findings. *See supra* Sections I, II, IV, V.

Whether as a question of statutory interpretation or of reasoned decision making intersect, EPA has failed to justify the Proposal's drastic change from longstanding practice in ways that are unlawful. Where the best reading of the statute forecloses the agency's interpretation, the D.C. Circuit has explained that "[n]o explanation could justify or make lawful the agency's new interpretation of the statute." *Centro de Trabajadores Unidos v. Bessent*, 167 F.4th 1218, 1238 (D.C. Cir. 2026). And when "the question is whether the agency has reasonably exercised its discretion," *id.*, EPA's action may not be arbitrary and capricious, including by violating the change-in-position doctrine. The proposal is neither a lawful interpretation of the statute nor the product of reasoned decision making.

B. EPA's Proposal Creates Obscurity Rather than Clarity (Response to EPA Question #4)

EPA's proposed revisions to the NSR program and related regulations are framed as an effort to "enhance clarity" in determining when construction may begin without a permit. 91 Fed. Reg. at 26,970. But the starting point for that analysis—the Clean Air Act itself—is already clear. The statute provides that "no major emitting facility . . . may be constructed . . . unless a permit has been issued." 42 U.S.C. § 7475(a). The Act makes the permitting trigger the construction of a facility, not discrete "pollutant-emitting activities." This statutory language reflects a straightforward rule: preconstruction review applies to the building of the source as a whole. By contrast, EPA's regulatory approach, both historically and in the current Proposal, recasts the statutory trigger into a more granular inquiry focused on emissions units and activities, an approach not supported by the Act's plain language. *See supra* Section II.

The proposed rule makes that inquiry harder, not easier. EPA would distinguish between "pollutant-emitting activities" and "non-emitting components or structures," but that distinction does not come from the statutory text. 91 Fed. Reg. at 26,870. EPA calls its approach the "best reading" of the statute, but a rule that requires regulators and developers to sort a project piece by piece is difficult to square with Congress's clearly stated choice to prohibit construction of a "facility" absent a permit. 91 Fed. Reg. at 26,965. The Clean Air Act does not ask whether a turbine foundation, control room, or support structure emits on its own. It asks whether a "major emitting facility" is being constructed without a permit. 42 U.S.C. § 7475(a).

Under EPA's Proposal, the legality of early construction activity turns on whether a given component is sufficiently tied to emissions. This inquiry has no clear statutory anchor and would produce inconsistent and subjective outcomes across permitting authorities.

The problem is not just theoretical. At a natural gas-fired power plant, a turbine building, turbine foundations, or fuel piping may not emit pollutants by themselves, but they are built for the turbines and only make sense as part of the whole facility. The same point applies in refinery projects, where storage tanks, processing units, and associated piping systems operate as parts of a larger whole. Control rooms, utility systems, or structural supports may look "non-emitting" in isolation, but in context they are part of the source being constructed. EPA's Proposal would require each of those elements to be classified one by one, with no obvious dividing line.

A hyperscaler data center makes the line-drawing problem especially clear. If a developer proposes a data center powered by 200 MW of turbines or backup generators, EPA might treat the generators as pollutant-emitting while treating the server halls, server racks, and HVAC systems as non-emitting. But the generation capacity is being built to serve those systems, and the turbines or generators would not be constructed apart from the data center's demand. If the project cannot go forward without the 200 MW of onsite generation, it is hard to see why the infrastructure built to use that power should be carved out of the facility for permitting purposes.

The arbitrariness of EPA's approach becomes even more apparent across a broader range of industrial sectors. Consider fuel delivery infrastructure, such as pipelines, conveyors, or storage systems, which are essential to supplying emissions units but might not emit pollutants themselves. Or consider electrical substations and switchyards, without which a power plant cannot operate or deliver its output. Similarly, cooling water systems, wastewater treatment units, and waste handling equipment are all integral to facility operations and closely intertwined with emissions-producing processes. In each case, the distinction between "pollutant-emitting" and "non-emitting" components depends on how finely one slices the project, not on any principled statutory boundary. The result is a framework in which the permitting trigger turns on subjective characterization rather than the objective fact that a facility is being constructed. EPA itself "recognizes that it will be difficult to draw a line in regulation that addresses every circumstance when construction begins of something that emits air pollutants." 91 Fed. Reg at 26,969/3. Thus, EPA says, states will need to resolve the issue on a "case-by-case, project-specific basis"—hardly a recipe for greater clarity. *Id.*

The problem is also clear for modifications intended to reduce air pollution. Suppose a facility installs foundations and structures for carbon capture equipment that will later be attached to emissions units. Are those components "non-emitting" because the equipment reduces some emissions, or are they part of the emissions-related project because they are being

built for equipment attached to the source? The same question arises for flue-gas desulfurization systems, selective catalytic reduction, scrubbers, low-NOx burners, and similar pollution-control devices. Those systems may reduce some emissions, but they are still part of the facility's emissions-control configuration. Treating them as "non-emitting"—and in many cases they decrease emissions—simply because they do not themselves release pollutants would be difficult to reconcile with past practice or with the Act's text.

Even the activities EPA identifies as purely non-emitting illustrate the same problem. Utility service infrastructure and office buildings may not emit pollutants themselves, but they exist to support the facility's emissions-producing operations. They are no less part of the constructed facility than the equipment EPA would classify as "pollutant-emitting." EPA's proposed distinction therefore does not clarify the permitting trigger; it invites disputes over how much of an integrated project may proceed before permit issuance. Put simply, many of EPA's "non-emitting" components are being built only because the facility will perform an emissions-producing function. The Act accounts for that reality by regulating construction of the facility as a whole, not by inviting a component-by-component inquiry.

EPA's Proposal thus shifts attention away from the statutory question—whether a facility is being constructed—and toward a newly minted inquiry into whether particular subcomponents are "pollutant-emitting" or "non-emitting." That inquiry will not make the permitting program clearer. It will make it more dependent on agency judgment and capture, project characterization, and after-the-fact line drawing. If EPA's goal is clarity, the best course (and "best reading") is to follow the plain statutory text: construction of any aspect of a major emitting facility triggers preconstruction review.

C. EPA May Not Lawfully Finalize the Proposed Definition of "Begin Actual Construction" for the Tribal NSR Program

EPA proposes to "revise the definition of 'begin construction' and 'commence construction' in the Tribal NSR regulations at 40 C.F.R. 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." 91 Fed. Reg. at 26,969-70. Like the other parts of the Proposal, EPA argues that these changes reflect the best reading of the Clean Air Act and provide greater flexibility for owners and operators to engage in construction activities that are allowed under the Act prior to obtaining an NSR permit, while still protecting public health and welfare through the NSR air permitting requirements." *Id.* at 26,970.

EPA may not lawfully finalize the proposed definition of "begin actual construction" in the Tribal NSR program for minor sources and minor modifications at existing major sources of air pollution located in Indian country. Clean Air Act Section 110(a)(2)(C) requires implementation plans by states and tribes to include a program to provide for the "regulation of the modification and construction of any stationary source within the areas covered by the plan as necessary to assure that national ambient air quality standards are achieved." 42 U.S.C. § 7410(a)(2)(C). The Proposal does not show that its weakening of the "begin construction" definition in favor of the proposed "begin actual construction" definition would "assure that national ambient air quality standards are achieved" in each tribal area, "Indian country," where the Tribal NSR program applies, areas where EPA is obligated to make such a showing. The

Proposal contains no evaluation of the impact on NAAQS achievement of allowing an unspecified number of minor sources to be largely built or modified without first obtaining permits. Indeed, EPA does not even bother any attempt to make this showing in any tribal area or even mention this statutory obligation in the Proposal.

An agency rule is "arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem," or counter to the evidence before the agency. *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43. An agency must also "examine the relevant data and articulate a satisfactory explanation for its action." *Fox*, 556 U.S. at 513. EPA does none of these things with regard to the proposed definition of "begin actual construction" for the Tribal NSR program, and the Proposal is arbitrary and capricious, accordingly.

Where, as here, an agency is not writing on a "blank slate" but instead departing from prior regulatory practice, it must also comply with the requirements of the agency-change-in-position doctrine. *Id.* at 515. Under that doctrine, an agency must (1) "display awareness that it *is* changing position," (2) "show that there are good reasons for the new policy," and, in some instances, (3) "provide a more detailed justification" where, as here, the "new policy rests upon factual findings that contradict those which underlay its prior policy" or there are "serious reliance interests that must be taken into account." *Id.* As explained above, EPA's Proposal has failed to show that there are good reasons to depart from its long-standing policies, and it has failed to provide a more detailed explanation for departing from prior factual findings. *See supra* Sections II, VI.A.

Finally, when "the question is whether the agency has reasonably exercised its delegation," *Centro de Trabajadores Unidos*, 167 F.4th at 1238, EPA's action may not be arbitrary and capricious, including by violating the change-in-position doctrine. The Tribal NSR Proposal is not the product of reasoned decision making. EPA may not finalize the proposed definition for "begin actual construction" for the Tribal NSR program.

VII. THE PROPOSAL WOULD CAUSE HARMS AND DENY THE PUBLIC LAWFUL RIGHTS

The Proposal would undermine the validity and meaningfulness of the protections guaranteed by Congress to the public through the NSR program. In doing so, EPA's Proposal would deny the public rights afforded to them by Congress and cause impermissible public health, environmental, social, and economic harms. EPA cannot lawfully adopt the Proposal.

A. Through the New Source Review Program, Congress Granted the Public Numerous Meaningful Substantive and Procedural Protections Against Increases in Local Air Pollution

In the NSR program, Congress guaranteed the public protections against significant increases in local air pollution resulting from new and expanded industrial facilities. In areas that are designated in attainment with the NAAQS, Congress required "[n]o major emitting facility . . . may be constructed . . . unless," among other things:

1. a permit has been issued setting forth emission limitations in accordance with the Clean Air Act;
2. a public hearing has been held with opportunity for interested persons to appear and submit written or oral presentations on the air quality impact of such source, alternatives thereto, control technology requirements, and other appropriate considerations;
3. the owner or operator of such facility demonstrates that emissions from construction or operation of such facility will not cause, or contribute to, air pollution in excess of allowable limits;
4. the proposed facility is subject to the best available control technology;
5. significant analysis has been conducted, including:
    a. continuous air quality monitoring data has been gathered for purposes of determining whether emissions from such facility will exceed legally allowed maximums;
    b. the person who owns or operates the facility agrees to conduct such monitoring as may be necessary to determine the effect which emissions from any such facility may have, or is having, on air quality in any area which may be affected by emissions from such source;
    c. an analysis of the ambient air quality at the proposed site and in areas which may be affected by emissions from such facility;
    d. an analysis of any air quality impacts projected for the area as a result of growth associated with such facility;
    e. analysis of the ambient air quality, climate and meteorology, terrain, soils and vegetation, and visibility at the site of the proposed major emitting facility and in the area potentially affected by the emissions from such facility for each pollutant regulated that will be emitted from, or which results from the construction or operation of, such facility, the size and nature of the proposed facility, the degree of continuous emission reduction which could be achieved by such facility. 42 U.S.C. § 7475.

In areas in non-attainment with the NAAQS, permits must require the source "to comply with the lowest achievable emission rate" and "an analysis of alternative sites, sizes, production processes, and environmental control techniques for such proposed source" must demonstrate "that benefits of the proposed source significantly outweigh the environmental and social costs imposed as a result of its location, construction, or modification." 42 U.S.C. § 7503(a)(2), (5). The proposed source must also ensure that its emission increases will be more than offset by emission decreases from the same or other sources in the area. *Id.* § 7503(a)(1)(A), (c).

B. The Proposal Would Result in More Air Pollution and Environmental and Health Harms

Allowing construction to proceed before the NSR permitting process is completed would lead to worse environmental and human health outcomes. NSR is intended to inform whether and how the facility's construction and operation proceed, so that permitting authorities may issue requirements that reduce or avoid public health harms. Air pollutants regulated under NSR include ozone, carbon monoxide, particulate matter, sulfur dioxide, lead, and nitrogen dioxide, in addition to other regulated air pollutants. The industrial facilities regulated under NSR emit a

wide array of dangerous air pollution associated with a wider range of health harms, including but not limited to those listed below:

Ozone: Exposure to ozone pollution damages the respiratory system and may cause immediate breathing problems, including asthma attacks.[89] For vulnerable high-risk groups, ozone exposure could increase the risk of premature death.[90] Long-term exposure to ozone could cause serious health issues, including respiratory illness, metabolic disorders, nervous system issues, reproductive issues, and cardiovascular issues.[91]

Carbon Monoxide: Carbon monoxide poisoning is extensively documented and is the leading cause of mortality due to poisoning in the United States.[92] Severe poisoning causes cardiac arrest, respiratory arrest, seizures, and coma.[93] The most reported symptoms associated with carbon monoxide poisoning are headache, nausea, dizziness, and blurred vision; however, carbon monoxide exposure has the potential to affect nearly all tissues.[94] Populations living in urban areas with stationary sources such as petroleum refineries, gas- and coal-burning power plants, and petrochemical plants are more likely to be exposed to higher levels of carbon monoxide.[95]

Particulate Matter: Exposure to fine particulate matter, $PM_{2.5}$, results in serious health issues because tiny particles can penetrate deep into the lungs and enter the bloodstream, causing severe cardiovascular, respiratory, and neurological damage.[96] Studies have linked exposure from fine particle pollution to mortality and morbidity rates, heart failure, and adverse respiratory effects, including aggravated asthma, diabetes, and more.[97]

Sulfur Dioxide: Exposure to sulfur dioxide primarily affects the respiratory system.[98] Inhaling sulfur dioxide may cause immediate irritation to the nose, throat, and lungs, with asthmatic individuals experiencing severe symptoms.[99] High levels of sulfur dioxide can cause difficulty breathing, while long-term exposure can reduce overall lung function. [100]

Lead: Lead poisoning damages almost every organ system, with risks of irreversible neurological and behavioral effects.[101] Children are the most vulnerable to lead exposure, as there is no safe blood lead level, [102] and even low-level exposure leads to decreased cognitive

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[89] Am. Lung Assn, *Ozone* (June 9, 2025), https://www.lung.org/clean-air/outdoors/what-makes-air-unhealthy/ozone.
[90] *Id.*
[91] *Id.*
[92] *Toxicological Profile for Carbon Monoxide*, Agency for Toxic Substances and Disease Registry 30 (June 2012), https://www.atsdr.cdc.gov/toxprofiles/tp201-c2.pdf.
[93] *Id.* at 34.
[94] *Id.*
[95] *Id.* at 30.
[96] *Guidance for Inhalation Exposures to Particulate Matter*, Agency for Toxic Substances and Disease Registry 3 (June 2024), https://www.atsdr.cdc.gov/pha-guidance/resources/ATSDR-Particulate-Matter-Guidance-508.pdf.
[97] *Id.*
[98] *Toxicological Profile for Sulfur Dioxide*, Agency for Toxic Substances and Disease Registry 31 (Dec. 1998), https://www.atsdr.cdc.gov/ToxProfiles/tp116-c2.pdf.
[99] *Id.* at 23.
[100] *Id.*
[101] *Toxicological Profile for Lead*, Agency for Toxic Substances and Disease Registry 18 (Aug. 2020), https://www.atsdr.cdc.gov/toxprofiles/tp13.pdf.
[102] *Id.* at 17–18.

function, including lower IQ, and behavioral issues.[103] Adults face risks of cardiovascular, renal, and reproductive effects.[104]

Nitrogen Dioxide: Breathing nitrogen dioxide causes harmful effects to the lungs.[105] Even short periods of exposure to nitrogen dioxide can aggravate respiratory diseases.[106] Breathing high levels can cause rapid burning, spasms, and swelling of tissues in the throat and upper respiratory tract, reduced oxygenation of body tissues, a build-up of fluid in your lungs, and death.[107] Studies suggests that exposure to nitrogen dioxide likely causes asthma in children.[108]

1. The Proposal will Result in More Dangerous Air Pollution from New Data Center-Related Infrastructure

EPA states that this Proposal will "support the development of Artificial Intelligence (AI) infrastructure and power generation,"[109] but completely neglects to consider the harmful impacts of the Proposal on air pollution from AI infrastructure and power generation. Here we use illustrative examples to highlight the types of air pollution and health harms that are associated with power generation for new and expanding data centers. EPA's Proposal threatens regulators' ability to adequately address this harmful air pollution. *See also supra* Section V.B. (explaining how this Proposal would bias permitting decisions and increase polluting activities).

Tucker Co. Data Center: A new stationary methane gas combustion turbine proposed to be built in Tucker County, West Virginia to support data center operations is expected to release annually up to 71.44 tons of $PM_{2.5}$, 58.89 tons of SO_2, 99.25 tons of NOx, and 43.84 tons of VOCs.[110] One analysis found that over 250,000 people would be exposed to greater $PM_{2.5}$ from the facility's operation.[111] Exposure to $PM_{2.5}$ is associated with a range of adverse health outcomes including asthma attacks, respiratory and cardiovascular disease, heart attacks, strokes, and premature death.[112] The study estimated that the methane gas plant could cause up to $35 million in damages per year from premature mortality, nonfatal heart attacks, new asthma cases, respiratory hospitalizations, restricted activity days, and lost workdays.[113]

Virginia Diesel Generators: A Sierra Club analysis of diesel generators being used to provide backup power supply for data centers in Virginia estimates they could emit up to 13,000

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[103] *Id.* at 147–48.
[104] *Id.* at 17–18.
[105] *ToxFAQs™ for Nitrogen Oxides*, Agency for Toxic Substances and Disease Registry (Mar. 25, 2014), https://wwwn.cdc.gov/tsp/ToxFAQs/ToxFAQsDetails.aspx?faqid=396&toxid=69.
[106] *Id.*
[107] *Id.*
[108] Am. Lung Assn, *Nitrogen Dioxide* (Oct. 26, 2023), https://www.lung.org/clean-air/outdoors/what-makes-air-unhealthy/nitrogen-dioxide.
[109] Press Release, U.S. EPA, EPA Proposes Redefining "Begin Actual Construction" to Remove Unnecessary Impediments to Building and Advance Economic Progress, https://www.epa.gov/newsreleases/epa-proposes-redefining-begin-actual-construction-remove-unnecessary-impediments.
[110] *See* Report: Air Pollution Impacts of Proposed Ridgeline Plant, Dominici Lab, at 1 (Jan. 12, 2026), https://www.tuckerunited.com/study.
[111] *Id.* at 2.
[112] *Id.* at 3.
[113] *Id.* at 2.

tons of NO_x and over 650 tons of particulate matter, annually.[114] This pollution is estimated to cause up to 177 premature deaths every year.[115]

MZX Tech Facility: A proposed stationary methane gas combustion turbine in Southaven, Mississippi to power a nearby xAI data center is estimated to emit up to 19.56 tons per year of $PM_{2.5}$, 156.53 tons per year of SO_2, 423.39 tons per year of NO_x, and 417.40 tons per year of VOCs.[116] An analysis estimates $30–44 million per year in health-related damages including from premature death, hospital visits, and lost productivity.[117]

2. The Proposal will Result in More Dangerous Air Pollution from Other Industrial Facilities

This Proposal will not just result in more air pollution from data centers, but from all industrial facilities subject to weaker protections being proposed by EPA. *See also supra* Section V.B. (explaining how this Proposal would bias permitting decisions and increase polluting activities). The EPA has said previously that over 15,000 major stationary sources have obtained Title V operating permits, providing some indication of the universe of industrial facilities eligible for the harmful, weakening EPA Proposal.[118] And new, proposed major stationary sources, like hyperscale data centers, will add to this number. Here are just a select few examples:

- Portland cement plants emit $PM_{2.5}$, HCl, "a corrosive gas that can cause irritation of the mucous membranes of the nose, throat and respiratory tract," including "swelling and spasm of the throat and suffocation" and exposure of which can lead to "RADS, a chemically- or irritant-induced type of asthma," and mercury, associated with neurodevelopmental and cardiovascular harms.[119]
- Petroleum refineries can emit over 180 different air pollutants, including benzene, which can damage the blood cells; 1,3-butadiene, linked to cardiovascular and respiratory harms; hydrogen fluoride, linked to kidney and liver damage; hydrogen sulfide, linked to headache, nausea and other harmful effects; particulate matter (PM), linked to heart and lung problems; sulfur dioxide, which can impair the airway and lead to pulmonary function declines; sulfuric acid, which can decrease lung function; and toluene, which can harm the central nervous system.[120]

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[114] *A Secret Coal Plant in the DC Suburbs*, Sierra Club, https://www.sierraclub.org/coal/secret-coal-plant-dc-suburbs (last updated April 14, 2026).
[115] *Id.*
[116] *See* Empower Analytics Group LLC, *Air Quality, Health, and Economic Impacts of the Proposed MZX Tech Facility* (Feb. 2026), https://static1.squarespace.com/static/602aef80ede5cc16ae73697b/t/699d284da23b490a4d1afaf8/1771907149789/Health+Impacts+Report+MZX+Tech.pdf/.
[117] *Id.* at 2.
[118] U.S. EPA, Introduction to State Review Framework Data Metrics Spreadsheet Clean Air Act (Nov. 6, 2009), https://echo.epa.gov/system/files/CAA%20Data%20Metrics%20Spreadsheet%2011.06.09.pdf.
[119] *See, e.g.*, U.S. EPA, National Emission Standards for Hazardous Air Pollutants for the Portland Cement Manufacturing Industry and Standards of Performance for Portland Cement Plants, 78 Fed. Reg. 10006, 10028 (Feb. 12, 2013).
[120] *See, e.g.*, California Env't Prot. Agency, *Analysis of Refinery Chemical Emissions and Health Effects* at iv, 21–26 (Mar. 2019), https://oehha.ca.gov/air/analysis-refinery-chemical-emissions-and-health-effects.

- Stationary methane gas combustion turbines release NO_x, linked to respiratory effects including exacerbation of asthma and asthma development.[121] They also release hazardous air pollutants, including formaldehyde, a probable human carcinogen; toluene, linked to dysfunction of the central nervous system; benzene, a known human carcinogen, and acetaldehyde, a probable human carcinogen that can cause irritation of the eyes, mucous membranes, skin, and upper respiratory tract, while it also is a central nervous system depressant.[122]

3. The Proposal will Result in More Dangerous Air Pollution in Areas Already Overburdened with Pollution

The Proposal impermissibly weakens permitting authorities' ability to address harmful air pollution in communities already facing disproportionate burdens from environmental hazards. This Proposal would perpetuate unjust siting practices and further entrench polluting facilities (especially power plants and now data centers) in already-overburdened and climate-vulnerable low-income communities and communities of color. Data centers and power plants, the siting of which will be accelerated unlawfully by this Proposal, are most often located near frontline, low-income communities and communities of color that face multiple, overlapping, systemic burdens.[123] The health and environmental impacts of this Proposal would be felt most acutely by these communities.

Some communities face heightened environmental and health harms because they are exposed to multiple sources of harmful air pollution and the cumulative impacts from those pollution burdens. As just one example, consider xAI's South Memphis data center facility, which is alleged to have installed and run dozens of methane gas turbines emitting smog-forming pollution near the community.[124] The data center is located near predominantly Black communities who face a cumulative cancer risk that is four times higher than the national average.[125] This heightened risk is due to multiple sources of harmful air pollution including fossil fuel plants, steel, refining, and food processing industries as well as mobile source pollution.[126]

EPA has previously recognized that NSR is an important tool that states use to address increases in pollution in communities already facing higher cumulative burdens of air pollution and health harms. In addition to having authority to adopt additional requirements in order to address disproportional environmental burdens, EPA has recognized that permitting authorities

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[121] *See, e.g.*, U.S. EPA, *National Emission Standards for Hazardous Air Pollutants for Stationary Combustion Turbines*, 69 Fed. Reg. 10512, 10513–14 (Mar. 5, 2004).
[122] *Id.*
[123] *See, e.g.*, Pat Knight *et al*., Assessing Power Sector Impacts on Environmental Justice Communities (May 2026), https://www.synapse-energy.com/sites/default/files/Assessing%20Power%20Sector%20Impacts%20on%20EJ%20Communities%205.19%2023-119.pdf; U.S. Data Centers Dashboard, FracTracker All. (Apr. 7, 2026), https://www.fractracker.org/2026/04/open-u-s-data-centers-tracker/.
[124] Press Statement, NAACP, Elon Musk's xAI threatened with lawsuit over air pollution from Memphis data center, filed on behalf of NAACP (Jun. 17, 2025), https://naacp.org/articles/elon-musks-xai-threatened-lawsuit-over-air-pollution-memphis-data-center-filed-behalf.
[125] Chunrong Jia & Jeffery Foran, *Air toxics concentrations, source identification, and health risks: An air pollution hot spot in southwest Memphis, TN*, 81 Atmos. Env't 112 (2013).
[126] *Id.*

can use "enhanced engagement" for communities with specific concerns due to high burdens from pollution, including "facilitating increased public participation in the formal permit consideration process (*e.g.*, by granting requests to extend public comment periods, holding multiple public meetings, or providing translation services at hearings in areas with limited English proficiency) and taking informal steps to enhance participation earlier in the process, such as inviting community groups to meet with the permitting authority and express their concerns before a draft permit is developed." 89 Fed. Reg. 101,306, 101,312 (Dec. 13, 2024). EPA fails to consider how the Proposal will frustrate the ability of permitting authorities to engage and protect highly burdened communities as it weakens those authorities' ability to engage with communities *before* construction and investment begin.

C. The Proposal Would Cause More Air Pollution by Violating the Review-First Framework Required by Congress

The Proposal would allow significant investment and construction to occur on a facility—including key design components that impact air pollution levels, air pollution control measures or process improvements, and environmental impacts—without preconstruction permitting review required by NSR. By allowing pivotal design decisions to be made and implemented before permitting authorities conduct and conclude their review, the Proposal weakens permitting authorities' ability to complete an unbiased, unencumbered review that fulfills statutory requirements. This approach will likely result in more dangerous and unlawful air pollution exposure for nearby communities.

EPA's Proposal puts permitting authorities in the compromised position of making crucial legal and technical determinations—about emission limitations, BACT, LAER, whether there has been sufficient demonstration that pollution from the facility will comply with established limits, and whether the facility will impose unacceptable air quality impacts on the surrounding community—only after significant construction and investment are completed but before an NSR permit is even sought or issued. This will inevitably bias the process in favor of approving the permit on terms that protect the investment already made, rather than protecting air quality or public health. *See, e.g.*, *supra* Sections II.C.5., V.B.

EPA ignores this problem. Instead, the agency claims glibly that the risk of lost investment for a project whose permit is denied lies with the owner. EPA may not discount the consequences of its illegal actions so easily. EPA may not violate the Act's clear prohibitions on pre-permit constructions and then claim blithely that regulated entities bear the economic risks created and facilitated by EPA's own illegal actions. Congress and the Clean Air Act do not impose those economic risks on companies; only the illegal EPA Proposal does that. 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.

91 Fed. Reg. at 26,972.

Nothing in the Clean Air Act or its legislative history supports the notion that Congress created this regime purposefully or even entertained that it would be created by EPA. The

Proposal, of course, does not and cannot identify anything in the Act or that legislative history to support or echo this world view. As explained above, this point undermines the Proposal rather than supporting it, because owners will face greater uncertainty—not less as EPA claims, 91 Fed. Reg. at 26,965/1—over the risk of lost investments when the outcome of the permit decision is truly unknown but potentially skewed by early investment. EPA proposes to weaken (and violate) NSR protections to provide industry an even more uncertain environment in which to construct early (and unlawfully).

The more relevant question is whether the permitting authority will face pressure to protect the owner or operator's investment. There are incentives for the permitting authority to do so. First, NSR is largely implemented by state and local agencies whose implementing programs have been approved by EPA. This means permitting decisions are in the hands of entities who also have a stake in seeing the project succeed because they stand to benefit politically from local economic growth, tax revenue, employment opportunities, etc. that the project may bring. Then, when completing review, the permitting authority is incentivized to approve the permit in order to protect the investment and benefits that will flow to their residents/jurisdiction or risk losing the opportunity if denying the permit or changing its terms risks losses to the owner that would jeopardize the future of the project entirely. *See supra* Sections II.C.5., V.B. Requiring permitting authorities to complete permitting review as Congress required in the Clean Air Act before investment is sunk into the project prevents this distortion. EPA has recognized this legal obligation for nearly 50 years, as illustrated in its longstanding policies discussed elsewhere in these comments.[127]

D. The Proposal Will Increase Harms to the Public from Construction and Re-Construction, Which Will No Longer Be Able to Be Reviewed, Mitigated, or Prevented by Permitting Authorities

The Proposal would worsen public health harms that result from **construction** of the facility. The Clean Air Act requires that, "the owner or operator of such facility demonstrates that emissions from construction . . . of such facility will not cause, or contribute to, air pollution" in excess of allowable limits. 42 U.S.C. § 7475(a)(3). It also requires "analysis of the ambient air quality, climate and meteorology, terrain, soils and vegetation, and visibility at the site of the proposed major emitting facility and in the area potentially affected by the emissions from such facility for [pollution] that . . . results from the construction [of] such facility." *Id*. § 7475(e)(3)(B). In non-attainment areas, the Act requires "an analysis of alternative sites, sizes, production processes, and environmental control techniques for such proposed source." *Id*. § 7503(a)(5). There must be a demonstration that "benefits of the proposed source significantly outweigh the environmental and social costs imposed as a result of its location, construction, or modification." *Id.*

Through these provisions, Congress directed there to be consideration of health and environmental impacts of the source's construction at the proposed location and site. If construction begins before the analysis, detrimental impacts may not be reviewed and uncovered

[127] *See, e.g.*, October 1978 Memo, *supra* note 38 ("It is extremely difficult to deny issuance of a permit when it results in a completed portion of a project having to remain idle. Therefore, in order to avoid any equity arguments at a later time, it is better to prevent any construction now rather than to have a "white elephant" on our hands later on").

before pollution has already been released; such damage cannot be undone. Permitting authorities must review impacts of construction of the *entire facility* (not just the emitting components) to ensure compliance with the Act. This review will be rendered meaningless if the very construction to be reviewed is already complete at the time of the review.

Environmental and public health harms from construction of industrial facilities can be significant. The harms of constructing large industrial facilities like data centers begin before they begin operating. Building the facility itself carries a heavy carbon footprint from materials production, transport, and on-site work.[128] A study of multiple data center projects, "The True Environmental Cost of Data Centers," found that emissions from foundation and substructure systems run on average 414% higher for data centers than for comparable residential construction.[129] More broadly, embodied carbon in materials such as concrete and steel accounts for an estimated eighteen percent of global energy-related CO_2 emissions.[130] On-site construction equipment is also a concentrated source of criteria pollutants such as nitrogen oxides, particulate matter, and carbon monoxide.[131] Siting facilities in undeveloped rural areas multiplies these emissions by demanding new roads, transmission lines, and water infrastructure, while clustering them in suburban areas raises cumulative air-quality concerns that today's air-focused permitting may not adequately capture.[132]

Construction sites also have large scale impacts on land and water. Site preparation can accelerate stormwater runoff, which carries sediment into nearby streams and can smother aquatic habitat and spawning grounds or impede navigation.[133] Data center construction also consumes land and can lead to habitat and farmland loss, with the average data center site in 2024 spanning 244 acres.[134] For example, the Amazon data center under construction in New Carlisle, Indiana, will eliminate roughly ten acres of wetlands and is being built largely on farmland.[135] For the surrounding community, the construction phase means months or years of

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[128] Paul Eloke, *Embodied Carbon and Life Cycle Assessment of Data Centre Structures*, 9 Eur. Mod. Stud. J. 213, 213 (2025).

[129] Juan D. Núñez-Morales, Yoonhwa Jung & Mani Golparvar-Fard, *The True Environmental Cost of Data Centers: An Insight into the Construction Phase of the Era of Artificial Intelligence*, CIB Conferences (2025).

[130] U.N. Env't Programme & Glob. Alliance for Buildings and Construction, *Not just another brick in the wall: The solutions exist – Scaling them will build on progress and cut emissions fast. Global Status Report for Buildings and Construction 2024/2025* U13 (2025), https://wedocs.unep.org/items/cd45bf5e-f635-4b6e-a453-8de0433aef35.

[131] Ebrahim Eslami, *Air Quality and Greenhouse Gas Emissions Assessment of Data Centers in Texas: Quantifying Impacts and Environmental Tradeoffs*, arXiv.org 12, https://arxiv.org/pdf/2509.21312.

[132] *Id.* at 13.

[133] U.S. EPA, *National Menu of Best Management Practices (BMPs) for Stormwater-Construction* https://www.epa.gov/npdes/national-menu-best-management-practices-bmps-stormwater-construction (last visited Jun. 24, 2026).

[134] Brian Ungles *et al.*, Data Center Development Cost Guide 2025, Cushman & Wakefield, https://digital.cushmanwakefield.com/Data-Center-Development-Cost-Guide-2025/2-3/ (2025).

[135] Hoosier Environmental Council, *Measuring the Environmental Cost of AI and its Data Centers*, Hoosier Environmental Council Blog, (June 28, 2025), https://www.hecweb.org/2025/06/28/measuring-the-environmental-cost-of-artificial-intelligence-and-their-data-centers/.

heavy truck traffic, dust, and noise, and while the jobs it generates are largely temporary, the conversion of farmland, forest, and wetland is permanent.[136]

The Proposal would harm members of the public from construction that otherwise would not occur if a project were deemed incompatible with the proposed site. Congress anticipated that the review and public engagement processes of NSR could lead to alternatives to the proposed site and provided for that consideration at 42 U.S.C. § 7503(a)(5). Any pollution emitted during that construction will endanger the public and cannot be undone—even if it is later determined to be a violation of statutory limits on air pollution deemed by EPA to be safe, even if it violated health-based air quality standards, and even if it should have resulted in a denial of the permit or specific terms to ensure compliance.

The Proposal would have the perverse effect of exposing communities to even greater pollution and health harms from construction. By allowing construction to begin on a facility before a permit is issued for the facility, the Proposal would allow situations in which the owner or operator will have to do more construction than otherwise would have been required. For example, the permit terms might require modifications to structural elements that have already been constructed or built. This would result in more pollution and harm than would have occurred if construction had waited until the plans for the site and facility were approved and finalized.

EPA completely fails to consider or explain how permitting authorities are supposed to consider construction-related harms or costs that already have occurred as part of their permit review, consistent with the Clean Air Act. The Proposal entirely fails to consider the adverse environmental and health impact of allowing construction to proceed before review. The Proposal would allow a project that has significant harms associated with its construction to proceed before permitting authorities begin their review. A permitting authority that might otherwise have denied the permit or required additional controls to mitigate construction harms would be permitted by the Proposal to no longer consider the construction-related harms that already have taken place. The permitting authority can no longer mitigate or prevent construction-related harms that it otherwise would have had a duty to review. And, if permitting authorities are no longer considering the harms that already have occurred in their benefit/harm analysis, they will be more likely to approve projects or not require mitigation for projects whose operations will harm the community.

The Proposal also introduces confusion into the review process about whether permitting authorities would need to consider the pollution resulting from modifications to the facility that have already been constructed. The Proposal might also result in permitting authorities no longer requiring protections that they otherwise would have required based on consideration of the extended construction impacts from having to modify what was already constructed.

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[136] Carla D. Walker & Ian Goldsmith, *From Energy Use to Air Quality*, World Resources Inst., (Feb. 17, 2026), https://www.wri.org/insights/us-data-center-growth-impacts; Dany Bahar & Greg Wright, *New evidence on data center employment effects*, Brookings Inst., (May 4, 2026), https://www.brookings.edu/articles/new-evidence-on-data-center-employment-effects/.

E. The Proposal Harms Communities and the Public by Severely Undermining the Procedural Protections of the Clean Air Act

EPA has failed to consider how both environmental and public policy goals will be harmed by the Proposal's weakening of the Act's public review and engagement process for NSR. The Clean Air Act prescribes an essential role to the public in NSR. Before an NSR permit may issue, the public must be given an opportunity to provide written and oral comment on "the air quality impact of such source, alternatives thereto, control technology requirements, and other appropriate considerations." 42 U.S.C. § 7475(a)(2). Public input is intended to inform key decisions about the proposed facility **before** construction. When done correctly, this public engagement can enhance the quality of the environmental review and increase trust between the community and regulators and lead to greater acceptance of new projects. The National Academies have summarized research on public participation as follows:

> When done well, public participation improves the quality and legitimacy of a decision and builds the capacity of all involved to engage in the policy process. It can lead to better results in terms of environmental quality and social objectives. It also can enhance trust and understanding among parties. Achieving these results depends on using practices that address difficulties that specific aspects of the context can present.[137]

Allowing construction before public engagement has begun significantly undermines this process. The National Academies have found two components that affect the success of public participation in improving outcomes are (1) regulator's "commitment to use the process to inform their actions" and (2) "appropriate timing in relation to decisions."[138] On the other hand, "participatory processes convened as a superficial formality or without adequate support by decision makers increase the public's distrust of government when, almost inevitably, the results have little impact."[139]

If significant construction and investment occur before a NSR permit has been noticed for public comment and hearing opportunity or issued, members of the public will be justifiably skeptical about the role of public engagement and regulatory review in the decision-making process. If community members can see an owner or operator committing to a specific design or outcome and construction taking place before review has begun or concluded—they cannot be expected to trust the government to seriously consider their input or to believe that their engagement will have any meaningful impact on the process. This both undermines trust in government authorities and is likely to lead to worse outcomes in assessing the environmental and air quality impacts of new and expanding facilities.

The National Academies explained, "the more committed a decision-making agency is to act on the results of a public participation process the more likely the parties are to engage seriously" whereas "[a]mbiguity about how information will be used increases uncertainty, which . . . makes high-quality thinking less likely."[140] This "implies that a public participation process is likely to go better if the responsible agency can honestly signal to the participants that

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[137] Nat'l Rsch. Council, Public Participation in Environmental Assessment and Decision-Making 76, 226 (2008).
[138] *Id.* at 227.
[139] *Id.*
[140] *Id.* at 99.

it has not made a decision and does not have a strong predisposition for one course of action over another but is sincerely looking for input."[141]

The National Academies also have stressed the importance of timing public engagement early enough for successful outcomes: "If the process is started too late, there may not be adequate time to develop trust and understanding and to process scientific and technical information. Furthermore, if the outputs from the participatory process come too late to influence decisions, it becomes impossible for an agency to fulfill promises to take the process seriously."[142]

F. The Proposal Will Harm the Public by Allowing Construction Before Alternatives Are Considered

Public health harms are likely to occur if analysis of alternatives is not completed before significant construction on the source begins. Section 165(a)(2) of the Clean Air Act provides an additional PSD requirement that states must consider submitted alternatives to a proposed new or modified stationary source. More specifically, under Section 165(a), PSD permits may not issue before the proposed permit has, among other things, been subject to review in accordance with the Clean Air Act and "public hearing has been held with opportunity for interested persons . . . to appear and submit written or oral presentations on the air quality impact of such source, **alternatives thereto**, control technology requirements, and other appropriate considerations." 42 U.S.C. § 7475(a)(2) (emphasis added).

The EPA has, in the past, interpreted this provision to provide the opportunity for a permitting authority to consider alternative, inherently lower-emitting technologies, such as the installation of an integrated gasification combined cycle ("IGCC") power plant in lieu of constructing a coal-fired power plant.[143]

The Act's requirements for the public to have the opportunity to offer alternatives to a proposed source and for permitting authorities to consider them will be flouted if construction is already significantly underway before such alternatives are proposed and considered.

G. The Proposal Will Accelerate Harmful, Unlawful Data Center Construction

The Proposal will accelerate the construction of data centers, which have a range of detrimental impacts. *See, e.g., supra* Section VII.B.1. Regulatory oversight, including that required by the NSR provisions of the Act, is critical as data centers proliferate. For example, the Stratos Project is a proposed $100 billion data center campus located in Box Elder County, Utah.[144] It is projected to span approximately 40,000 acres—roughly twice the size of

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[141] *Id.* at 100.
[142] *Id.* at 103.
[143] *See, e.g.*, Letter from Mr. Stephen D. Page, Director, US EPA Office of Air Quality Planning and Standards (OAQPS), to Mr. Paul Plath, Senior Partner, E3 Consulting, LLC (Dec. 13, 2005) (explaining that Section 165(a)(2) is one of two sections of the Clean Air Act where "consideration of alternative designs or production processes may occur").
[144] Michael Posner, *One Utah County's Fight Over A $100 Billion Data Center—And What It Means for All of Us*, Forbes (Jan. 9, 2026), https://www.forbes.com/sites/michaelposner/2026/06/09/one-utah-countys-fight-over-a-100-billion-data-center---and-what-it-means-for-all-of-us/.

Manhattan—and at full buildout, will reach nine gigawatts—more than the entire state of Utah's current peak electricity demand.[145]

The project is set to be completed over multiple years in several phases.[146] Phase One will build approximately three gigawatts of data center capacity, fueled by on-site methane gas generation.[147] The data center building footprint in Phase One will be fewer than 2,000 acres, but development staging, renewable energy, energy storage, and infrastructure may be added beyond that.[148]

A typical hyperscale data center building is 20,000 to 100,000 square feet.[149] And at the scale of the projected Stratos Project, individual data center buildings can span hundreds of thousands of square feet.[150] A hyperscale data center like the Stratos Project is a very large facility that handles massive computing, storage, and networking demands for AI, cloud computing, and big data.[151] The data center structures are essentially self-contained—each building houses numerous rows of computer servers running in constant operation, surrounded by massive cooling systems and connected to power distribution infrastructure.[152]

Under EPA's Proposal, Stratos Project developers might contend they can build the entire 100,000 square foot data center building without an NSR permit simply because the "pollutant-emitting activities" are technically taking place outside the building. 91 Fed. Reg. at 26,970. In practice, the data center buildings themselves do not directly emit regulated NSR pollutants, and the methane gas turbines constituting the power plant are located outside the data center buildings. If EPA's rule is finalized as proposed, the NSR preconstruction permitting would be necessary only once construction begins on the gas turbines and directly associated emissions equipment located outside the building. *See id.* at 26,964.

Residents of Box Elder County are opposing this proposed data center in its entirety.[153] Under current regulations, no permanent on-site construction can take place before permitting. *See supra* Section IV.A. The Proposal would authorize and facilitate the staged evasion of NSR permitting. While initial public comments describe completion in three phases, the EPA Proposal would allow much of the construction to occur and be completed before any draft preconstruction permit is noticed for public review or even before any final permit is issued. Moreover, once the first phase of the project (building three gigawatts of capacity) is complete,

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[145] Oliver Milman, '*Irresponsible': backlash as Utah approves datacenter twice the size of Manhattan*, The Guardian (May 13, 2026), https://www.theguardian.com/us-news/2026/may/13/utah-approves-datacenter-backlash.
[146] Box Elder County, Utah, *Stratos Project Fact Sheet*, https://www.boxeldercountyut.gov/647/Stratos-Project-Fact-Sheet (last visited June 28, 2026).
[147] *Id.*
[148] *See* Alixel Cabrera, *"I seek to do better," Cox says after heated comments on Box Elder County data center, Utah News Dispatch* (May 8, 2026), https://utahnewsdispatch.com/2026/05/08/cox-seeks-to-to-better-after-heated-comments-on-box-elder-data-center/.
[149] Phill Powell & Ian Smalley, *What is a hyperscale data center?*, IBM, https://www.ibm.com/think/topics/hyperscale-data-center (last visited June 28, 2026).
[150] *Id.*
[151] *Id.*
[152] *Id.*
[153] Leia Larsen, *The world's largest data center was supposed to run on 100% natural gas. Utah's Republican governor says 'never,'* Grist (May 28, 2026), https://grist.org/accountability/data-center-natural-gas-utah-cox-box-elder-stratos/.

and if an incomplete, abbreviated NSR permit is issued, a significant portion of the facility could begin **operating** while Phase 2 and Phase 3 construction proceeds without completed permitting.

Despite overwhelming bipartisan opposition by Americans, the data center boom is only predicted to increase: more than 1,500 new data centers are in development nationwide, and experts forecast that the hyperscale data center capacity will double worldwide.[154]

H. The Proposal Will Harm the Public's Reliance Interests (Response to EPA 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?)

The public has reliance interests in the current regulations that will be harmed by the Proposal. Residents near sites that may see development in the future have acted in reliance on the current regulations and their guarantee to these residents that regulators will provide substantive and procedural protections to analyze the impacts of developments expected to increase air pollution **before** construction. The Proposal makes these residents more vulnerable to air pollution and environmental harms that might occur from local development. In the absence of the existing, stronger regulations, these residents may not have purchased their property or chosen to live in their current area. These residents have chosen to reside in their homes based on the guarantee that before air pollution-increasing development occurs, they will be granted an opportunity to provide input on alternatives to the development, air quality impacts, and that regulators will provide an unbiased review of these impacts and require pollution controls consistent with the Clean Air Act to address harms—all prior to construction.

I. Impacts on State and Local Economies (Response to EPA 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. 91 Fed. Reg. at 26,974/3.)

Allowing substantial investment prior to the start of the Clean Air Act preconstruction permitting process risks substantial economic harm, both to local communities and industry, including small businesses. First, it risks state and local communities (including other small businesses, as well as local governments) making investment decisions based on expected development that then does not manifest due to being unable to ultimately clear the permitting process, or determining required controls make an investment less attractive. Second, a project already well along in the construction process may see even higher economic impacts from requirements imposed by the NSR process. Finally, and conversely, these potential impacts heighten already existing risks of improper influence on permitting decisions due to reliance interests.

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[154] Skylar Seets & Kaitlyn Radde, *Most New Data Centers in the U.S. Are Coming to Rural Areas*, Pew Rsch. Ctr. (Apr. 13, 2026), https://www.pewresearch.org/short-reads/2026/04/13/most-new-data-centers-in-the-us-are-coming-to-rural-areas/; Synergy Rsch. Grp., *Hyperscale Data Center Count Hits 1,136; Average Size Increases; US Accounts for 54% of Total Capacity* (Mar. 19, 2025), https://www.srgresearch.com/articles/hyperscale-data-center-count-hits-1136-average-size-increases-us-accounts-for-54-of-total-capacity.

The direct cost of the permitting process itself is relatively well-documented,[155] however case-by-case determinations such as NSR's BACT/LAER requirements of necessity vary significantly, as permitting authorities rely on other continuously-improving decisions such as those documented in the RACT/BACT/LAER Clearinghouse.[156] Additionally, aside from the direct costs of permitting itself, the location of a facility can impact the costs of compliance, as major NSR generally requires analysis of local and regional air quality, including modeling that incorporates local meteorology and topology, to determine potential impacts.[157] Further, as covered in Section II.B., the very location of a project to be constructed is itself a portion of the NSR process.

Nor does securing economic development require circumventing or "streamlining" these permitting requirements. Indeed, to the contrary, as explained above in Section V.A., the permitting process and economic development are compatible and synchronous.[158] This highlights the second risk, that a project already substantially far along in development and construction, may end up seeing even higher costs than otherwise would be borne if permitting were conducted prior to beginning construction. This risk is laid out more fully in Section V.B.

Which brings up the final risk summarized above—the potential for improper influence over the local or state permitting process by economic or other interests to avoid lost sunk costs. This is a risk that is already seen in myriad examples of permits being fast-tracked or rubber-stamped by overtaxed local and state agencies, often at the exhortation of elected officials and economic development agencies and interests. For instance, the air permits for the Formosa Plastics facility were challenged by community groups alleging improper influence from Louisiana Governor John Bel Edwards, leading to the permits being vacated by a state court as arbitrary and capricious in 2022. *RISE St. James v. La. Dep't of Env't Quality*, No. C-694029, 2022 WL 4596350 (La. Dist. Ct. Sept. 14, 2022). While that decision was ultimately overturned, No. 2023-CA-0275, 2024 WL 219195 (La. Ct. App. Jan. 19, 2024) (reinstating permits and granting agency deference), the project remains under heavy scrutiny, may not ultimately end up proceeding,[159] and continues to face permitting challenges as it recently received its fourth permit extension without beginning construction.[160]

This risk has further been brought to public attention with fast-tracked (or even unpermitted) data center projects backed by wealthy individuals. For instance, xAI projects in Mississippi near the border with Memphis, Tennessee, recently received air permits for on-site power generation, amid claims that "the agency was under immense pressure to quickly approve

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[155] *See, e.g.*, Doug Ruhlin, *How Much Does an Air Permit Cost?*, RMA Blog (May 5, 2025), https://www.rmagreen.com/rma-blog/how-much-does-an-air-permit-cost.
[156] U.S. EPA, RACT/BACT/LAER Clearinghouse (RBLC), https://cfpub.epa.gov/RBLC (last visited Jun. 19, 2026).
[157] Ruhlin, *supra* note 155; U.S. EPA, Fact Sheet: New Source Review (NSR), (2006), https://www.epa.gov/sites/default/files/2015-12/documents/nsrbasicsfactsheet103106.pdf.
[158] *See* U.S. EPA, *The Clean Air Act and the Economy*, https://www.epa.gov/clean-air-act-overview/clean-air-act-and-economy (last updated Sept. 25, 2025).
[159] Tom Sanzillo, *Louisiana Court Reinstates Formosa Plant Permit, but Financial Outlook Still Bleak*, Inst. for Energy Econ. & Fin. Analysis (Jan. 24, 2024), https://ieefa.org/resources/louisiana-court-reinstates-formosa-plant-permit-financial-outlook-still-bleak.
[160] Press Release, Earthjustice, Groups Sue Over Formosa Plastics' Permit Extensions (Feb. 5, 2026) https://earthjustice.org/press/2026/groups-sue-over-formosa-plastics-permit-extensions.

xAI's air permit."[161] This rubber-stamp process occurred after the project already had been constructed.[162] That decision is now being challenged by the NAACP and others, represented by the Southern Environmental Law Center and Earthjustice. Complaint, *National Ass'n for the Advancement of Colored People v. X.AI Corp.*, No. 3:26-cv-00074-MPM-JMV (N.D. Miss. Apr. 14, 2026).

Authorizing construction of projects without application for, let alone approval of, permitting under the Clean Air Act only further heightens each of these risks. Projects are more likely to be cancelled after substantial local, state, and potential downstream small business investments, or conversely fast-tracked after pressure from economic and elected official influence based on already sunk costs and promises of job and tax benefits. Either outcome substantially harms local communities, either through lost investments or public health detriments from rubber-stamped permitting.

VIII. EPA MAY NOT RELY UPON AN EXECUTIVE ORDER TO JUSTIFY A PROPOSED ACTION THAT PLAINLY CONTRAVENES THE REQUIREMENTS OF THE CLEAN AIR ACT

EPA states that the Proposal is "an Executive Order 14192 deregulatory action," and that it "is expected to reduce burden by increasing flexibility to begin construction of non-emitting components or structures before an NSR permit is obtained." 91 Fed. Reg. at 26,975. Elsewhere, EPA plainly states that the Proposal is intended to "align the rule with statutory and policy directives" and "implement recent Executive Orders focused on regulatory reform and burden reduction." *Id.* at 26,965. EPA must clearly explain on the record how Executive Order ("EO") 14192—or any other recent executive orders "focused on regulatory reform and burden reduction"—impacted this rulemaking. To the extent that EPA is relying upon EO 14192, or any other executive orders, as justification for this Proposal, such reliance is improper and impermissible because an executive order cannot justify agency action that contravenes clear statutory requirements (as is the case here).

In EO 14192, "Unleashing Prosperity Through Deregulation," the Trump administration asserts that "complicated Federal regulation imposes massive costs on the lives of millions of Americans, creates a substantial restraint on our economic growth and ability to build and innovate, and hampers our global competitiveness." 90 Fed. Reg. 9,065 (Feb. 6, 2025). It further states that it is the policy of the Trump administration "to significantly reduce the private expenditures required to comply with Federal regulations." *Id.* To that end, EO 14192 requires that "any new incremental costs associated with new regulations shall, to the extent permitted by law, be offset by the elimination of existing costs associated with at least 10 prior regulations," and that an agency "identify at least 10 existing regulations to be repealed" as a part of the notice and comment process for any new regulation. *Id.*

EPA opens the Proposal's preamble by stating that its "changes aim to foster economic growth by providing greater flexibility for owners and operators building or modifying stationary

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[161] Press Release, S. Env't Law Ctr., Mississippi Regulators Rubber-Stamp Air Permit for xAI Power Plant, Ignoring Overwhelming Public Pushback (Mar. 10, 2026), https://www.selc.org/press-release/mississippi-regulators-rubber-stamp-air-permit-for-xai-power-plant-ignoring-overwhelming-public-pushback/.

[162] Ariel Wittenberg, *xAI Gets Air Permit for Unauthorized Gas Turbines*, E&E News (Mar. 10, 2026), https://www.eenews.net/articles/xai-gets-air-permit-for-unauthorized-gas-turbines/.

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 process. 91 Fed. Reg. at 26,960.

In its section addressing the "need" for this action, EPA explains that "the proposed revisions aim to align the definition [of begin actual construction] with the best reading of the CAA and implement recent Executive Orders focused on regulatory reform and burden reduction." *Id.* at 26,965. Thus, it is clear President Trump's deregulatory agenda, as espoused in EO 14192, is a major driver for this rulemaking.

EPA cannot rely upon EO 14192 as justification for this Proposal, because an executive order cannot constitute a "reasoned explanation" for agency action, let alone one that contravenes clear statutory requirements. An agency must articulate a reasoned explanation for promulgating a rule reversing longstanding policy, which includes demonstrating at a minimum that "the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change adequately indicates."[163] *FCC v. Fox Television Stations, Inc*., 556 U.S. 502, 515 (2009). While a "change in administration" may be grounds for an agency's "reappraisal of the costs and benefits of its programs and regulations," *Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1043 (D.C. Cir. 2012) (citations omitted), a change in administration by itself does not (and **cannot**) constitute a "reasoned explanation" for an agency rulemaking. In reappraising those costs and benefits, the agency must show that it has actually "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Manufacturers Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *accord Fox*, 556 U.S. at 515 (stating that "that the agency *believes* it to be better" is already indicated by the proposed change. The agency must separately demonstrate that there are "good reasons for it.").

EPA has not done so here. EPA provides no new fact-finding or analysis to support its sharp reversal of the interpretation of "begin actual construction" that it held for nearly 50 years. EPA merely states that the Proposal is intended to "implement recent Executive Orders focused on regulatory reform and burden reduction," 91 Fed. Reg. at 26,965, and intones repeatedly that the rule will "foster economic growth" and "reduce regulatory burden," with no apparent negative impacts on air quality or human health. *Id.*; *see also generally supra* Section V. But EPA fails to provide any evidence to support that conclusion, or any indication that it has actually analyzed *any* of the costs or benefits to this rule—even the supposed benefits to regulated industry—in any meaningful way, beyond its surface-level conclusion that this rule reduces regulatory burden and therefore aligns with the executive's policy directives. *Id.* The policy directives of the executive branch, with no consideration of countervailing factors such as the benefits of regulation, statutory purposes and requirements, and public health and welfare needs, cannot sustain agency action under the Clean Air Act, and certainly cannot sustain such action when it violates the plain language of the Act itself. *See supra* Section II.

As discussed throughout these comments, this Proposal contradicts both the plain text of the Clean Air Act and undermines its clear statutory purposes. *See supra* Sections II, V. While it

[163] In light of the Supreme Court's recent decision in *Loper Bright*, this first factor can be re-evaluated as requiring an agency's reading to be the *best* one.

is true that Congress intended to balance the Act's environmental objectives against economic growth to some degree, EPA provides no evidence suggesting that Congress intended EPA to **prioritize** factors such as "foster[ing] economic growth," "reduc[ing] regulatory burdens," or "regulatory certainty" over the potential impacts on air quality or human health that are the primary focus of the Clean Air Act. 91 Fed. Reg. at 26,960. Nothing in the Clean Air Act suggests that EPA can allow sources to begin construction before an NSR permit is obtained on the grounds that the President believes that there are too many regulations delaying construction. This is especially ironic since, as EPA previously recognized, the statutory and regulatory design is *expressly* to prevent any construction until a permit has issued, because allowing such construction has the perverse consequence of making it much more difficult to deny a permit at all—and there are multiple statutory provisions that make clear the Act requires a permit for construction of a facility as a whole, and not just "pollutant-emitting activities."[164]

It is not EPA's role in implementing the Clean Air Act to promote the President's view on what constitutes an appropriate amount of regulation, at the expense of Congressional objectives. "Under our system of government, Congress makes laws and the President, acting at times through agencies like EPA, 'faithfully execute[s]' them." *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 327 (2014) (quoting U.S. Const., Art. II, § 3). "The power of executing the laws necessarily includes both authority and responsibility to resolve some questions left open by Congress that arise during the law's administration. But it does not include a power to revise clear statutory terms[...]" *Id*. As the Supreme Court has recently emphasized, the APA is designed to protect against this manner of executive overreach and specifies that "courts, not agencies, will decide '*all* relevant questions of law'… even those involving ambiguous laws—and set aside any such action inconsistent with the law as they interpret it." *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 392 (2024) (quoting 5 U.S.C. § 706); *see also Volkswagenwerk Aktiengesellschaft v. Fed. Maritime Comm'n*, 390 U.S. 261, 272 (1968) (establishing that courts have final say over all questions of law under § 706 and cannot "rubber stamp" agency decisions that are "inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute" (internal citations omitted)). If an executive order alone were sufficient to justify agency action, it would render the APA and judicial review entirely meaningless. *Accord Chamber of Com. of U.S. v. Reich*, 74 F.3d 1322, 1326–27 (D.C. Cir. 1996) (that an agency's regulations are pursuant to Executive Order "hardly… insulate[s] them from judicial review under the APA"); *see, e.g.*, *Drs. for Am. v. Off. of Pers. Mgmt*., 793 F. Supp. 3d 112, 145 (D.D.C. 2025) (noting that "the existence of an executive order does not automatically render an agency's implementing actions adequately reasoned," and even when implementing an executive order, "agencies are bound by their APA obligations to 'analyz[e] the impacts, costs, and benefits of alternative policy options.'") (internal citations omitted); *see also State v. Su*, 121 F.4th 1, 15 (9th Cir. 2024) (emphatically rejecting argument that agency rules implemented pursuant to an executive order directive are not subject to APA review, because this "would shockingly allow Presidents to insulate any desired rulemaking from judicial review with the single stroke of an executive pen.").

The "policy directives" of the executive branch cannot stand as a "reasoned explanation" justifying EPA's departure from the plain text, structure, history, and statutory objectives of the Act they are charged with faithfully executing—particularly where, as here, the statute forecloses

[164] *See, e.g.*, *supra* Section II; October 1978 Memo, *supra* note 38, at 2.

EPA's proposed new approach. Even if it did not, EPA has offered no new facts or analysis that would support a sharp reversal of nearly 50 years of policy. To the extent the EPA relied on any executive orders or policy directives as the basis for this Proposal, it must withdraw the Proposal because these directives are contrary to and cannot supersede the Clean Air Act.[165]

A. EPA Must Withdraw the Proposal Because Executive Policy Preferences Like "Burden Reduction" and "Deregulation" are Not Lawful Grounds for Circumventing Clean Air Act Protections

The Administration has made a number of public statements and announcements in the lead up to this Proposal that—in addition to the contents of the Proposal itself—suggest that EPA's proffered justification for the Proposal is pretextual and does not communicate the Administration's actual basis for this action. First, for all the reasons already explained, EPA's rationale for the Proposal is arbitrary, capricious, and fails to draw a logical conclusion based on the record before the Agency. Taken against President Trump's clearly stated agenda to deregulate no matter the consequences[166] and to promote data centers and other industrial sources via deregulation,[167] the strong implication is that the decision to weaken the NSR safeguards preceded the invention of the justifications for the rollback that EPA provides in the Proposal. Because EPA fails to "offer genuine justifications for [the] important decisions" proposed, and rather provides only "contrived" reasoning, the Proposal cannot be finalized. *Dep't of Com. v. New York*, 588 U.S. 752, 756 (2019).

On March 12, 2025, a mere 52 days after President Trump's inauguration, EPA Administrator Lee Zeldin announced that "the agency will undertake 31 historic actions in the greatest and most consequential day of deregulation in U.S. history, to advance President Trump's Day One executive orders and Power the Great American Comeback."[168] In his own phrasing, he proclaimed: "[w]e are driving a dagger straight into the heart of the climate change religion."[169] This language evinces hostility towards multiple Clean Air Act regulations and a primary intent to deregulate for the sake of deregulation. The overarching message of this Administration, communicated also through the executive orders cited to by the Proposal and discussed above, is that regulation (particularly environmental and public health regulation) is scorned by this Administration.

While every administration will have its own agenda and policy priorities that it will seek to implement, a policy priority to "deregulate" with no consideration of countervailing factors such as the benefits of regulation, statutory purposes and requirements, and public health and

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[165] As noted above, EPA is not 100% clear as to whether the Proposal is "an Executive Order 14192 deregulatory action" because it is balancing the cost of a different regulation, or because it is being implemented to further EO 14192's deregulatory agenda. EPA would fare no better under the APA if it were the former. Nothing in the Clean Air Act (or any statute) permits EPA to consider cumulative regulatory burdens across the portfolio of EPA's regulations, even from other statutory regimes. This would be strictly contrary to the Clean Air Act's purpose and the plain text of the NSR permitting requirements that enumerates specific factors for EPA to consider.
[166] U.S. EPA, Press Release, *EPA Launches Biggest Deregulatory Action in the U.S. History* (Mar. 12, 2025), https://www.epa.gov/newsreleases/epa-launches-biggest-deregulatory-action-us-history ("Day of Deregulation Press Release").
[167] *Id.*
[168] *Id.*
[169] *Id.*

welfare needs, cannot sustain action under the Clean Air Act. And the Administration has otherwise failed to lawfully justify this Proposal. The speed with which this Proposal was issued and the fact that no new analysis or fact-finding supports it undermines the credibility of EPA's assertion that it is warranted. The more accurate conclusion under these circumstances is that the Proposal is based purely on the deregulatory policy priorities of the Administration. Indeed, EPA does not appear to have considered any alternatives to the Proposal but instead was fully and solely focused on weakening the NSR permitting regulations in the name of putative burden reduction.

For the reasons explained above, none of President Trump's executive orders and the policies they enshrine, which arbitrarily favor deregulation with no holistic consideration of the benefits of regulatory action or the purposes of the Clean Air Act, provide a proper basis for the Proposal. The Agency has not properly explained or justified the proposed rule, and purely pretextual reasoning cannot support agency rulemaking. Therefore, EPA must withdraw the Proposal.

IX. Additional questions about which EPA specifically solicits comment

Responses to EPA Questions 4, 6, 7, 10, and 11 are provided in the sections above and specifically noted. 91 Fed. Reg. at 26,974. The responses to the remainder of the enumerated questions that EPA poses are found below.

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? 91 Fed. Reg. at 26,974/1.

The proposed revisions are not appropriately aligned with other definitions within the NSR regulations because the proposed revisions conflict with the text of the Clean Air Act and are arbitrary for all the reasons set forth elsewhere in these comments. *See, e.g.*, *supra* Section II. With respect to unintended impacts, the most severe impacts of this Proposal are intentional ones that will endanger public health, air quality, and the environment in communities across the country, many of which are already disproportionately burdened by health and environmental degradation in their communities.

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? 91 Fed. Reg. at 26,974/2.

Neither of the suggested approaches are appropriate. This question presupposes that EPA may lawfully exclude certain "equipment, components, and processes" from the scope and definitions of "begin actual construction" and "pollutant-emitting activities." For the reasons discussed throughout these comments, EPA lacks authority to create such exclusions in the first instance. Accordingly, the Agency cannot incorporate the proposed exclusion list into either the definition of "emissions unit" or "stationary source."

Moreover, placing the exclusions within either definition would only compound the legal and interpretive problems presented by the Proposal. The terms "emissions unit" and "stationary source" have established regulatory and statutory meanings that serve functions far broader than

determining when construction begins. Revising those definitions to accommodate a novel and illegal exclusion list would risk importing the Proposal's unsupported distinction between "pollutant-emitting" and non-emitting activities into other aspects of the NSR program. The appropriate course is not to relocate the exclusion list within the regulations, but to decline to adopt it altogether and to withdraw the Proposal.

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? 91 Fed. Reg. at 26,974/2.

For all the reasons set forth in these comments, there are no permissible construction activities that may lawfully be excluded from the Act's bar on pre-permit construction. The Clean Air Act prohibits construction of a major emitting facility absent compliance with applicable preconstruction permitting requirements. EPA lacks authority to create categorical exemptions that permit construction activities to begin prior to NSR permitting. Moreover, EPA's proposed concept of "pollutant-emitting activities" is not grounded in the statutory text and has no bearing on the regulatory definition of "begin actual construction." An arbitrary and unlawful definition of "pollutant-emitting activities" cannot inform the creation of any extra-statutory safe harbor, as the Proposal attempts. The relevant inquiry is whether a source has commenced physical on-site construction activities, not whether a particular activity itself emits pollutants. EPA therefore cannot lawfully rely on the distinction between "pollutant-emitting" and "non-pollutant-emitting" activities to create an expanded safe harbor for pre-permit construction. Accordingly, EPA should not adopt any additional exclusions from the definition of "begin actual construction," and no lawful basis exists for the exclusion list proposed in this rulemaking. EPA must withdraw the Proposal.

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? 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? 91 Fed. Reg. at 26,974/3.

EPA lacks authority to allow any industry-specific or general construction activities to occur prior to issuance of an NSR permit. As discussed in Section II, allowing construction of any part of a major source of air pollution prior to receiving an NSR permit, regardless of whether the agency considers that part to fall under "pollutant-emitting activities," contradicts the Clean Air Act. But allowing construction work related to industry-specific activities—which by definition are specific to and required for the polluting industry—would be particularly egregious. These activities have no purpose except for being necessary for an industry that requires a major stationary source of pollution, so the case for prohibiting this construction when a permit still could be denied is particularly compelling, and the pressure that would fall on the permitting agency to approve the permit —when industry-specific construction activities have already started—would be particularly concerning and impermissible.

Without the "pollutant-emitting activities" in a facility, it is particularly clear that any industry-specific component of the facility would not be built. Building a refinery tie-in is not a multi-use type of construction activity; rather, it is clearly being built to "accommodate" the pollutant-emitting activity. Allowing this kind of construction would contradict even EPA's 1978 Memo (in addition to the Act), as this kind of construction is "integral" to the facility and would

have to remain idle if a permit were denied. 91 Fed. Reg. at 26,963. This is clearly the case for EPA's example of refinery tie-ins, which are used to connect new pipelines for hydrocarbons from stationary sources to existing pipelines.

EPA does not even bother to explain how it can allow industry-specific construction activities while 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." 91 Fed. Reg. at 26,972. Industry-specific construction activities for a polluting industry are particularly likely (or at least more likely than construction activities that are not industry-specific) to have characteristics unique to a source of air pollutants. As discussed above in Section VI, EPA's Proposal would create a messy line-drawing problem, particularly if it allows industry-specific construction activities without a permit, and "more specific text" is unlikely to fix this problem (and obviously could not fix the Proposal's legal vulnerabilities).

The purpose of building an industry-specific part of a facility is for use with the "pollutant-emitting activities," so even if EPA does not consider this to be part of the pollutant-emitting activity with the framework of this unlawful Proposal, clearly this aspect of the facility would not be built without the expectation that the pollutant-emitting activity would follow. Building a refinery tie-in is not a multi-use type of construction activity; rather, it is clearly being built to serve the pollutant-emitting activity. These would be particularly likely to represent sunk costs, could be significant, and would put particularly strong pressure on permitting agencies to approve the project.

Allowing industry-specific construction activities would create exactly the kind of "white elephant" problem EPA previously feared it would have on its hands if it allowed construction of a portion of a facility that would have to remain idle if an NSR permit were denied. 91 Fed. Reg. at 26,962. As discussed above in Section VI, the agency now flips its position without identifying any statutory basis for allowing any construction activities to begin, including industry-specific construction activities, and despite clear statutory language contradicting its new position. EPA's failure to identify specific statutory authority for dramatically reversing preconstruction permitting is as problematic for industry-specific construction activities and this "white elephant" issue as it is for the rest of the Proposal; Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking* 531 U.S. 457, 468 (2001).

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? 91 Fed. Reg. at 26,974/3.

No. First, the EPA cannot and should not require states to adopt requirements into their plans that, as we note throughout these comments, violate the Clean Air Act. The Act requires that each SIP must include enforceable emission limitations and other control measures, means, or techniques as necessary to meet the applicable NAAQS. 42 U.S.C. § 7410(a)(2). Similarly, 40 C.F.R. § 51.160(a) requires every SIP to include

> Legally enforceable procedures that enable the State or local agency to determine whether the construction or modification of a facility, building, structure or installation, or combination of these will result in . . . [i]nterference with attainment or maintenance of

a national standard in the State in which the proposed source (or modification) is located or in a neighboring State.

This federal rule also requires that every SIP "must include *means by which the State* or local agency responsible for final decisionmaking on an application for approval to construct or modify *will prevent such construction* or modification if . . . [i]t will interfere with the attainment or maintenance of a national standard." 40 C.F.R. § 51.160(b) (emphasis added). Incorporating these proposed "revisions" into SIPs would preclude this showing.

Second, the Clean Air Act prohibits EPA from approving state plans that would interfere with attainment of air quality and other applicable requirements. 42 U.S.C. § 7410(l). As EPA notes, the instant Proposal is a deregulatory one, and for the myriad reasons outlined above, Commenters believe that the proposed rule would negatively impact air quality and interfere with applicable requirements of the Act. *See supra* Section VII. As such, the proposed revisions, which EPA lacks authority to finalize, cannot be revisions that states are required to incorporate into their SIPs, as they would negatively impact air quality and interfere with applicable legal requirements.

Third, the Clean Air Act allows for mandatory revisions of SIPs in only specific circumstances. The Act's two primary vehicles through which EPA may initiate SIP modifications are: 1) the SIP call procedure under Section 110(k)(5) and 2) the error-correction mechanism under Section 110(k)(6). Under Section 110(k)(5), whenever the Administrator finds that the applicable implementation plan for any area is **substantially inadequate** to attain or maintain the relevant NAAQS or to otherwise comply with any requirement of the Clean Air Act, the Administrator shall require the state to revise the plan as necessary to correct such inadequacies. The focus here is on attainment and maintenance of air quality—it does not suffice for the Agency to merely prefer a different approach or have amended its own regulations. Similarly, under Section 110(k)(6), the Administrator may determine that a prior approval or disapproval action was in error, and the Administrator may revise such action without requiring any further submission from the state, but only after making an explicit error determination and providing that determination and its basis to the state and the public.

Neither of these sections apply in the context of the instant proposal, which is aimed at weakening the Act's requirements. As such, EPA is precluded from requiring revisions to approved plans to incorporate these changes. Similarly, as noted here and elsewhere in these comments, we believe the Proposal itself will interfere with the attainment or maintenance of air quality, and as such, not only may EPA not require revisions to state plans as a result of this Proposal should it be finalized, its very deregulatory revisions counsel the exact opposite, making a SIP inherently deficient on the provisions' inclusion.

Notably, EPA fails to identify any statutory language supporting any claim that the Proposal's approach is a mandatory minimum element of the Act's NSR preconstruction programs for state, local, and tribal governments (much less a permissible element). Indeed, EPA does not even bother to make this insupportable claim in the Proposal. This means EPA may not finalize such a position. Finally, any future attempt to do so would require the agency first to take that position, then identify the purported legal authority for it, and then notice a rulemaking proposal with opportunity for public comment and public hearing.

Lastly, as EPA notes in its Proposal:

> 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.**

91 Fed. Reg at 26,974 (emphasis added).

The cooperative federalism structure inherent in the Act provides a separate and distinct reason that EPA may not require revisions to state plans should this deregulatory action be finalized. As EPA itself here notes, a state that has an approved PSD program under 40 CFR 51.166 may already be more stringent than the federal minimum requirements. Requiring the state to revise its program simply because EPA has amended its own regulations to deregulatory and deleterious effect would be inappropriate where the state's existing program already meets or exceeds the new federal minimums. Since, as noted above, the Proposal sweeps in many new and previously disallowed activities to its regulatory definitions, the action is inherently less protective of air quality, and as such the Act similarly precludes EPA requiring revisions to incorporate these unlawful regulatory provisions.

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? 91 Fed. Reg. at 26,974/3.

We do not oppose a requirement for states to adopt within 3 years nonattainment SIP revisions required by the Act to make a SIP more stringent, but, and as elaborated in our response to EPA Question #8 and elsewhere, *supra,* we oppose any and all provisions including the instant Proposal that would require submission of SIP revisions within 3 years (or any other time frame) that would make a SIP less stringent. That would violate the plain language of the Clean Air Act, including in the PSD and NNSR provisions and elsewhere.

Since EPA's proposal is unlawful and arbitrary and would make both the PSD and NNSR programs less stringent, EPA cannot and should not require states to adopt the revisions it proposes here. As EPA correctly notes in the PSD context, states are free to adopt and maintain SIPs that are more stringent than the federal requirements. This is similarly true in the context of NNSR. As such, if EPA relaxes federal requirements, as it is proposing to do here, states cannot be required to follow suit in either attainment areas or nonattainment areas. *See, e.g.*, 42 U.S.C. § 7410(a)(2); *id*. § 7410(l).

Similarly, Commenters reject any suggestion that should EPA finalize this Proposal, that the rule would take immediate effect in any state or local area with a SIP that reflects current regulations regarding "Begin Actual Construction." As we make clear in numerous respects throughout these comments, and as EPA acknowledges itself in the Proposal, the proposed deregulatory approach is incompatible with EPA's consistent practice for nearly fifty years. It is impossible to interpret EPA's existing NSR regulations or any EPA-approved NSR programs in any SIP or TIP to authorize the starkly inconsistent, unlawful approach to pre-permit construction in the Proposal.

Under 42 U.S.C. § 7410(a)(2), each implementation plan submitted by a state must be adopted by the state only following reasonable notice and public hearing. Revisions to state plans must follow the same process, under Section 110(l). EPA then must make a completeness determination, no later than six months later, whether the submission meets minim requirements for completeness. Within 12 months from that point, the Agency must act on that submission. At that point, the federal rulemaking process commences, including a period for public comment. 42 U.S.C. § 7607(d). Any "good cause" exception to the requirement for a public process is narrow, must be expressly invoked, and would not apply here.

Further, as noted above, Section 110(l) provides the overarching requirement that:

> Each revision to an implementation plan … shall be adopted … after reasonable notice and public hearing. The Administrator shall not approve a revision of a plan if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress (as defined in section 7501 of this title), or any other applicable requirement of this chapter.

42 U.S.C. 7410(l). *See also* CAA § 193, 42 U.S.C. §7515 (stating that no SIP control requirement in effect before November 15, 1990, in any area which is a nonattainment area for any air pollutant may be modified after November 15, 1990, in any manner unless the modification insures equivalent or greater emission reductions of such air pollutant).

These anti-backsliding provisions are central to the very concept of the State Implementation Plan structure itself, and mandate that air quality must not worsen as a result of components in the plans. EPA utterly fails to assess how the Proposal's NSR changes and Tribal minor NSR changes will affect backsliding. Not only may EPA not require revisions to plans that mandate incorporation of these proposed revisions, but EPA also must evaluate how states with approved implementation plans and tribal implementations plans for their NSR programs (and minor NSR programs, for tribes) would continue to meet the anti-backsliding provisions of the Clean Air Act under these collective proposed deregulatory NSR changes. The requirements of sections 110(l) and 193 of the Act plainly prohibit states, tribes and EPA from revising an implementation plan if the revision would weaken the existing plan's requirements. They further place an obligation on EPA to **decline** to approve any SIP and to correct that SIP, should it be found inadequate to maintain air quality or insure equivalent or greater emission reductions. EPA has failed to take these statutory obligations into account and nowhere in the Proposal does it address the inherent contradiction between those obligations and the proposed regulatory language.

CONCLUSION

For the above reasons, EPA should withdraw its proposed rule.

Sincerely,

[signature blocks follow]

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