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June 29, 2026

Andrew Kormos
Permitting & Program Support Division
Office of State Partnerships
Environmental Protection Agency
Post Office Box 12055
Research Triangle Park, North Carolina 27711

Re: Begin Actual Construction in the New Source Review (NSR) Preconstruction Permitting Program, Proposed Rule; May 13, 2026; EPA-HQ-OAR-2025-0618

Dear Mr. Kormos,

The Midwest Ozone Group[1] (MOG) is pleased to offer these comments regarding a proposed rule by the U.S. Environmental Protection Agency (EPA) entitled "Begin Actual Construction in the New Source Review (NSR) Preconstruction Permitting Program," (Proposed Rule) published at 91 Fed. Reg. 29658 on May 13, 2026, with a comment deadline of June 29, 2026. These comments will address MOG's support of the Proposed Rule.

MOG is an affiliation of companies and associations that draws upon its collective resources to seek solutions to the development of legally and technically sound air quality programs that may impact on their facilities, their employees, their communities, their contractors,

[1] The members of the Midwest Ozone Group include: Ameren, American Electric Power, American Forest & Paper Association, American Iron and Steel Institute, American Wood Council, Appalachian Region Independent Power Producers Association, Associated Electric Cooperative, Berkshire Hathaway Energy, Big Rivers Electric Corp., Citizens Energy Group, City Water, Light & Power (Springfield IL), Cleveland Cliffs Inc., Council of Industrial Boiler Owners, East Kentucky Power Cooperative, ExxonMobil, Hoosier Energy REC, Inc., Indiana Energy Association, Indiana-Kentucky Electric Corporation, Indiana Municipal Power Agency, LGE/ KU, Marathon Petroleum Company, Monongahela Power Company, National Lime Association, North American Stainless, Nucor Corporation, Ohio Utility Group, Ohio Valley Electric Corporation, Olympus Power, Steel Manufacturers Association, and Wabash Valley Power Alliance.

and the consumers of their products. MOG's primary efforts are to work with policy makers in evaluating air quality policies by encouraging the use of sound science.

MOG has been actively engaged in a variety of issues and initiatives related to the development and implementation of air quality policy and permitting, including the development of emissions limitations, state implementation plans, transport rules, National Ambient Air Quality Standards (NAAQS), exceptional events, 179B demonstrations, nonattainment designations, petitions under Sections 126, 176A and 184(c) of the Clean Air Act (CAA), NAAQS implementation guidance, the development of state and federal interstate transport plans, regional haze, and climate change issues.

MOG offers the following comments to the proposal and to the questions raised by EPA in its proposal.

Memorandum of Policy, Regulatory Provisions, and Statutory Language. The history of implementation efforts by EPA and the states relative to air permitting pursuant to the Clean Air Act are founded within sections:

- 110(a)(2)(C) – SIPs must contain regulation for the modification and construction of any source to assure achievement of NAAQS a program comprised of major and minor source permitting
- 165 – Preconstruction requirements
- 169(2)(c) – Definition of "construction" for PSD.
- 172(a)(5) – Permits for new and modified major stationary sources in nonattainment areas,
- 173 – Permit requirements for new and modified stationary sources in nonattainment areas, and
- 301(a)(1) – EPA administrator regulatory development authorities.

The preamble to this proposed rule provides a detailed history of EPA's numerous memoranda, determinations, proposed rulemakings, and final rulemakings which have reflected upon the scope of the CAA statutory prohibition on construction of a source without a permit based on text, court decisions, and experience. The time span of 1977 (when PSD/NSR were introduced into the CAA) to present covers 49 years of administrative agency efforts to manage permitting of sources of air pollution. It is evident that there has been a significant volume of time and resources expended on what seems to be a clear mission. That commitment of administrative resources has served to educate about how best to manage the statute and the program designed for implementation. MOG supports EPA's proposal to derive the best reading of the CAA via a rulemaking process providing for notice and comment. Transparency fosters improved outcomes. This permitting issue has been maturing for 49 years and is well poised for codification in regulation. The construction of regulated sources over that time period has also evolved in response to many factors, including the programs founded upon the CAA. MOG agrees that the regulatory provisions of "when" and "what" of the construction of a permitted facility must be clarified so that all impacted stakeholders can be well-informed to make decisions consistent with CAA environmental policy.

As noted by EPA, minor source permitting by the States also manages the query of actual construction of a source.

> New sources and modifications that do not require a major NSR permit may instead require a minor NSR permit prior to construction. Minor NSR requirements are approved into a SIP, Tribal Implementation Plan (TIP), or Federal Implementation Plan (FIP) to achieve and maintain the NAAQS. The CAA and the EPA's regulations are less prescriptive regarding the minimum minor NSR program requirements. Therefore, reviewing authorities generally have flexibility in designing their minor NSR programs. Minor NSR permits are almost exclusively issued by State, local, and other authorized reviewing authorities, although the EPA issues minor NSR permits for most areas of Indian country where Tribes have not developed TIPs or requested delegation to administer minor NSR air permitting programs for their jurisdictions.

Id. at 26961. Many states are currently managing their own preconstruction policy and regulations related to construction of a source and preconstruction activities. This EPA proposal is in many instances consistent with state minor source programs. (e.g., W. Va. Code 22-5-11a addresses activities authorized in advance of issuance of an air permit undertaken at the permit applicant's own risk; Tennessee Division of Air Pollution Control policy llows for certain activities to go forward prior to issuance of a construction permit[2]; South Carolina regulations provide guidance for construction prior to permit issuance, taken at the facility's risk. S.C. Code Ann. Regs. 61-62.1). Cooperative federalism will serve this issue well because of the common history shared by EPA and the States in managing the pre-construction activities addressed in this proposal. MOG supports a process among the states and EPA to develop a program that promotes clarity.

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?

The preamble provides important context to the proposed changes offering examples of how permitting obligations will be implemented relative to construction of a source. The narrative of the final rule will need to include well-developed discussion of the CAA language, implementation examples and the purpose to be served with the added and revised NSR, PSD and NNSR relevant definitions such as those proposed for "begin actual construction," "pollutant-emitting activities," "begin construction," and "commence construction." It is recommended the final rule provide appropriate narrative concerning the implementation of the regulatory program with a view toward the context and spirit of the CAA targeting physical construction of on-site equipment or components that have characteristics that identify them as something that will emit air pollution. Such reasoned justification of statutory law and regulatory development would serve to inform of the intended preconstruction authorizations and the results of such preconstruction authorizations.

The fact analyses of "when" to regulate "what" determines which activities can proceed prior to securing a permit. It is important to all stakeholders that the administrative process generates predicable outcomes as a means of achieving accurate administrative decisions and efficient expenditure of resources. Air permitting is frequently among the most complex issues confronting stakeholders. Permitting that protects the environment is the goal of the Clean Air Act delivering reasoned timely decisions that are easily understood. MOG supports this proposal.

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[2] https://www.tn.gov/content/dam/tn/environment/air/documents/apc_permit-docs/apc_Construction-Activities-Prior-to-Permit-Issuance_sep-5-2019.pdf

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?

With a view towards clarity, MOG supports the current approach of listing excluded equipment, components, and processes under the newly proposed definitions of "begin actual construction" and "pollutant-emitting activities" rather than incorporating exclusions into the definitions of "stationary source" of "emission units" since the existing definitions for "stationary source" and "emission units" serve other different purposes. EPA notes in the proposed rule preamble.

> The existing definition of "emission unit" serves an important function of distinguishing between new and existing emission units for purposes of determining how to calculate the increase in emissions from a modification to an existing source to determine if that modification requires a permit. The EPA is thus concerned that adding to that definition a list of construction-related activities that do not need an NSR permit prior to construction may have the unintended effect of causing confusion as to which projects require an NSR permit, rather than clarifying which construction-related activities constitute construction of a stationary source and which do not.

91 Fed. Reg. 26972.

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?

MOG suggests that "begin actual construction" not include establishment and management of water-front infrastructure (docks, ramps, etc.) or foundations for any building or warehouse as they are not part of an emission unit or stationary source.

Question #4: Are the proposed revisions too general or too specific? What suggestions do you have for enhancing clarity and certainty in these regulations?

MOG supports the proposed revisions as an appropriate balance of comments and issues brought to the attention of the agency.

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?

The issue presented by refining industry tie-ins highlights the need to take into consideration unique facts from the basic concept of pre-construction for all of industry. For example, refineries operate continuously connection of new piping or equipment to major existing systems must be managed during planned facility maintenance turnarounds or outages. Such work needs to match the opportunity, rather than paired solely upon timing of administrative permit issuance. Permittee

assurances about assumption of risk of such activities prior to permit issuance must be embedded within the NRS program. Managing reliable industrial operations, such as those with tie-ins, that are key to supply chain and high demand outputs/products must be part of the factual analysis targeting the goal of effective air permitting.

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.

Fifteen years ago, the U.S. Chamber released a report that the cumbersome regulatory processes for permitting were potentially delaying hundreds of projects and costing the 2011 US economy more than $1 trillion Gross Domestic Product (GDP), including $352 billion in employment earnings, and up to 1.9 million new jobs. That historic report focused upon stalled energy projects so its focus was not comprehensive, yet the message continues to resonate. The risk of lost opportunities due to the delays of permitting and project initiation are tangible. This modest regulatory clarity concerning preconstruction activities that are not sources of regulated air emissions is a well-reasoned proposal that works to resolve the unintended consequence of denying lawful development. Additionally, to allay concerns of economic pressure to approve the pending permit application, this proposal places the risk solely on the owner/operator.

Question #7: Should the EPA add regulatory text to explicitly prohibit permitting authorities from considering economic losses for permit applicants if a valid permit cannot be issued? Should those economic losses include the cost of modifying or rebuilding specific facility components that were built without an NSR permit because they were initially considered not to generate or emit air pollutants but are later determined to require modification to enable the components or equipment that do produce emissions to meet NSR permitting requirements? Would such text help ensure that permitting authorities do not consider equity already invested or by permit applicants in determining the conditions in a permit or whether a final permit should be issued for a stationary source of air pollution or not?

Permitting authorities have extensive statutory, regulatory and case law about the elements they must assess for issuance of a permit. It is not necessary nor appropriate to add into that calculation economic losses from preconstruction activities.

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?

Revision to approved plans to reflect current regulatory law would be legally correct. In order to preserve a uniform regulatory program consistent with the federal, it would be appropriate to urge revision to state implementation plans. MOG supports an EPA requirement that revisions to existing approved plans reflect any final revisions to bring them up to date relative to this rulemaking once final. Specifically, EPA should explain that because the Clean Air Act does not require anything more stringent than the proposed rule, any state that wishes to prohibit pre-construction activities allowed under the proposed rule must do so under state law. MOG also suggests EPA explain that conforming changes to state implementation plans will not implicate

anti-backsliding concerns. Specifically, 42 U.S. Code § 7502(e) is not implicated, because this proposed rule does not change a NAAQS. Also 42 U.S.Code §7515 should not be implicated, because the proposed rule does not increase emissions, and therefore does not trigger the need for equivalent emission reductions.

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?

MOG supports inclusion of an analogous provision in the NNSR regulations, for the sake of regulatory consistency, and to ensure that there are appropriate deadlines for such state plans, whether PSD or NNSR.

Question #10: Does the EPA articulate the best interpretation of the CAA in this proposal? Is there additional statutory text, history, or judicial precedent that the EPA should consider?

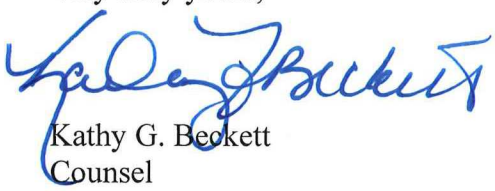
The proposal is well supported.

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?

MOG is unaware of reliance actions and defers to individual regulated stakeholders on this point.

Thank you for this opportunity to provide comments.

Very truly yours,



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Cc: U.S. Environmental Protection Agency
EPA Docket Center,
Docket ID No. EPA-HQ-OAR-2025-0618