

GIBSON DUNN



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Data Centers & Digital Infrastructure Update

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EPA Continues Push to Streamline Clean Air Act Major Source Permitting Process

New guidance and a proposed rule are part of EPA's ongoing efforts to reduce administrative burdens and speed up timelines for Clean Air Act major source permitting.

On May 11, 2026, U.S. EPA announced a new proposed rule^[1] and updated guidance^[2] aimed at improving the process for Clean Air Act Title V operating permits. In the proposed rule, EPA redefines what it means to “begin actual construction” under the New Source Review (NSR) program, in order to allow the construction of non-emitting components prior to issuance of an NSR permit. EPA’s updated guidance clarifies that EPA’s review of Title V permits may run concurrently with the public comment process, expediting permit review and issuance. Both actions aim to reduce air permitting timelines without relaxing substantive emission controls. However, owners and operators should be mindful that permit denial after undertaking pre-permitting construction activities is possible, and the shift to the concurrent public comment period and EPA review for operating permits does not alter the 60-day window for public petitions objecting to new permits.

Key Takeaways

NSR “Begin Actual Construction” Proposed Rule

- EPA has proposed redefining the regulatory term “begin actual construction” to allow construction of non-emitting components—such as utility infrastructure, concrete pads, and certain building shells—before issuance of an NSR permit.^[3]

- This change is particularly significant for data center operators, who can now begin site preparation and foundational construction while their NSR permits remain pending.
- Pre-permit work remains prohibited on equipment or structures that are pollutant-emitting or specifically configured to serve emissions units.[\[4\]](#)
- Early work proceeds at the owner's risk, however, and the proposed rule warns that "preparatory construction activities prior to permit issuance" will not "alter or influence" permitting decisions.[\[5\]](#)
- The proposed rule also clarifies that state and local permitting authorities must "exercise their judgment to resolve questions" about the scope of allowable construction on "on a case-by-case, project-specific basis."[\[6\]](#)
- Public comments on the proposed rule will be accepted for 45 days after Federal Register publication, which is expected imminently.[\[7\]](#)

Title V Operating Permit Review Guidance

- EPA's updated guidance clarifies that permitting authorities may submit Title V permit applications for EPA's review concurrently with the public comment period, rather than sequentially, which can materially reduce permitting timelines.[\[8\]](#)
- It also confirms that the Clean Air Act does not mandate a full 45-day EPA review period for Title V permits, and encourages EPA regional offices to expedite reviews upon request from permitting partners.[\[9\]](#)
- However, by statute, EPA must accept petitions objecting to a final permit for 60 days starting from the end of the full 45-day EPA review period, even if EPA completes review early.[\[10\]](#)
- In jurisdictions where NSR preconstruction permits and Title V operating permits are processed in parallel, quicker Title V finalization can help avoid back-end bottlenecks that might otherwise slow NSR approvals.[\[11\]](#)

Proposed Rule Redefining "Begin Actual Construction"

EPA's proposed rule, "[Begin Actual Construction in the New Source Review \(NSR\) Preconstruction Permitting Program](#)," seeks to resolve ambiguity in the scope of allowable pre-permit construction by clarifying that "construction of components that do not emit air pollutants, such as utility surface infrastructure for a site, concrete pads, and some types of buildings and building components" are permissible before an NSR air permit has been issued.[\[12\]](#) Under the NSR permitting program, new construction of certain stationary air emissions sources and major modifications of existing sources must obtain permits before the start of construction.[\[13\]](#) However, "significant uncertainty and inconsistent interpretations" of the term "begin actual construction" has "[led] to burdens on permitting authorities and industry stakeholders, complicat[ed] compliance, and delay[ed] projects."[\[14\]](#)

To resolve this issue, the proposed rule allows regulated parties to begin constructing non-emitting components or structures before obtaining an NSR permit.[\[15\]](#) To implement this change, EPA proposes to revise the definition of "begin actual construction" and add a new definition of "pollutant-emitting activities" "to identify which on-site construction activities an owner

or operator of a stationary source ... may lawfully undertake” prior to receiving an NSR permit.[\[16\]](#)

The updated definition of “begin actual construction” contains a non-exclusive list of items that are allowed without an NSR permit, including preparing land for building (e.g., clearing, grading, stabilization, and excavation), paving surfaces, and installing trailers for construction management staff.[\[17\]](#) EPA is expressly soliciting comments on whether additional activities should be added to the list.[\[18\]](#)

The new “pollutant-emitting activities” definition is intended to be read alongside the definition of “stationary source”—a “building, structure, facility, or installation which emits or may emit a regulated NSR pollutant, “ 40 CFR 51.165(a)(1)(i), 51.166(b)(5), and 52.21(b)(5)—to help regulated parties determine what qualifies as a “stationary source.” Under the new definition, the following are excluded from “pollutant-emitting activities,” and, consequently, are not “stationary sources” requiring preconstruction permits:[\[19\]](#)

- Office buildings
- Retail stores
- Buildings or structures for storing non-vapor or -particle emitting materials
- Concrete pads, building foundations, walls, and roofs “that are not closed in on the interior side and do not have design elements ... specifically and uniquely configured” to support an emissions-generating process or operation
- HVAC systems
- Utility services and “associated support structures”

EPA notes this is not an exclusive list and requests comments on additional activities that should be added.[\[20\]](#)

Throughout the proposed rule, EPA is careful to clarify that commencing pre-permitting construction is at the permit applicant’s own risk, and that on-site activities undertaken prior to obtaining a permit will not alter permitting decisions.[\[21\]](#) EPA specifies, “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.”[\[22\]](#)

Title V Operating Permit Streamlining Guidance

EPA’s new [guidance on the review process for Clean Air Act Title V operating permits](#) clarifies two points, both with the potential to reduce permitting timelines. First, it confirms that permitting authorities may submit Title V permit applications to EPA and open the public comment period concurrently with EPA’s review, rather than sequentially.[\[23\]](#) Treating these as sequential steps could add weeks or months to the permitting process, and EPA touts this guidance as “eliminat[ing] an unnecessary source of administrative delay.”[\[24\]](#) In EPA’s press release announcing the guidance, the agency notes that this concurrent approach “preserves public

participation and is particularly effective when the permitting authority does not anticipate adverse comment on the draft permit.”[\[25\]](#)

Second, the guidance affirms that the Clean Air Act does not require EPA to take the full 45-day period allowed by statute to review a proposed permit.[\[26\]](#) EPA is accordingly encouraging EPA Regions “to expedite their reviews upon request from the permitting authority.”[\[27\]](#) In addition to potentially reducing the time between proposal and approval for Title V permits, in jurisdictions where NSR and Title V permits are processed simultaneously, “expeditious finalization of [T]itle V permits will also speed up issuance of NSR permits.”[\[28\]](#) However, the 60-day statutory period for public petitions objecting to a permit has not changed, and will continue to run “for 60 days after the end of the full 45-day EPA review period.”[\[29\]](#)

This guidance builds on EPA’s April 2026 guidance to streamline the Title V operating permit renewal process,[\[30\]](#) discussed in our [prior update](#), continuing EPA’s efforts to reduce permitting timelines.

Practical Impacts

Together, these actions signal a sustained effort by EPA to reduce administrative burdens for major source permitting. Importantly, the agency has emphasized that neither action alters the substantive emissions standards under the Clean Air Act, including the assessment of control technologies under the NSR program.[\[31\]](#) In the proposed rule, EPA notes that its goal is to “reflect the best reading of the statute ... and effectuate congressional intent to preserve and maintain air quality while facilitating economic growth.”[\[32\]](#)

The changes also underscore EPA’s focus on improving permitting timelines for data centers. In particular, the proposed rule builds on guidance EPA provided when launching its *Clean Air Act Resources for Data Centers* webpage, discussed in our [prior update](#). There, EPA previewed the definition of “begin actual construction” adopted in this proposed rule. And in announcing the proposed rule, EPA stated that the new definitions will “support the development of Artificial Intelligence (AI) infrastructure and power generation” and facilitate “the data centers essential to making the U.S. the AI capital of the world.”[\[33\]](#)

For data center developers and operators, the practical impact of the NSR revisions could be substantial. Under the current regulatory framework, the definition of “begin actual construction” has prevented construction activities that have no emissions impact from taking place before completion of the often-lengthy NSR permitting process. If finalized, this rule would allow operators to commence significant site preparation—including pouring foundations, running electrical wiring, and installing piping—while awaiting permit approval for emissions-generating equipment. This could improve project timelines significantly, particularly for projects where non-emitting infrastructure represents a significant portion of early-stage construction.

[\[1\]](#) Proposed Rule, “Begin Actual Construction in the New Source Review (NSR) Preconstruction Permitting Program” (May 11, 2026), pre-publication version available at <https://www.epa.gov/system/files/documents/2026-05/proposed-rule-begin-actual-construction-new-source-review-5-11-2026.pdf> [hereinafter “Prepublication Rule”].

[2] Memorandum from Aaron Szabo, Assistant Administrator for Air and Radiation, U.S. EPA, “Guidance on Streamlining Title V Operating Permit Reviews” (May 11, 2026), <https://www.epa.gov/system/files/documents/2026-05/guidance-on-streamlining-title-v-operating-permit-reviews-5-11-26.pdf> [hereinafter “Title V Operating Permit Guidance”].

[3] Prepublication Rule at 11–12.

[4] *Id.* at 51.

[5] *Id.* at 65.

[6] *Id.* at 48-49.

[7] *Id.* at 2.

[8] Title V Operating Permit Guidance at 1–2.

[9] *Id.* at 3.

[10] *Id.* at 4.

[11] *Id.* at 3 n.12.

[12] Prepublication Rule at 11.

[13] *Id.* at 12–13.

[14] *Id.* at 30.

[15] *Id.* at 11.

[16] *Id.* at 49–50.

[17] *Id.* at 50.

[18] *Id.* at 51.

[19] *Id.*

[20] *Id.* at 52.

[21] See, e.g., *id.* at 64.

[22] *Id.*

[23] Title V Operating Permit Guidance at 1–2.

[24] *Id.* at 2.

[25] Press Release, U.S. EPA, “EPA Issues Guidance on Streamlining Clean Air Act Title V Operating Permit Process to Expedite Approvals” (May 11, 2026), <https://www.epa.gov/newsreleases/epa-issues-guidance-streamlining-clean-air-act-title-v-operating-permit-process>.

[26] Title V Operating Permit Guidance at 2–3.

[27] *Id.* at 3.

[28] *Id.* at 3 n.12.

[29] *Id.* at 4.

[30] Memorandum from Aaron Szabo, Assistant Administrator for Air and Radiation, U.S. EPA, “Guidance on Streamlining Clean Air Act Title V Operating Permit Renewals” (Apr. 16, 2026), <https://www.epa.gov/system/files/documents/2026-04/guidance-on-streamlining-clean-air-act-title-v-operating-permit-renewals.pdf>.

[31] Title V Operating Permit Guidance at 2; Prepublication Rule at 65.

[32] Prepublication Rule at 57.

[33] Press Release, U.S. EPA, “EPA Proposes Redefining ‘Begin Actual Construction’ to Remove Unnecessary Impediments to Building and Advance Economic Progress” (May 11, 2026), <https://www.epa.gov/newsreleases/epa-proposes-redefining-begin-actual-construction-remove-unnecessary-impediments>.

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