

EPA Proposal Aims to Clarify Scope of Construction Activities Allowed Prior to Issuance of NSR Permit



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To clarify the Clean Air Act's preconstruction permitting requirements, EPA issued a proposed rule to revise the definition of "begin actual construction" in its New Source Review (NSR) regulations to allow the construction of components that do not emit air pollutants prior to obtaining an NSR permit, such as support structures for utility services, certain concrete pads and foundations, office buildings, and certain storage buildings. See [91 Fed. Reg. 26958 \(May 13, 2026\)](#). The proposal would also add a new definition of "pollutant-emitting activities." EPA's NSR regulations apply to the construction of new stationary sources and major modifications of existing major stationary sources. If finalized, these revisions will automatically apply to projects seeking an NSR permit from EPA and state, local, or tribal permitting authorities that directly implement EPA's PSD regulations. States implementing their own SIP-approved NSR programs may need to amend their regulations to incorporate the revised definitions proposed by EPA.

As currently written, EPA's definition of "begin actual construction" at 40 C.F.R. §§ 51.165, 51.166, § 52.21, and Appendix S to Part 51 prohibits "on-site construction activities on an emissions unit which are permanent in nature" prior to obtaining an NSR permit. See 40 C.F.R. § 51.166(a)(7)(iii); 40 C.F.R. § 52.21(a)(2)(iii). These construction activities include the installation of building supports and foundations, laying underground pipework, and the construction of permanent storage structures. In past guidance, EPA has also construed the term "emissions unit" in these regulations to include any installations necessary to accommodate that unit.

EPA now proposes to revise the definition of "begin actual construction" and add a new definition for "pollutant-emitting activities" in 40 C.F.R. §§ 51.165, 51.166, § 52.21, and Appendix S to Part 51. These proposed changes would shift the focus from whether an activity is permanent to whether the component to be constructed will emit a pollutant. EPA proposes to define "begin actual construction" as "initiation of physical on-site construction of pollutant-emitting activities on a stationary source." 91 Fed. Reg. at 26970. EPA's proposed definition includes the following non-exhaustive list of activities excluded from the definition of "begin actual construction":

1. engineering and design planning;
2. geotechnical investigation (surface and subsurface explorations);
3. clearing vegetation, grading, surveying, soil compacting and stabilization (including associated pile driving), and excavating land (including blasting or other removal of hardrock);
4. ordering of equipment and materials;
5. storing of equipment or setting up temporary trailers to house construction management or staff and contractor personnel; and
6. paving surfaces.

EPA similarly proposes to define "pollutant-emitting activities" as "any equipment or component in a process or operation that emits or has the potential to emit a regulated NSR pollutant." *Id.* This proposed definition also includes the following non-exhaustive list of activities excluded from the definition of "pollutant-emitting activities":

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; and
7. sealed junctions or tie-ins within one process that may serve equipment or components in another process constructed at a later time.

The comment period for the proposed rule closes June 29, 2026. EPA specifically solicits comments on what additional activities should be excluded from the definitions of “begin actual construction” and “pollutant-emitting activities,” as well as what industry-specific construction activities, such as refinery tie-ins, should be allowed prior to obtaining an NSR permit. EPA also solicits comments on whether the proposed regulatory revisions should include regulatory text explicitly prohibiting permitting authorities from considering the economic losses that a permit applicant might suffer if the applicant is unable to obtain an NSR permit after conducting construction activities excluded from permitting requirements. Finally, EPA requests comments on whether EPA should require revisions to EPA-approved state or local NSR permitting regulations to reflect any final amendments to EPA’s regulations.

Babst Calland’s Environmental practice attorneys are closely tracking these developments and are available to provide guidance on how these actions affect your business. For more information, please contact Gina Buchman at (202) 853-3483 or gbuchman@babstcalland.com, Gary Steinbauer at (412) 394-6590 or gsteinbauer@babstcalland.com, or Christina Puhnaty at (412) 394-6514 or cpuhnaty@babstcalland.com.

