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Docket No. EPA-HQ-OAR-2025-0618
U.S. Environmental Protection Agency
401 M Street, NW
Washington, D.C. 20006
Attn: Andrew Kormos, Permitting and Program Support Div.,
Office of State Air Partnerships kormos.andrew@epa.gov

Re: **Proposed Rule to Amend the NSR/PSD Permit Definition of "Begin Actual Construction," 91 Fed. Reg. 26958 (May 13, 2026) [2026-09524.pdf]**

Dear Mr. Kormos:

Introduction -- The Flexible Packaging Association ("FPA"), the national organization representing U.S. manufacturers of flexible packaging, supports the EPA's May 13, 2026 Notice of Proposed Rulemaking ("NPRM" or "Notice") to amend the "Prevention of Significant ("PSD") and "Nonattainment Area (NNSR) Permit Programs' shared New Source Review ("NSR") regulatory definitions of "begin actual construction" and adding a new definition of "pollutant emitting activities." If the NPRM is finalized, it will allow Owners/operators ("O/o") of NSR-regulated sources to install *non-emitting* structures of a permanent nature as well as peripherals such as electric and water piping before an O/o receives an NSR preconstruction permit to construct a "major *emitting* source" or "major modification of a major *emitting* source." FPA believes this is what Congress intended in 1977, when it amended the Clean Air Act by adding the New Source Review (NSR) program, and FPA supports the proposed rule.

FPA Background- FPA represents converters that produce flexible packaging from paper, plastic, film, aluminum foil, or any combination of these materials, to manufacture bags, pouches, labels, liners, wraps, rollstock, and other flexible packaging products for foods of all types, medicines, medical devices, and many other related articles. The industry represents $42.9 billion in annual sales; is the second largest and fastest growing segment of the domestic packaging industry; and employs approximately 85,000 workers throughout the United States. In this manufacturing sector, nearly all major existing and major new plants are required by federal and state "Clean Air Act (CAA)" laws to have total emissions capture vented to "regenerative thermal oxidizers (RTOs)" that achieve 95-98 percent overall destruction efficiencies based on state and local Reasonable Available Control Technology (RACT)"

pursuant to CAA Sections 110 and 183(b) and "Maximum Achievable Control Technology (MACT') requirements for hazardous air pollutants pursuant to CAA Sections 113.[1]

FPA'S COMMENTS ON THE PROPOSED RULEMAKING

Background - FPA has long-argued that the Clean Air Acts of 1977 and 1990 did not prohibit construction activity related to an major emitting unit so long as the activity did not itself emit PSD/NNSR regulated air pollutants.[2] However, because the EPA determined through guidance that the 1977 Clean Air Act did not define the word "construction" and there was no legislative history on Congress's intent regarding that term or the scope of prohibited pre-permit construction, the agency concluded in 1978, that "we are not bound by it in deciding what activities may be conducted prior to receiving a necessary PSD permit." E. Reich, Dir., Stationary Source Compliance Division (SSCD), "Interpretation of 'Constructed' as it Applies to Activities Undertaken Prior to Issuance of PSD Permit" (Dec. 18, 1978). Thereafter, EPA promulgated a definition of "begin actual construction" to define the line between allowed pre-permit activity, and prohibited construction that was "of a permanent nature:"

> *Begin actual construction* means, in general, initiation of physical on-site construction activities *on an emissions unit* which are of a permanent nature. Such activities include, but are not limited to, installation of building supports and foundations, laying underground pipework and construction of permanent storage structures. With respect to a change in method of operations, this term refers to those on-site activities other than preparatory activities which mark the initiation of the change.[3]

As a consequence, to this day, the term "begin actual construction" remains focused on "permanent installations" rather than to "emissions units," as this rulemaking underscores. The resulting regulations and guidance have thereby stifled innovation and economic productivity for three decades, created competitive advantages for international companies with respect to bringing new products to market, and inflated construction costs over the (often) years it has taken manufacturers to obtain a NSR permit. The Notice also accurately characterizes the term "begin actual construction" as a tool that local and regional EPA regulators used to bully permit applicants, despite the fact that preparatory activities to accommodate an emitting unit, such as excavation,

[1] See 42 U.S.C. §§ 7410(b) and 7413(d).

[2] See, e.g., Flexible Packaging Association Comments on Proposed Policy Changes to Definition of Begin Actual Construction (May 11, 2020) (cited at 91 Fed. Reg. 26971, *fn*. 118); See also, FPA Comments on Impact of Federal Regulations on Domestic Manufacturing: Streamlining Federal Permits for Manufacturers 82 Fed. Reg. 12786 Mar. 7, 2017) (Docket # 170302221-7221-01.

[3] *See* 45 Fed. Reg. 52676 at 5,731, 52,736, 52,743, 52,745 & 52,748 (Aug. 7, 1980) *(emphasis added);* codified at 40 C.F.R. §§ 40 C.F.R. § 51.166(b)(11) (PSD), 40 CFR 52.21(b)(11) (PSD), 40 C.F.R. 1.165(a)(l)(xv) (NNSR), and at Part 51 Appendix S 11.A.17 (NNSR).

installing footings, tool sheds, and pouring foundations have nothing to do with environmental harms that the Clean Air Act is designed to prevent.

A. Because this Manufacturing Sector of the Economy is Expanding, NSR Permitting is Critically Important to FPA's Members, and They Would Benefit by Being Able to Undertake a Variety of Preconstruction Activities of a Permanent Nature Before Receiving an NSR Permit for an Emitting Unit/Units.

1. Time is opportunity and competitive advantage in the international marketplace.

Flexible packaging is fortunate to be in a position of economic expansion with new products and construction activities to permit. Material and process changes to rid products of certain chemicals that EPA and other agency deem toxic, also may require modifications of some emitting process equipment that can trigger NSR and minor NSR. By formally allowing preparatory work beyond site-clearing that lets O/o lay footings and foundations as well as installing piping and tying in electricity for a proposed NSR-affected project will greatly expedite when a facility can come online after a manufacturer obtains a NSR permit to begin actual construction of an affected emitting unit. That itself saves money, by allowing contractors and staff to engage in meaningful activity toward realization of new products and processes. Conversely, not being allowed to undertake such activities simply makes a project more expensive. And it also disassociates the goals of a company's expansion with employees' (and possibly, investors') expectations.

Other industries that are not expanding at the same rate as flexible packaging also will benefit financially where the ability to work on allowed preconstruction activities will promote new manufacturing, save time and money, and might even save a company which until now cannot afford to expand because it is barred from these banned activities until in obtains its NSR permit. In either case, the expense of a project generally swells if permit applicant is unable to undertake preconstruction activities which causes a proposed project to become more expensive because time inflates the cost of the project. (In some ways it makes one wonder if NSR was meant to impede the economy instead of create a negotiation about the maintenance and enhancement of air quality and the stringency of air pollution control technologies.)

2. The "equity in the ground" argument against allowing construction of non-emitting permanent structures is untenable.

The May 13, 2026 Notice also addresses the agency's historical argument that such activities create an "equity in the ground" argument for industry.[4] Air pollution control agencies, EPA and

[4] See 91 Fed. Reg. at 26,962 at col. 1-2.

the public have seemed to fear that the investment in non-emitting construction related to a proposed project will be used to exploit regulators by pressuring them to issue permits. Industry has been unsuccessful, it seems, in countering this argument, even though the elephant in the ground can actually be advantageous for the public in many ways both in terms of local economies but also in ensuring pollution controls and other environmental amenities in the course of permitting.

The "elephant in the ground" line of argument never made any sense, but it sure would not hold much water in a fight to get an agency to issue a draft permit for public review. The major equity investment for most NSR sources is the investments on the "emitting unit," which need to be designed and sometimes fabricated offsite to form the technical basis for analyzing potential emissions for a project. No one to our knowledge has ever argued that a permitting authority could refuse to issue a permit because of that emitting facility investment, even though it greatly overshadows the cost of excavation, laying pipelines, and building foundations or construction sheds with the expectation of receiving a permit. For that reason, we wouldn't oppose EPA stating in the final regulation that "pre-construction" activities such as X, Y, and/or Z, and the permit applicant is estopped from arguing that activities that are not included in the definition of construction can be used to challenge the failure of an agency to issue a NSR permit.

The public should not fear that non-emitting activities "of a permanent nature," such as demolition, site clearing, installation of building footings and foundation work, and installation of electric and water tie ins will be used by NSR permit applicants to "coerce" regulators to issue permits and the public without sufficient review. Not only are there plenty of more substantive air quality issues that hold-up issuance of draft and final NSR permits, such as the proper way to model air quality for the a proposed major emitting source, whether air pollution control technology is feasible for the source, the near-exhaustion of air quality increments in certain parts of the country, and post-operation air pollution monitoring, but public input and the rising costs of projects overshadow everything else in terms of time and resources. In other words, there are plenty of remaining pressure points in NSR permitting for the public and regulators to wrestle over with companies, which dictate whether a project gets built, not to mention local zoning and other environmental issues like water usage. In fact, it is quite possible that the equity argument shifts to the benefit of the regulator and public to argue for additional environmental protections as the installation of non-emitting unit advances.

B. From a Legal Perspective, the EPA Has Ably Explained Why the Agency's Historical Guidance interpreting "Beginning Actual Construction" Was -- and Remains -- Improper.

FPA believes that the May 13, 2026 Federal Register Notice provides a cohesive and accurate legal analysis of why "begin actual construction" refers to a new "major *emitting*

source" and/or a "major modification of a *major emitting source*." By rebutting EPA's 1978 guidance that there was a proverbially "hole" in the 1977 Act that was created by Congress's failure to define "construction," or "commence construction," it is far more reasonable to conclude that Congress clearly did address when a PSD/NNSR permit was required before the installation of a new major emitting facility or a major modification of an emitting facility. As explained on page 26967 of the Notice, the 1977 Clean Air Act Amendments, birthing the New Source Review Permit program, applies to a ''major stationary source," which was defined as ''any stationary facility or source of air pollutants which directly emits, or has the *potential to emit, one hundred tons per year or more of any air pollutant* …." CAA section 110(a)(2)(C) likewise requires the NSR program to regulate ''construction of any stationary source," defined by the Act and later in the 1990 Amendments by the source's *potential to emit regulated air pollutants* pursuant to Title I (i.e., the six national ambient air quality pollutants and their precursors). In addition, CAA section 110(a)(2)(C) requires regulation of construction ''as necessary'' to protect the NAAQS. This is not a mandate to regulate construction of something else that does not emit air pollutants. Installation of concrete, the placement of footings, installation of electrical and water/wastewater piping, installation of a shed for building materials and tools do *not* emit regulated pollutants.[5]

In view of the similarities between the asserted missing definition of the CAA term "*source*" which spawned EPA's 1978- 1979 "bubble policies" with the asserted missing definitions of "construction" and "begin actual construction" that spawned the 1978 "Reich EPA Memo," at nearly the same time, it makes sense to analyze the impact of the Supreme Court's decision in *Loper Bright v. Raimondo*, 603 U.S. 369 (2024), which overturned the Supreme Court's decision in *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 137(1984), upholding EPA's final 1979 bubble policy. *See, e.g., 91 Fed. Reg. at 26970-71.* Not because *Loper Bright* has retroactive legal impact on the existing regulatory definition of "construction" that has been around for thirty-years (because it does not), but because both immensely significant judicial decisions focus on the "identification of a "hole" or ambiguity in federal administrative laws and what comes next. Although FPA agrees with the EPA's current view that it is reasonable to construe the CAA's provisions as allowing the installation and construction of non-emitting activities before a PSD/NNSR permit is issued for the "major emitting source," it is clear that *Loper Bright also* curtails the deference that courts have traditionally given to the reasonableness of an agency's statutory interpretations.[6] For that reason, EPA also should argue in the final rule that its legal interpretation is not just reasonable, but based on the plain language of the CAA.

[5] We note that the only pre-construction activity that is *plainly allowed under the current agency interpretation* of "begin actual construction," is land clearing. Curiously, it also is the preconstruction activity that actually has the potential to emit a NAAQS, i.e., particulate matter, albeit fugitive.

[6] "*Loper Bright Enters. v. Raimondo, 603 U.S. 369, 403:* (The resolution of statutory ambiguities involves legal interpretation. That task does not suddenly become policymaking just because a court has an "agency to fall back

C. FPA Urges the EPA to Codify the Proposed Definition of "Begin Actual Construction" in both the PSD and NNSR provisions of the CAA, Title I Regulations; However, the Association Also Believes that the EPA Will Need to Take Special Care in Defining the Term "Commence Construction" as a Synonym in the NNSR Program Because of its Other Uses in CAA Regulations.

The EPA solicited comments on whether revisions to existing approved state implementation plans reflecting the proposed changes (if finalized) should be required and if this provision (40 CFR 51.166(a)(6)), which is only in the PSD regulations, should be added into the NNSR provision in 40 CFR 51.165 (see section VI of this preamble). *Id.* at 26974/1. Although FPA thinks the regulations will be clear without doing so, amending the definition of those terms will make it particularly clear. If EPA does modify the two definitions to obviate any confusion, the agency also might explain in the preamble that while it is not using it discretion to interpret an "ambiguity" or "hole in the Act," the agency simply wants the revised NSR regulation to be clear on its face that certain preconstruction activities related to non-emitting units is consistent with its statutory analysis. The PSD/NNSR regulations are among the most complex environmental regulations that EPA administers, and adding a few sentences that eliminate confusion or questions about how the definition applies can only help.[7]

FPA does express concern, on the other hand, regarding the agency's proposal to synchronize the terms "begin actual construction" with "commence construction." Collectively, our initial knee-jerk reaction was "yes, EPA, please use the terms congruently," but then red flags instantly appeared with varying usage of the terms "commence construction," "commence," and commencing," throughout the NSR and most prominently in the "New Source Performance Standard (NSPS)" regulations and their respective implementation histories. As the agency explains in the proposed rule, the term, "commence construction," historically, was a grandfathering mechanism insulating construction of an emitting unit from application of NSR and/or a New Source Performance Standard if construction was commenced March 19, 1979, discontinued for a period of 18-months or more, and completed construction within a reasonable time. See 40 CFR 52.21(i)(3) (1979). That use of the regulatory term in the new source review is now obsolete because nearly fifty years have passed for construction to have been completed "in a reasonable time."

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on. * * * Courts interpret statutes, no matter the context, based on the traditional tools of statutory construction, not individual policy preferences.) (*internal citations omitted*).

[7] FPA acknowledges that doing so may lead to administrative aggravation to make sure that all CAA agencies modify their programs accordingly, but regional consistency is very important to ensure. If states wish to exercise their authority in this regard to be more stringent than the federal program under CAA Section 116, then they will need to "own" that decision by taking steps with the public to prevent preconstruction activities of a permanent nature.

However, the CAA's definition of "commenced" in the PSD program, set forth at 42 U.S.C. § 7479(2)(A) could be problematic to revise through a regulation. It states, that "commenced," "as applied to construction of a major emitting facility, means that the owner or operator has obtained all necessary permits or approvals and "either has (i) begun, or caused to begin, a continuous program of physical on-site construction of the facility or (ii) entered into binding agreements or contractual obligations, which cannot be canceled or modified without substantial loss to the owner or operator, to undertake a program of construction of the facility to be completed within a reasonable time." If EPA proceeds to change the "regulatory meaning" of the statutory PSD term, it will need to cautiously explain why the agency is clarifying the plain language of the CAA by adding another meaning to the existing meaning of the term "construct." Otherwise, litigants opposed to the rule revisions could argue that the term was silent (i.e., not just unclear under the agency's statutory interpretation of its context only to major emitting facilities)"and under *Loper Bright,* that agency lacks the discretion to interpret the term as other than what the 1977 statute provided.

Under the NSPS regulations, "commence construction" also is still framed as a grandfathering provision based on financing before the proposed date of a sector-specific NSPS, so as not to allow an entity to evade an otherwise applicable CAA standard in bad faith. Equally important, however, it is used interchangeably in the amendment of specific NSPS standards as a "cut off" for applicability of revisions of NSPS standard for affected sources. For instance, in the internal combustion engine NSPS at § 60.4200.4200(a), the term "*construction commences"* is the date the engine is ordered by the owner or operator and that date would be operative for determining when revision of an NSPS standard applies to a unit. FPA, therefore, submits that using a term like "commence construction" might lead to unforeseen problems unless this possible source of confusion is clarified as meaning different sets of events between the NSPS and NSR Programs.

D. . FPA's Responses to Selected EPA Requests for Comment

The EPA solicited comments on a set of Questions set forth at the Conclusion of the Proposed rule, several of which FPA responds to below.

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?

FPA does not think the definition of "stationary source" should -- or needs to -- include a list of equipment, components, and processes excluded from "begin actual construction," First, the PSD permitting program is based on the term "major emitting facility, and the term

"commenced" applies to a "major emitting facility." Second, the general definition of CAA "source" at 42 USC § 7602(j) is defined as "(e)xcept as otherwise expressly provided, the terms "major stationary source" and "major emitting facility" mean any statutory facility or source of air pollutants which directly emits or has the potential to emit, on hundred tons per year or more or so of any air pollutant *** as determined by rule by the Administrator. That does not seem to be an appropriate definition to amend by adding a list of non-emitting activities. Moreover, it also can also be argued that the regulatory definition of a "major source," which is used in both the PSD and NNSR programs, covers everything on a property owned or operated by the same person(s), belonging to a common SIC code (now a NAICS code), that is located on adjacent properties.

A stronger case can be made for amending the definition of "emission units," to exclude the list of equipment, components, and processes that are not considered emitting units, although it probably is not necessary if they will already be listed in the definition of "pollutant emitting activities" and there might be confusion about above ground pipelines that are emitting processes with electrical and water pipelines that generally are laid underground. There, a more general issue that the Notice seems to allude to is whether the agency in the final rule should risk listing specific equipment, components, and/or processes that are excluded from these PSD/NNSR terms major stationary source and/or "major emitting facility." The issue, of course, is if a non-emitting structure or activity like an electric box is not specifically in the definition. Therefore, FPA urges EPA to couch such a list as examples. prefaced by the words "such as," or "including, but not limited to" X, Y, and Z. EPA also could make use of the agency's Applicability Determination Index to further elucidate other types of "non-emitting units," in the case of additional inquiries or disagreements (although presently the ADI seems to be limited to NSPS applicability determinations).

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

There does not appear to be a proposed set of regulatory changes in the Federal Register NPRM or a redline in the docket, so it is very difficult to know. Overall, the PSD/NSR regulations are so complex, that it would be very hard to do, but a redline of the existing regulations would be of assistance to synchronize the meanings of construction, commence construction, and begin actual construction in the PSD/NSR programs.

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?

FPA does not oppose adding regulatory text to prohibit equity already invested from being considered by permit authorities in permit issuance, although as we allude to above, there are many types of investments in a new source, including intellectual property, design and fabrication costs that eclipse preconstruction of emitting units are not, or should not be considered. Thus, our members also think it would be sufficient to include a discussion of the issue in the final rule's preamble where it could be more thoroughly discussed and referenced. EPA also might consider using utilizing Frequently Asked Questions or Applicability Determination Requests, to field questions on specific equipment.

The second part of the question seems to allude to requiring a modification of a non-emitting component that perhaps acts as a bottleneck to production once a major emitting unit (or major modification) has been constructed is modified to allow greater capacity of the permitted unit. The issue there would appear to be whether the bottleneck's replacement and/or modification would require a preconstruction permit *or* would the major source whose emissions were based on its original potential to emit require a preconstruction permit before the bottleneck could be removed. It would appear that air pollution source, not the-non-emitting bottleneck itself, would require a CAA permit if the change would result in a significant emission increase in a regulated NSR pollutant from the NSR permit.

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?

Yes, states, local agencies, and tribes should have up to three years to amend their implementation plans, until which time the proposed changes, if they are finalized, will be effective throughout the country. First, if the Agency makes regulatory changes, particularly to the terms begin actual construction and commence (construction), it is important that FSLT regulations mirror federal law. Second, the patchwork effect across the country of different regulations will be difficult if not impossible for permit applicants to deal with on their own, and that could extend permitting timeframes and stall much needed projects.

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?

Yes, but it is incredibly important that these regulatory amendments be implemented immediately, in the same manner as Title V amendments for excess emissions from "startups, shutdowns and malfunctions," were implemented before Part 70 Programs were "called" by EPA, amendments were adopted locally and submitted for EPA approval and adopted (and now retracted for emergency malfunctions).

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In closing, FPA appreciates having this opportunity to comment on the proposed amendment of the PSD and NSR regulations to define "begin actual construction" to allow a variety of non-emitting activities before a manufacturer receives a PSD/NNSR permit to construct a major emitting source. FPA's members believe that private and public companies are well-equipped to accept financial risks for expenditures and activities to ready a site for installation of emitting equipment when a permit is issued by a State, EPA, or a Tribe, and that the current policy of holding other non-emitting and non-regulated activities hostage is a threat to businesses and the nation's economy prospering.

If you have questions regarding these comments, please contact me.

Respectfully submitted,

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