

May 11, 2020

The Honorable Ms. Anne L. Idsal
U.S. Environmental Protection Agency
Office of Air and Radiation
1200 Pennsylvania Avenue NW
Washington, DC 20004

Re: Comments on the U.S. Environmental Protection Agency's Memorandum "Interpretation of 'Begin Actual Construction' Under the New Source Review Preconstruction Permitting Regulations"

Dear Ms. Idsal,

The U.S. Chamber of Commerce and Associated Builders and Contractors appreciate the U.S. Environmental Agency's (EPA) efforts to provide clarification to the interpretation of the term 'begin actual construction' in the EPA regulations implementing the major New Source Review (NSR) permitting program. We collectively offer the following comments on EPA's efforts.

Our organizations represent a broad swath of the business and construction industry that are generating jobs, building communities, and providing products and services for the American people. We are supportive of effective air quality programs that allow our members to start and complete projects in a timely and affordable manner while fostering job creation, economic growth, and environmental progress in the process.

Coordinated, predictable and transparent processes that clarify and streamline permitting will enable our members to plan and execute even the most complex projects while safeguarding our communities, maintaining a healthy environment and being good stewards of public funds. Our members take the appropriate measures that are required of them to comply with federal and state permitting processes and to help meet the attainment goals of ambient air quality standards under the NSR Prevention of Significant Deterioration (PSD) program.

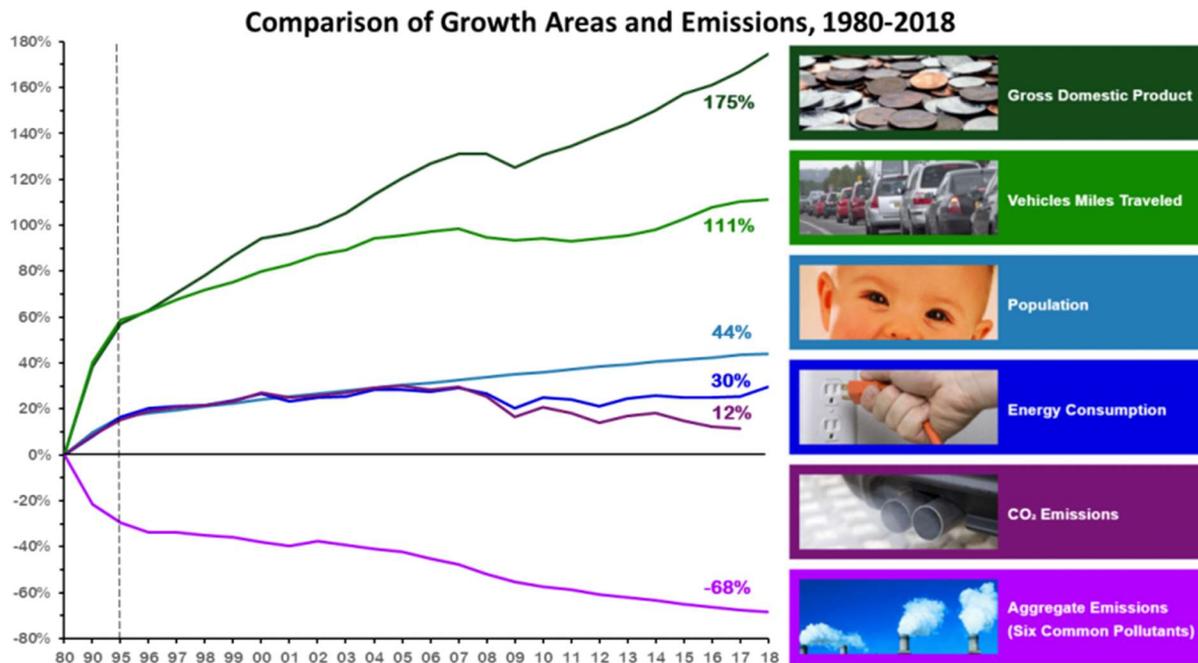
I. Significant Air Quality Improvements Have Been Made Over the Last Few Decades

Across decades of planning and investment, businesses have worked with EPA and their state partners to lower concentrations of criteria air emissions. These emissions reductions have occurred while the U.S. economy, population, and energy use have steadily grown—undoubtedly a testament to successful collaboration between EPA, states, and industry to adopt new emissions control technologies and practices in a sound, cost-effective manner.

EPA's 2019 Air Trends and National Emissions Inventory report details this progress.¹ The report shows that the aggregate emissions from all six criteria pollutants have declined by 68 percent since 1980. The annual 8-hour ozone concentrations have declined by 31 percent since 1980, with 16 percent of that reduction happening since 2000. Total sulfur dioxide (SO₂) and nitrogen oxide emissions (NO_x), which may contribute to the secondary formation of PM_{2.5} precursors under certain atmospheric conditions, were reduced by 91 percent and 65 percent, respectively, since 1980; with 80 percent of the sulfur dioxide and 49 percent of the nitrogen dioxide emissions being reduced since 2000. For PM_{2.5},

¹ National Air Quality: Status and Trends of Key Air Pollutants, EPA, July 12, 2019, <https://www.epa.gov/air-trends>

the annual concentrations have declined by 39 percent since 2000. Looking back to 1980, these reductions have occurred while U.S. gross domestic product has increased by 175 percent, vehicle miles traveled have increased by 111 percent, and energy usage increased by 30 percent. The below chart depicts this simultaneous advancement of both the economy and environmental progress.



National Air Quality: Status and Trends of Key Air Pollutants, EPA, July 12, 2019, <https://www.epa.gov/air-trends>

II. Simplification and Clarification in the Permitting Process Will Help Spur Economic Growth and Maintain America’s Competitiveness

Many forms of infrastructure are necessary to move people, goods, energy, and information across the country via pipelines, transmission lines, railroads, highways, waterways, and ports. Major investments are needed to repair, upgrade, and build new infrastructure to keep up with our growing population and demand for high quality infrastructure.

In order to maintain American’s competitive edge and attract the world’s investments, the U.S. will need to increase its investment in quality infrastructure. The American Society of Civil Engineer’s gave American infrastructure a D+ grade in their 2017 report card. They gave energy infrastructure a D- and estimated the need for investment at close to one billion dollars to meet growing energy demand and technology innovation.² Across many sectors, the U.S. has considerable investments to make in order to spur economic growth and maintain a competitive edge that will provide both immediate and long-term benefits for local communities and the U.S. as a whole.

Many areas in the U.S. may miss out or are already missing out on the full benefits of improved infrastructure and the efficient delivery of goods and services because it is difficult to permit new as well as modify or replace existing critical infrastructure. A U.S. Chamber of Commerce flow chart shows the

² 2017 Infrastructure Report Card, American Society of Civil Engineers, <https://www.infrastructurereportcard.org/>

arduous and complex process that project proponents must complete in order to develop a pipeline project, including the potential for going through NSR review.³

Due to the overlaying complexity of the permitting process and unnecessarily long permitting delays, we support policy changes that will help build infrastructure to meet not only the needs of today, but those that will emerge tomorrow. Policy updates, such as the guidance that is the subject of these comments, must ensure timely reviews of projects related to critical infrastructure and streamline permitting at the federal and state levels.

III. The Revised Interpretation is Needed to Support More Efficient Project Development and Reduce Permitting Costs

The NSR preconstruction permitting program has long suffered from uncertainty regarding ‘where on the continuum from initial planning to operation’⁴ that a source owner or operator must have a permit before proceeding with certain construction activities. The decision regarding where to draw this line for what construction is permissible prior to receiving an NSR permit has been left to EPA rulemaking and guidance documents.

Unfortunately, EPA’s guidance from the 1970’s to today has progressively limited the extent and types of preconstruction activities that project proponents may engage upon or ‘construct’ prior to receiving their NSR permit. This has often led to a hold on all pre-permit construction activities and unnecessarily long delays in project development. For example, natural gas combined cycle power plants are delayed as much as 3.5 years on average due to the time-consuming NSR permitting process.⁵ When these delays are compounded across thousands of projects, they are costly and have detrimental effects on economic efficiency and productivity.

Below are a few anecdotal examples of how the overreaching past guidance on what constitutes ‘begin actual construction’ has led to inefficiencies in project development, inefficiencies in permitting agency resources, and increased the likelihood that permit conditions are outdated by the time facilities begin actual construction on a project:

- Upgrading natural gas capacity to a facility requires an already long lead-time for planning due to complex pipeline installation, planning, and permitting that typically ends at a tie-in point at the project sponsor’s fence line. A facility may choose to upgrade its natural gas capacity to secure better fuel pricing compared to its existing fuel supply or provide fuel security by diversifying their options. Under the prior guidance’s overly narrow interpretation, the tie-in of the additional gas capacity might be considered ‘begin actual construction’ and thus require an air permit even without any modifications or process changes to the emissions unit.
- For a facility that is planning for a major modification requiring an air permit, site preparations will be necessary to ensure all systems are carefully prepared including adding shutoff valves to

³ What’s It Take to Build Pipelines In America?, Global Energy Institute, <https://www.globalenergyinstitute.org/sites/default/files/Pipeline-Flowchart%20Final.PDF>

⁴ Memorandum, Edward E. Reich, Director, U.S. EPA Division of Stationary Source Enforcement, to U.S. EPA Enforcement Division Directors, Regions I-X (December 18, 1978).

⁵ EPA’s New Source Review Program: Evidence on Processing Time, 2002-2004, Art Fraas, Mike Neuner, and Peter Vail, Resources for the Future, February 2015. <https://www.rff.org/publications/working-papers/epas-new-source-review-program-evidence-on-processing-time-20022014/>

process pipes that convey water or steam. For power sector applications, it is critically important to complete any necessary site preparations during the short periods of time that a unit is in outage. The valve installation, although not part of the 'emissions unit' might have been considered 'begin actual construction' possibly requiring an NSR permit even though it is unrelated to the emissions unit.

- Requiring an NSR permit to build a bridge in order to gain access to the site to begin site clearing and grading is another example of the overreaching nature of the interpretation of 'begin actual construction' in prior NSR permits. Clearing and grading were allowable under the prior guidance interpretation; however, building the bridge might not have been permitted without an NSR permit as the prior interpretation precluded building any permanent structure and the bridge would have been considered essential to the operation of the emissions unit.

Increased permitting times impose direct costs on project sponsors due to the investment of staff time and the requirement to answer questions of regulators and the public during the permit review process. There are also costs to project sponsors due to opportunity costs from delays in starting-up operations of a manufacturing facility, power plant, pipeline, or other project. In addition, project sponsors may also have to pay penalties in their contracts to engineering and construction companies resulting from delays in the start of construction.⁶ Project construction uncertainty can make projects unprofitable and prone to litigation between the owner and the contractors. Project sponsors may also miss opportunities for better financing or deadlines for certain tax breaks. The longer a permit decision is delayed the more costly a project will be to complete, sometimes leading to a project's cancellation.

Restrictive policies on what can be constructed prior to receiving an NSR permit also lead to the inefficient use of permitting agency resources by increasing the likelihood that permit conditions are outdated by the time sponsors begin actual construction on a project. In this type of situation, it may be necessary for the project sponsor to commit more resources to revise air modeling to update the permit conditions and go through further agency review.

As the complexity and duration of NSR permitting has evolved over the years, submission of air permit applications frequently becomes the critical path for the completion of a project. The complexity and length of the New Source Review process often drives premature decisions on project elements necessary for permit applications, ahead of when they would otherwise be determined in an optimal project design sequence. For example, deciding on a boiler capacity while still designing project elements that will impact the final project steam demand is less than optimal. This inevitably leads to inefficient permit revisions and rework of permit criteria by both the facility and the permitting agency.

IV. EPA Should Make Clear that 'Emissions Unit' is Narrowly Focused on Equipment that Causes Emissions or Directly Impacts the Magnitude of Emissions

The application of the term 'emissions unit' in the NSR permitting context should be clearly and narrowly focused on equipment that causes emissions or directly impacts the magnitude of emissions (*e.g.*, equipment components that are the basis for emissions factors or manufacturer emissions guarantees).

⁶ EPA's New Source Review Program: Time to Reform?, Art Fraas, John Graham, and Jeff Holmstead, Environmental Law Institute, 2017, <https://media.rff.org/archive/files/document/file/47%2010026.pdf>

Further clarification around the term ‘emissions unit’ is an area EPA’s draft guidance could be improved upon. While we recognize there will be certain scenarios where sources and permitting authorities will need to make case-specific determinations as to the scope of an ‘emissions unit,’ it would be helpful to have further clarity in the guidance as to what types of construction activities are generally not considered construction on an ‘emissions unit’ and which activities are considered construction.

Additional clarity of this term would be helpful to assure the coordination of construction activities align with the regulatory definition of ‘begin actual construction.’ One possible means of providing more clarity would be to include in the guidance, examples of construction activities that would generally be permissible prior to issuance of an NSR permit because they are not construction on an emissions unit. For a boiler or process unit, the construction of accommodating installations, such as concrete foundations to support the boiler or process unit should not be considered part of the ‘emissions unit.’ Instrumentation buildings and control rooms are also examples of components that may accommodate an emission unit but are not themselves part of an emissions unit.

The context EPA provided in the draft guidance for determining an ‘emissions unit’ does not provide sufficient clarity to the revised interpretation. First, the reliance on sites and permitting agencies to determine the ‘emissions unit’ on a case-by-case basis creates uncertainty as to what items of interest could occur or be constructed before a permit is issued. Sites will likely have engagement with permitting agencies ahead of permit issuance and can informally align on emissions unit interpretation, but asking permitting agencies to formally concur on allowable pre-permit activities on a case-by-case basis may lead to inefficient and inconsistent application of the guidance. Accordingly, case-specific determinations should be permissible to allow some agency flexibility, but should primarily be used for unique or uncommon situations that can’t readily be characterized in this guidance document.

Second, correlating the New Source Performance Standards (NSPS) or National Emissions Standards for Hazardous Air Pollutants (NESHAP) criteria for defining an affected source would create inconsistency and unneeded confusion on the definition of an emissions unit. The intent of the NSPS and NESHAP is a distinctly different context than what is relevant for consideration in characterizing an ‘emissions unit’ for NSR ‘begin actual construction’ purposes. For NSPS/NESHAP standards, it may be appropriate at times to look at groups of emission units collectively for control purposes, whereas for NSR ‘begin actual construction’ consideration, the focus should be on what construction activities are part of the emissions units.

V. “Equity in the Ground” Should not be Considered a Factor of Influence on the Permitting Agencies’ Decision to Grant an NSR Permit

The permitting authorities will be making their decision on the submitted NSR application as opposed to any of the preconstruction, in the ground, work that a project sponsor may pursue prior to receiving their permit. Nor should project sponsors assume that undertaking pre-permit onsite construction activities would grant them leverage with respect to the outcome of the permit.

With over four decades of experience in NSR permitting, permitting agencies have ample access to precedential information to evaluate case-specific items in NSR permits, such as control technology evaluations of the Best Available Control Technology (BACT) for NSR PSD permits. The permitting agencies have leverage in such equity in the ground situations, as facilities bear the interest in timely issuance of permits to align with capital spending plans and avoid missing opportunistic market conditions that may only exist for limited time periods. Accordingly, facilities with equity in the ground

may be more inclined to agree to more stringent permit conditions (beyond what may appropriately be considered as BACT) to avoid delays in permit issuance.

VI. Conclusion

Our associations have long supported the efforts to provide regulatory clarity under the NSR program, while ensuring that the program's intended benefits are preserved. The complexity that has evolved around every aspect of implementing this program has made simple decisions unnecessarily complex. The consequences of these complexities include elevated investor risk, thereby creating a reluctance to invest in needed infrastructure to meet America's future needs.

We support EPA's efforts to provide clarity to the interpretation of 'begin actual construction' under the NSR program as it will support both economic progress and the environment. Providing this clarity is consistent with Clean Air Act Section 101(b)(1)'s statement of purpose of protecting and enhancing the nation's air resources to promote both the public health and welfare and the productive capacity of the country.

Associated Builders and Contractors
U.S. Chamber of Commerce