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EPA May Redefine ‘Begin Actual Construction’ in Permit Reform Intended to Expedite Construction of Emissions-Generating Developments

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The U.S. Environmental Protection Agency (EPA) has expressed its intent to propose a rule to revise the regulatory definition of “begin actual construction” under the Clean Air Act’s (CAA) New Source Review (NSR) preconstruction permitting program, with a proposed rule expected in 2026.[1] The EPA has indicated that the rule, if proposed and finalized, will provide “flexibility” to developers to begin construction on ancillary structures that are not themselves components of the emitting structures, such as concrete pads and external walls, before obtaining the requisite air permit.[2]

CAA permit reform arrives at a time when energy demand, driven by artificial intelligence (AI) development, data center expansion, and electrification, is projected to surge over the next decade.[3] Against this backdrop, the EPA’s potential permitting reform aims to provide stakeholders with greater flexibility for early-stage site developments and accelerated project timelines.

Regulatory Background

Under the CAA, a new or modified major stationary source of air pollutants cannot “begin actual construction” without first obtaining an NSR permit.[4] EPA regulations define “begin actual construction” as the “initiation of physical on-site construction activities *on an emissions unit*,” which “include, but are not limited to, installation of building supports and foundations, laying underground pipework and construction of permanent storage structures.”[5]

For decades, the EPA interpreted this definition broadly. In a 1986 memorandum issued by then-EPA Director Edward Reich (the Reich memo), the agency adopted the position that the construction of structures “necessary to accommodate” emissions units could themselves constitute “actual construction” of emissions units and therefore trigger the need for an NSR permit.[6] The Reich memo effectively prohibited construction of structures that are not emission units — like footings, foundations, storage structures, and retaining walls — until developers obtained an NSR permit.

The result: often slower timelines and higher costs. Indeed, one study found that from 2002 to 2014, the average time to process an NSR permit was 420 days.[7] Of course, permitting timelines may vary depending on the type of project. For example, the same study found that natural gas permits on average were processed the fastest (319 days), whereas refinery project permits took the longest to assess (537 days).

In March 2020, however, the EPA issued draft guidance (the 2020 draft guidance) that adopted a less restrictive interpretation of the term "begin actual construction."[8] Returning to the original regulatory text, the 2020 draft guidance confirmed that the only construction prohibited prior to issuance of an air permit is construction "on an emissions unit." The EPA explained that its prior interpretations were "unnecessarily restrictive," and that the revised interpretation "better conforms to the regulatory text" that defines "begin actual construction."[9]

EPA Announces Permitting Reform

In September 2025, the EPA reaffirmed its 2020 guidance on the definition of "beginning actual construction" to provide "much needed clarity" and "flexibility," motivated primarily by the global AI race.[10] EPA Administrator Lee Zeldin stated that, "[f]or years, Clean Air Act permitting has been an obstacle to innovation and growth" and identified "Permitting Reform" as a key pillar of the agency's new "Powering the Great American Comeback Initiative."[11] A stated goal of CAA permit reform is to promote the development of data centers "critical to making the U.S. the Artificial Intelligence (AI) capital of the world."[12] A proposed rule to further clarify the meaning of "beginning actual construction" is expected by January 2026, with a final rule targeted for September 2026.[13] Proponents hope the rule will accelerate project timelines.

The latest guidance from the EPA is found in a letter to the Maricopa County Air Quality Department (MCAQD) regarding a proposed semiconductor facility in Phoenix, Arizona (the TSMC letter).[14] MCAQD sought guidance from the EPA on whether Taiwan Semiconductor Manufacturing Company (TSMC), one of the world's largest chip manufacturers, could begin construction on the "core and shell" of the semiconductor facility — *i.e.*, foundation, steel superstructure, and external walls — prior to MCAQD's issuance of an NSR permit. TSMC agreed to defer the installation of semiconductor manufacturing equipment that could be classified as emissions units, foundations for such units, and piping until after the issuance of a permit.

The EPA referred back to its 2020 draft guidance and concluded that TSMC could proceed with the initial phase of construction because the structures to be built were not specifically configured for emissions units and therefore did not constitute "begin[ning] actual construction."[15] But the EPA cautioned that any construction activities undertaken prior to issuance of an NSR permit would be at the developer's "own risk" and that the developer's "time and resources expended on construction prior to obtaining a permit" may *not* be used as justification to grant the air permit.[16] And until the EPA officially proposes and finalizes a rule, the EPA stated that it may advise on "begin actual construction" questions on a "case-by-case basis."[17]

Takeaways

The effects of the EPA's permitting reform will certainly vary by the particulars of a project, and likely by state as well, because state permitting agencies have broad discretion to enforce NSR requirements.[18] Developments that include significant non-emitting structures, such as manufacturing facilities and data centers, may benefit from accelerated timelines. However, construction of emission units cannot be completed without an NSR permit. And while permitting reform may allow for faster construction times, proceeding with pre-permit construction activities is unlikely to be a risk-free endeavor. At least in one response to a state agency — the MCAQD — the EPA expressed that the time and resources expended on pre-permit construction will not influence permitting decisions. Developers therefore retain potentially significant exposure by proceeding with construction of even non-emitting structures. Indeed, permits could impose conditions requiring modification to work that was already in progress or,

even be outright denied.

While the full effects of the promised permitting reform will not be understood for some time, it is not too early for stakeholders to start to evaluate their potential risks and develop risk mitigation measures for their current and future projects. Potential risks that project participants may think through include:

- Permit conditions that require modifying or rebuilding work already in progress
- What happens to the project if a permit is delayed, or even denied outright
- How risk and delay-related costs are allocated in both prime and downstream contracts (*e.g.*, subcontracts and purchase orders), including, but not limited to, idle labor, storage and preservation of equipment, and extended insurance or bonding costs
- Financing risks, such as the loss of financing or the inability to close on a construction loan due to permit delays or denial

Of course, each project brings with it unique circumstances, challenges, and risks, which may only be compounded as project stakeholders navigate permitting requirements. Troutman Pepper Locke attorneys are well positioned to advise clients on construction project permitting and emerging market trends. Our team helps all key stakeholders in construction projects secure long-term success with their projects.

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[1] *View Rule: EPA/OAR Proposed Revision to "Begin Actual Construction" in the New Source Review Preconstruction Permitting Program*, Office of Info. & Regulatory Affairs, https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202504&RIN=2060-AW84 (last accessed Nov. 25, 2025).

[2] Press Release, EPA, EPA Announces Permitting Reform to Provide Clarity, Expedite Construction of Essential Power Generation, Reshore Manufacturing (Sep. 9, 2025), https://www.epa.gov/newsreleases/epa-announces-permitting-reform-provide-clarity-expedite-construction-essential-power

[3] *See generally* "Navigating Contractual Considerations in the AI Data Center Construction Boom" by Ryan Graham, Jamey Collidge, Jason Spang, and Christian Pirri.

[4] 40 C.F.R. § 52.21(a)(2)(iii). By contrast, the EPA allowed companies prior to obtaining an NSR permit to conduct "limited activities," such as "planning, ordering of equipment and materials, site clearing, grading, and on-site temporary storage of equipment and materials." Memorandum from Dave Howekamp, Director, Air and Toxics Division, EPA Region IX, to all Region IX Air Agency Directors and NSR Contacts at 1 (Nov. 4, 1993), https://www.epa.gov/sites/default/files/2015-07/documents/rev_con.pdf.

[5] 40 C.F.R. § 52.21(b)(11) (emphasis added).

[6] Memorandum from Edward E. Reich, Director, U.S. EPA Division of Stationary Source Compliance, to Robert R. DeSpain, Chief, Air Programs Branch, EPA Region VIII at 2 (Mar. 28, 1986), https://www.epa.gov/sites/default/files/2015-07/documents/begin.pdf.

[7] Arthur G. Fraas, Michael Neuner & Peter Vail, *EPA's New Source Review Program: Evidence on Processing Time, 2002–2014* at 8 (Resources for the Future Discussion Paper No. 15-04, Feb. 6, 2015),

https://media.rff.org/documents/RFF-DP-15-04.pdf.

[8] *See* Draft Memorandum from Anne L. Idsal, Principal Deputy Administrator, Office of Air and Radiation, to the EPA Regional Air Division Directors at 2 (Mar. 15, 2020), https://19january2021snapshot.epa.gov/sites/static/files/2020-03/documents/begin_actual_construction_032520_1.pdf; *see also* "EPA Shifts Policy on Construction Prior to an Air Permit" by Mack McGuffey, Randy Brogdon, and Melissa Horne.

[9] *Id.*

[10] *See* Press Release, EPA, EPA Announces Permitting Reform to Provide Clarity, Expedite Construction of Essential Power Generation, Reshore Manufacturing (Sep. 9, 2025), https://www.epa.gov/newsreleases/epa-announces-permitting-reform-provide-clarity-expedite-construction-essential-power

[11] *Id.*

[12] *Id.*

[13] *View Rule: EPA/OAR Proposed Revision to "Begin Actual Construction" in the New Source Review Preconstruction Permitting Program*, Office of Info. & Regulatory Affairs, https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202504&RIN=2060-AW84 (last accessed Nov. 25, 2025).

[14] Letter from EPA Assistant Administrator to Maricopa County Air Quality Department at 1 (Sep. 2, 2025), https://www.epa.gov/system/files/documents/2025-09/tsmc-arizona-begin-actual-construction-epa-response-letter.pdf.

[15] *Id.* at 3.

[16] *Id.*

[17] *Id.* at 2.

[18] *See, e.g.*, TSMC Letter, at 3 ("EPA believes that it is within MCAQD's *discretion* to interpret its existing regulations to allow TSMC to undertake, prior to obtaining an NSR permit, the activities listed under stage 1, 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." (emphasis added)).

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