



June 29, 2026

Lee Zeldin, Administrator
 U.S. Environmental Protection Agency
 William J. Clinton Building
 1200 Pennsylvania Avenue, NW
 Washington, DC 20460

Re: Comments on EPA’s proposed revision to the definition of “begin actual construction” and its addition of a new definition of “pollutant-emitting activities” for both Nonattainment New Source Review (NNSR) and Prevention of Significant Deterioration (PSD) (Docket #: EPA-HQ-OAR-2025-0618)¹

Dear Administrator Zeldin:

The undersigned national, state and local health organizations urge EPA to withdraw this proposal. For the patients and communities we serve, air pollution is a significant driver of health harms. Our organizations have long advocated for setting, implementing and enforcing strong requirements for polluting facilities to obtain permits to ensure they don’t add to the burden of unhealthy air in a community. We are deeply concerned that this proposal would make the existing permitting process less effective and less protective of public health.

Specifically, our organizations oppose the proposal to redefine “begin actual construction” to focus narrowly on “pollutant-emitting activities.” If finalized, this proposal would allow new facilities to begin construction before a permit has been secured, as long as the construction is not on the specific part of the facility that would result in emissions. As we outline in our comments below, this approach is inconsistent with the Clean Air Act. The proposed definitions would run contrary to the intended statutory triggers for New Source Review (NSR) and Prevention of Significant Deterioration (PSD) by severing emissions-generating components from the broader construction of a “major emitting facility.” This artificial segmentation would allow major projects to proceed with substantial physical construction and financial investment before any meaningful review of their pollution impacts, undermining the Clean Air Act’s core

¹ [Federal Register :: Begin Actual Construction in the New Source Review \(NSR\) Preconstruction Permitting Program](#)

requirement that construction as a whole be evaluated and approved in advance.² The impacts would run counter to the intent and purpose of the Clean Air Act, as well as EPA's own mission to protect public health and welfare.³

1. Preconstruction review is essential to prevent irreversible public health harm

The Clean Air Act's preconstruction permitting framework is grounded in the critical recognition that once major emitting facilities are built, the public health risks they impose are often locked in for decades.

Major sources subject to NSR⁴ can emit:

- Hundreds of tons per year of criteria air pollutants (CAPs) such as fine particulate matter (PM_{2.5}), NO_x (also a precursor to ozone) and ozone, a secondary pollutant
- Toxic hazardous air pollutants (HAPs), which pose substantial cancer, cardiovascular disease and premature mortality risks, especially to communities in close proximity to emitting sources

Exposure to CAPs causes or is linked to several morbidities, including impaired lung development, asthma onset and exacerbation in children, reduced lung function, chronic lung disease, heart attacks, strokes, metabolic disorders, adverse birth outcomes and premature death from cardiovascular and respiratory illnesses.^{5,6} Long-term PM_{2.5} exposure increases mortality risk even at low levels, with no safe threshold identified.^{7,8} The American Lung Association's 2026 "State of the Air" report shows air pollution to be a pervasive public health threat. The report found that nearly half of all Americans and a disproportionate number of children live in areas with unhealthy levels of ozone and/or PM_{2.5} pollution.⁹

Groups such as children, older adults, people with pre-existing illnesses including asthma or cardiovascular disease, and communities that are already overburdened by pollution face heightened susceptibility to even small increases in pollution levels. This means that exposure to even incremental emissions from new or modified sources can increase cumulative health impacts to unhealthy levels, compounding health risks of hospitalization, missed school days and premature death.

Preconstruction review of new facilities ensures:

² 42 U.S.C. § 7475(a) (PSD requirement) states: "No major emitting facility on which construction is commenced after August 7, 1977, may be constructed... unless... a permit has been issued... setting forth emission limitations... and such facility is subject to the best available control technology."; 42 U.S.C. § 7502(c)(5) requires State Implementation Plans to include: "a permit program to regulate the construction and modification of stationary sources... as necessary to assure that national ambient air quality standards are achieved."

³ [Our Mission and What We Do | US EPA](#)

⁴ National Academies of Sciences, Engineering, and Medicine. (2004). [Air Quality Management in the United States, Chapter 5. Implementing Emission Controls on Stationary Sources.](#)

⁵ EPA. (2022). [Integrated Science Assessment for Particulate Matter](#)

⁶ EPA. (2020). [Integrated Science Assessment for Ozone and Related Photochemical Oxidants](#)

⁷ Burnett *et al.* (2018). [Global estimates of mortality associated with long-term exposure to outdoor fine particulate matter.](#) *PNAS*, 115 (38), 9592-9597

⁸ World Health Organization. (2021). [WHO global air quality guidelines: particulate matter \(PM_{2.5} and PM₁₀\), ozone, nitrogen dioxide, sulfur dioxide and carbon monoxide](#)

⁹ American Lung Association. (2026). [State of the Air](#)

- Proper siting and design decisions
- Evaluation of alternatives that reduce emissions
- Assessment of cumulative impacts
- Air quality modeling to evaluate compliance with health-based standards
- Installation of pollution controls
- Public participation before permitting decisions are finalized.

The NSR preconstruction review program is a uniquely designed safeguard to prevent public health harms before they are created. EPA's proposed rule would undermine its successes.

The proposed rule would allow construction to proceed before review and analysis are completed, allowing for investments to be made in physical construction without knowing whether the air quality impacts of the facility will be effectively mitigated. This introduces a high risk that facilities would be more likely to be granted permits and completed once construction has begun, even without adequate controls.

2. The proposal violates Clean Air Act's plain text and structure

The Clean Air Act unambiguously requires preconstruction review and permitting **before** a source can begin construction, as shown in the following sections:

- i. Attainment of National Ambient Air Quality Standards (NAAQS) for criteria pollutants

Clean Air Act Section 110(a)(2)(C) requires State Implementation Plans (SIPs) to regulate construction and modification "as necessary to assure" attainment of NAAQS. This mandate is implemented through 40 C.F.R. § 51.160,¹⁰ which requires:

- Legally enforceable procedures to determine whether construction "will result in" interference with NAAQS
- "Means by which" the state will prevent such construction if it would cause interference.

The existing prohibition on construction without a permit is the core mechanism that satisfies this requirement. EPA's proposal to allow construction before that determination eliminates the very mechanism that the Clean Air Act requires, rendering SIP programs noncompliant. Without prior permit review, agencies cannot prevent construction of sources that may interfere with attainment or maintenance of NAAQS in vulnerable areas including:

- Current nonattainment areas or near-nonattainment regions
- Areas facing challenges in meeting tightening NAAQS, including the new PM_{2.5} standards
- Communities already burdened by existing air quality challenges and cumulative pollution from diverse sources.

- ii. Section 110(l) (Anti-Backsliding)¹¹

¹⁰ Electronic Code of Federal Regulations: Title 40, chapter I, subchapter C, part 51, subpart I, section 51.160. [eCFR :: 40 CFR 51.160 -- Legally enforceable procedures.](#)

¹¹ Clean Air Act § 110(l), 42 U.S.C. § 7410(l)

The Clean Air Act provides an anti-backsliding mechanism in Section 110(I), which states: EPA “shall not approve” any SIP revision that interferes with attainment, reasonable further progress, or other Clean Air Act requirements. Through this proposal, EPA does the opposite by:

- Removing a core control measure (pre-permit construction prohibition), and
- Failing to provide any substitute measure or equivalency demonstration.

iii. Preventive Review¹²

Permitting agencies cannot determine compliance, modeling results or control adequacy until completing a technical review. Allowing construction before that review:

- Prevents informed decision-making
- Risks construction of noncompliant sources
- Undermines NAAQS protections guaranteed by the Clean Air Act.

iv. PSD/NNSR statutory requirements (Clean Air Act Title I, Parts C and D)¹³

The NSR program is designed to ensure that health, environmental, and technological considerations are assessed **before** irreversible commitments are made. The Act expressly prohibits construction of major sources without permits which clearly demonstrate:

- No violation of NAAQS
- Application of best available control technology (BACT) or Lowest Achievable Emission Rate (LAER)
- Completion of public review and hearings

Allowing construction prior to these demonstrations directly contravenes statutory preconditions to construction approval.

3. The proposal could result in sunk-cost bias distorting decision-making

The proposed rule increases health risks through “lock-in” and sunk-cost effects. As the record reflects, allowing costly pre-permit construction introduces powerful economic pressure to approve permits due to already incurred costs and investments.¹⁴

Once a facility infrastructure is constructed, i.e. has “sunk-costs” through early site preparation and capital investment before health impacts are assessed, there could be financial pressure to approve projects that could potentially override health concerns.

This “build first, evaluate later” framework systematically increases the likelihood that sources contributing to harmful pollution will ultimately be approved, even where health

¹² 40 C.F.R. § 51.160(a)–(b). The NSR program is designed as a preventive mechanism, requiring permitting authorities to evaluate proposed construction in advance and to “prevent such construction” if it would interfere with air quality standards.

¹³ Clean Air Act Title I, Part C - Prevention of Significant Deterioration PSD) (42 U.S.C. §§ 7470–7492) and Part D - Plan Requirements for Nonattainment Areas (42 U.S.C. §§ 7501–7515).

¹⁴ EPA has long recognized that NSR’s preconstruction permitting requirement is designed to ensure that regulatory review occurs before sources make irreversible investments which can constrain agency decision-making (10/8/1996 - 61 Fed. Reg. 52,676, 52,695); *Alabama Power Co. v. Costle*, 636 F.2d 323, 400 (D.C. Cir. 1979).

risks are significant. Congress drafted the preventive framework of the Clean Air Act's NSR provision precisely to avoid this scenario.

4. The proposal is arbitrary and capricious

In this proposal, EPA does not include a robust analysis of the air quality impacts from implementing this proposal, of the potential of increased enforcement burdens, or of possible instances of construction proceeding in cases where it would not have prior to this proposal. It introduces a new distinction between “pollutant-emitting activities” and other construction that lacks statutory grounding.

For over four decades, EPA has consistently interpreted the Act to prohibit construction before permit issuance. Abandoning that longstanding interpretation without reasoned justification violates administrative law principles and therefore is arbitrary and capricious.¹⁵

5. The proposal undermines public participation and transparency¹⁶

The Clean Air Act guarantees the public notice of proposed projects, access to information, and an opportunity for the public to be heard **before construction begins**. The pre-permit construction allowed by this proposal would deprive communities of meaningful input, limit their ability to influence outcomes, and convert meaningful public participation in the decision-making process into a performative post-hoc formality.

6. The proposal could weaken enforcement and reduces effectiveness of remedies¹⁷

Our organizations are deeply concerned that the proposal would increase the risk of construction of polluting facilities with air quality impacts that would otherwise have been prevented or mitigated. The historical record demonstrates how existing flexibilities in the permitting process (e.g. project emissions accounting) already allow large projects to avoid PSD review. Those flexibilities, combined with the allowances in this proposal, could allow sources to avoid meaningful regulatory oversight altogether by mischaracterizing major projects as minor and beginning construction immediately, before agencies can verify major source applicability. The proposal would shift

¹⁵ Motor Vehicle Mfrs. Ass'n v. State Farm, 463 U.S. 29, 43 (1983): An agency acts arbitrarily and capriciously if it has (i) “relied on factors which Congress has not intended it to consider”, (ii) “entirely failed to consider an important aspect of the problem”, or (iii) offered an explanation that runs counter to the evidence or is implausible; Administrative Procedure Act, 5 U.S.C. § 706(2)(A): Courts shall set aside agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”; FCC v. Fox Television Stations, 556 U.S. 502, 515 (2009); Encino Motorcars, LLC v. Navarro, 579 U.S. 211, 222 (2016): Agencies can change policy, but must provide a reasoned explanation and acknowledge the change.

¹⁶ Proposal erodes CAA's core guarantee of informed public participation prior to agency action: 42 U.S.C. § 7475(a)(2); 40 C.F.R. § 51.161; Case Law recognizes the importance of public participation: Union Electric Co. v. EPA, 427 U.S. 246, 256 (1976).

¹⁷ By allowing construction to proceed before permitting, the rule weakens enforcement and reduces the effectiveness of remedies by shifting the CAA framework from preventive to reactive, and eliminates the ability of permitting authorities to “prevent such construction” as required by EPA regulations and instead forces agencies and courts to rely on less effective, after-the-fact remedies. 40 C.F.R. § 51.160(b); 42 U.S.C. § 7475(a); Alabama Power Co. v. Costle, 636 F.2d 323, 400 (D.C. Cir. 1979); Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 (1982).

enforcement responsibility toward citizen suits, which would impose additional costs on communities, and reduce the potential effectiveness of injunctive relief by creating incentives for courts to allow partially built projects to proceed.

7. Conclusion

The undersigned health organizations are deeply concerned that this proposal would undermine implementation and enforcement of the NAAQS, resulting in air pollution in communities that would have otherwise been prevented by the existing permitting process. We urge EPA to withdraw this proposal in its entirety.

Signed,

Alliance of Nurses for Healthy Environments
American Lung Association
Center for Environmental Health
International Society for Environmental Epidemiology-North America Chapter
Medical Students for a Sustainable Future (MS4SF)
Medical Society Consortium on Climate and Health
National Association of Pediatric Nurse Practitioners
National Association of Pediatric Nurse Practitioners- SF Bay Area Chapter
National League for Nursing
OUCH-Int'l
Physicians for Social Responsibility
San Francisco Bay Physicians for Social Responsibility