

Comments of the Attorneys General of Illinois, California, Colorado, Connecticut, Delaware, the District of Columbia, Hawai‘i, Maryland, Massachusetts, Michigan, Minnesota, New York, Oregon, Rhode Island, Vermont, Washington, and Wisconsin, the Chief Legal Officers of the City of Chicago and New York City, and the California Air Resources Board

Via Electronic Transmission on Regulations.Gov

June 29, 2026

Lee Zeldin, Administrator
U.S. Environmental Protection Agency
EPA Docket Center
Mail Code 28221T
1200 Pennsylvania Ave., NW
Washington, DC 20460

Re: The U.S. Environmental Protection Agency’s Proposed “Begin Actual Construction in the New Source Review (NSR) Preconstruction Permitting Program,” 91 Fed. Reg. 26,958 (May 13, 2026), Docket ID No. EPA-HQ-OAR-2025-0618

Dear Administrator Zeldin:

The Attorneys General of Illinois, California, Colorado, Connecticut, Delaware, the District of Columbia, Hawai‘i, Maryland, Massachusetts, Michigan, Minnesota, New York, Oregon, Rhode Island, Vermont, Washington, and Wisconsin, the chief legal officers of the City of Chicago and New York City, and the California Air Resources Board (collectively, States) respectfully submit these comments on the U.S. Environmental Protection Agency’s (EPA or the Agency) proposal entitled “Begin Actual Construction in the New Source Review (NSR) Preconstruction Permitting Program,” 91 Fed. Reg. 26,958 (May 13, 2026). The Proposal would alter definitions of terms in EPA’s NSR regulations to allow construction at new or modified major sources of air pollution without first obtaining an NSR permit. Under the new interpretation, a permit would not be required until construction begins on the source’s individual components that emit air pollution.

The States oppose the Proposal, which abruptly abandons the Agency’s nearly fifty-year old approach to interpreting the Clean Air Act in service of its new deregulatory policies and unchecked support for AI data center development. The new interpretation would potentially enable construction of vast portions of a facility or source without first obtaining an NSR permit, even though modern industrial facilities are designed as integrated plants with both emitting and non-emitting components.

EPA interpretation is not the best reading of the Clean Air Act. Rather, the statute requires permits to be obtained *before* construction of *any portion* of a major emitting facility or source. Furthermore, EPA has entirely ignored the reliance interests of States on the existing regulatory

approach. The Proposal would constrain state permitting agencies, limit public participation, and ultimately lead to harm to the environment and public health, particularly in already overburdened communities with environmental justice concerns. Additionally, EPA has justified its Proposal as necessary to accelerate development of AI data centers, which is completely irrelevant to the best meaning of the statute.

The States urge that EPA withdraw its Proposal.

I. Background of the NSR program

A. Statutory background

Pursuant to Title I of the Clean Air Act (CAA), the NSR program protects communities through pre-construction permitting and pollution control measures that regulate the construction of both new stationary sources and “major modifications”¹ of existing major stationary sources. The NSR permitting program is vital to the CAA’s goals to “protect public health . . . from air pollution,” “to insure that economic growth will occur in a manner consistent with the preservation of existing clean air resources,” and to assure that a permit for air pollution is granted “only after careful evaluation of all the consequences of such a decision and after adequate procedural opportunities for informed public participation in the decisionmaking process.” 42 U.S.C. § 7470.

The NSR program’s protections are designed to further these goals as polluting facilities change and expand. First, the NSR program is designed to ensure that each new or expanding NSR-regulated facility uses up-to-date air pollution control technologies and practices, meets all federal requirements, and does not emit pollution that would contribute to unhealthy air quality. Second, NSR is a critical tool to help States and local communities meet the National Ambient Air Quality Standards (NAAQS) and then maintain them. Without proper implementation of the NSR program, new construction projects that increase emissions could contribute to non-attainment of NAAQS, endangering public health. Third, the NSR process is a public one, often the only one in many states where residents or businesses can learn about and have early input on major projects that affect the air quality in their community.

The CAA requires all areas of the country to meet and maintain NAAQS for six “criteria” pollutants: ozone, particulate matter (PM₁₀ and PM_{2.5}), sulfur dioxide, nitrogen dioxide, lead, and carbon monoxide. The NSR preconstruction review and permitting process is a key mechanism to achieve and maintain clean air and compliance with the NAAQS. NSR imposes

¹ Congress defined “modification” broadly as “any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted.” 42 U.S.C. §§ 7479(2)(c) and 7501(4) (incorporating the definition set forth in 42 U.S.C. § 7411(a)(4)).

strict requirements on new and modified major stationary sources of criteria pollutants,² and comprises two separate programs for areas in “nonattainment” (out of compliance with the NAAQS) and “attainment” (in compliance with NAAQS). One of the programs is known as nonattainment NSR (NNSR), and it applies to new or modified major stationary sources in nonattainment areas. The other program is known as Prevention of Significant Deterioration (PSD), and it applies in attainment areas.³

Sources subject to the nonattainment NSR program must comply with strict emission control standards: they must receive a permit requiring pollution control consistent with the lowest achievable emission rate (LAER) and must offset emission increases associated with the newly constructed or modified source by creating or acquiring emission offsets from other sources. 42 U.S.C. § 7503(a)(1)-(2). These stringent requirements are intended to ensure, in an area where air quality does not meet the NAAQS for a particular pollutant, that any increase in emissions from new or modified major sources is as small as possible and is accompanied by even greater emission reductions from other sources so as to improve air quality in the area and help bring the area into compliance with the NAAQS. Sources subject to the attainment PSD program also must comply with strict emissions related requirements, including by modeling projected impacts from the source; demonstrate that emissions from the facility will not cause, or contribute to, air pollution in excess of any NAAQS or PSD “increment”; and obtain a permit requiring application of the best available control technology (BACT). *See generally* 40 C.F.R. § 52.21. These PSD requirements ensure that emissions from new or modified major sources do not cause significant deterioration of air quality in areas that meet the NAAQS for a particular pollutant.

States have a central role in carrying out the Clean Air Act and the NSR program. First, states are obligated to adopt a plan for “implementation, maintenance, and enforcement” of NAAQS, 42 U.S.C. § 7410(a)(1), that includes enforceable emissions limitations in permits. *Id.* at § 7410(2)(A). This plan is generally referred to as a “state implementation plan” (SIP). For attainment areas subject to the PSD program, the SIP must contain emissions limitations, enforceable via permit, that prevent significant deterioration of air quality. *Id.* at § 7471. Likewise, for areas subject to the NNSR program, the SIP must require permits for construction and operation of new or modified major sources. *Id.* at § 7502(c)(5). Cities are also partners in attainment of the NAAQS. City policies and city projects must account for NAAQS attainment and nonattainment or PSD areas as well as protecting the health of the city’s residents. In large cities like New York City and Chicago, which have populations greater than many states, this is a significant responsibility.

² For purposes of the NSR program, “regulated NSR pollutant” includes any pollutant for which a NAAQS has been promulgated (and any precursors to the NAAQS), as well as all other pollutants regulated under the Act except for hazardous air pollutants. 40 C.F.R. § 52.21(b)(50).

³ The term “NSR” is generally used to refer to both NNSR and PSD programs collectively.

The NSR program, as applied by many states, also provides an opportunity for early notice and public participation from communities impacted by a wide array of existing and new polluting facilities. One purpose of the PSD program is “to assure that any decision to permit increased air pollution in any area to which this section applies is made only after careful evaluation of all the consequences of such a decision and after adequate procedural opportunities for informed public participation in the decision-making process.” 42 U.S.C. § 7470(5). Pursuant to Section 165(a)(2) of the CAA, a PSD permit may be issued only after “a public hearing has been held with opportunity for interested persons including representatives of the Administrator to appear and submit written or oral presentations on the air quality impact of [the proposed] source, alternatives thereto, control technology requirements, and other appropriate considerations.”⁴

A. Rulemaking history

If the construction of a major new stationary source or a major modification of an existing major stationary source will increase emissions sufficiently to trigger NSR requirements, then the facility must obtain a permit before it can begin construction. The Clean Air Act requires a permit for any “major emitting facility on which construction is commenced after August 7, 1977 [for the PSD program] unless . . . a permit has been issued for such proposed facility . . . setting forth emission limitations[.]” 42 U.S.C. § 7475(a). *See also* 40 C.F.R. § 52.21 (PSD regulations). Likewise, NNSR provisions in the Act “require permits for the construction and operation of new or modified major stationary sources anywhere in the nonattainment area[.]” 42 U.S.C. § 7502(c)(5). *See also* 40 C.F.R. § 51.165 (NNSR regulations). The Act defines “commenced” to mean “that the owner or operator has obtained all necessary preconstruction approvals or permits” 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 cancelled or modified without substantial loss[.]” 42 U.S.C. § 7479(2)(A).

Terminology related to the commencement of construction has been subject to interpretation by EPA since 1978. In that year, EPA promulgated implementing regulations for the PSD program. The agency defined the terms “construction,”⁵ “source,”⁶ and “commence”⁷ as

⁴ *See also* 40 C.F.R. § 51.161 (requiring States administering the PSD program to “to provide opportunity for public comment on information submitted by owners and operators).

⁵ 40 C.F.R. § 52.21(b)(7) (1978); 43 Fed. Reg. 26,404 (“fabrication, erection, installation, or modification of a source”).

⁶ *Id.* at § 52.21(b)(4) (1978) (“any structure, building, facility, equipment, installation, or operation (or combination thereof) which is located on one or more contiguous or adjacent properties and which is owned or operated by the same person (or by persons under common control).

⁷ *Id.* at § 52.21(b)(8) (1978); 43 Fed. Reg. 26,404 (“owner or operator has all necessary preconstruction approvals or permits and either” has: (i) Begun, or caused to begin, a continuous program of actual on-site construction of the source, to be completed within a reasonable time; or (ii) Entered into binding agreements or contractual obligations, which cannot be cancelled or modified without substantial loss to the owner or operator, to undertake a program of actual construction of the source to be completed within a reasonable time”).

applied to construction of a major stationary source or modification. Subsequent 1978 guidance addressed the physical on-site construction activities permissible prior to the issuance of a PSD permit. Subsequent 1978 guidance addressed the physical on-site construction activities permissible prior to the issuance of a PSD permit.⁸ In 1980, EPA codified the policies articulated in the 1978 guidance with regulations defining the term “begin actual construction,” which served to delineate “the point in time when a facility begins construction of a stationary source and may no longer proceed with construction-related activities until it obtains its NSR permit.” 91 Fed. Reg. at 26,962. The regulations define “begin actual construction” to mean “initiation of physical on-site construction activities on an emissions unit which are of a permanent nature.”⁹ While EPA has periodically issued guidance documents and memos directed at EPA regional offices and State air agencies interpreting the term “begin actual construction,”¹⁰ the 1980 definition remains current for both the PSD and NNSR programs.

In 1996, EPA proposed changes to the NSR regulations. While leaving intact the definition of “begin actual construction,” EPA affirmed that the CAA “plainly bars construction without a permit,”¹¹ stating as the rationale that if “companies were given unlimited ability to place ‘equity in the ground’ by constructing plants before a permit is issued, permitting authorities’ discretion in making permit decisions may be compromised, and the ability of EPA and citizens to challenge the permit that is eventually issued may likewise be undermined.”¹²

B. EPA’s changed approach in guidance documents

In 2020, EPA revisited its longstanding definition of “begin actual construction” in a draft guidance memorandum issued by the Principal Deputy Assistant Administrator for the Office of Air and Radiation to Regional Air Division Directors (2020 Draft Guidance).¹³ Claiming that

⁸ EPA, Memorandum by Edward Reich, Director, Division of Stationary Source Enforcement, Source Construction Prior to Issuance of PSD Permit (1978), <https://www.epa.gov/sites/default/files/2015-07/documents/source.pdf>; EPA, Memorandum from Edward Reich, Director, Division of Stationary Source Enforcement, Interpretation of “Constructed” as it Applies to Activities Undertaken Prior to Issuance of a PSD Permit, (1978) <https://www.epa.gov/sites/default/files/2015-07/documents/cnstrctd.pdf>.

⁹ 40 C.F.R. § 51.165(a)(1)(xv), 51.166(b)(11), appendix S to part 51, and section II.A.17.

¹⁰ EPA, Letter from Valdas Adamkus, EPA Region 5 Acting Administrator, to Joseph Polito, Esq., “City of Detroit/General Motors Corporation; Central Industrial Park Project” (1981) <https://www.epa.gov/sites/default/files/2015-07/documents/indspark.pdf>; EPA, Memorandum from Edward Reich, Director, Stationary Source Compliance Division, Office of Air Quality Planning and Standards (OAQPS), Construction Activities Prior to Issuance of a PSD Permit with Respect to “Begin Actual Construction” (1986), <https://www.epa.gov/sites/default/files/2015-07/documents/begin.pdf>; EPA, Memorandum from John Rasnic, Director, Stationary Source Compliance, OAQPS. Construction Activities at Georgia Pacific (1993), <https://www.epa.gov/sites/default/files/2015-07/documents/cnstrctn.pdf>; EPA, Letter from John Seitz, Director, EPA OAQPS, to Mr. Charles Williams, Commissioner, Minnesota Pollution Control Agency (1995), <https://www.epa.gov/sites/default/files/2015-07/documents/19951213.pdf>.

¹¹ 61 Fed. Reg. 38,250 (July 23, 1996).

¹² *Id.* at 38,270–71.

¹³ EPA, Draft Memorandum from Anne Idsal, Principal Deputy Assistant Administrator for the Office of Air and Radiation. Interpretation of “Begin Actual Construction” Under the New Source Review Preconstruction Permitting Regulations (2020), https://19january2021snapshot.epa.gov/sites/static/files/2020-03/documents/begin_actual_construction_032520_1.pdf.

existing EPA positions were “considered by many industry stakeholders to be overly and unnecessarily restrictive,” EPA offered a revised interpretation of EPA’s regulations that would allow a source owner or operator to “undertake physical on-site activities—including activities that may be costly, that may significantly alter the site, and/or are permanent in nature” prior to obtaining a permit “provided that those actions do not constitute physical construction on an emissions unit, as the term is defined in 40 CFR 52.21(b)(7).”¹⁴ Contrary to prior guidance, the 2020 Memo took the position that the source owner or operator could engage in construction of “installation[s] necessary to accommodate” an emissions unit prior to obtaining a permit.¹⁵ EPA did not finalize the 2020 Draft Guidance.

In September 2025, EPA responded to a request from the Maricopa County Air Quality Department (MCAQD) for clarification about whether the construction of “the core or shell of a building” intended to eventually house an emissions unit would “begin actual construction” to trigger NSR permitting requirements.¹⁶ Relying on the 2020 Draft Guidance, both MCAQD and the project proponent took the position that a source owner or operator could construct a building core or shell prior to obtaining an NSR permit where the structure was “not specifically configured for emissions units.”¹⁷ EPA agreed that MCAQD had discretion to allow construction to proceed as long as the “core and shell of a building does not involve the physical construction on an emissions unit or the laying of underground piping or construction of supports and foundations that are part of any emissions unit.”¹⁸ In the letter, EPA indicated intent to revise the NSR regulations to clarify that construction of installations necessary to accommodate emissions units did not begin actual construction and, thus, did not trigger permitting requirements, the position taken by EPA in its 2020 Draft Guidance.¹⁹

C. EPA proposes to redefine “begin actual construction”, add a definition of “pollutant-emitting activities”, and make other related changes

Breaking from its longstanding policy and practice implementing the Act and the NSR program, EPA now proposes to require a preconstruction permit “to begin only construction of components or equipment that emit air pollution.” 90 Fed. Reg. at 26,969. EPA finds authority for its new interpretation from CAA § 7475(a), which requires a permit before “construction is

¹⁴ *Id.* at 2.

¹⁵ *Id.* at 2–3.

¹⁶ EPA, Letter from Aaron Szabo, EPA Assistant Administrator for the Office of Air and Radiation, to Philip McNeely, Director, MCAQD (2025 EPA Letter to MCAQD) (2025), <https://www.epa.gov/system/files/documents/2025-09/tsmc-arizona-begin-actual-construction-epa-response-letter.pdf>.

¹⁷ Maricopa County Air Quality Department, Letter from Philip McNeely, Director, MCAQD to Aaron Szabo, EPA Assistant Administrator for the Office of Air and Radiation (2025), <https://www.epa.gov/system/files/documents/2025-09/tsmc-arizona-begin-actual-construction-epa-response-letter.pdf>; TSMC Arizona Corporation, Letter from Robert Sandoval, Corporate Environmental Health & Safety Manager TSMC Arizona Corporation to Philip McNeely, Director, MCAQD (2025), <https://www.epa.gov/system/files/documents/2025-09/tsmc-arizona-begin-actual-construction-epa-response-letter.pdf>.

¹⁸ 2025 EPA Letter to MCAQD at 2.

¹⁹ *Id.* at 2.

commenced” for PSD, and § 7502(c)(5), which requires a preconstruction permit for NNSR. *See* 91 Fed. Reg. at 26,965. The purpose of these new regulations, EPA asserts, is to “enable owners, permitting authorities, and citizens to distinguish something that generates and emits air pollution from something that does not emit air pollution.” *Id.*

EPA proposes adding several new and revised definitions to the Agency’s regulations to facilitate the process of distinguishing between what does and does not emit air pollution.²⁰ The proposal would define “begin actual construction” to mean the “initiation of physical on-site construction of pollutant-emitting activities on a stationary source,” followed by an explicitly non-exhaustive list of six specific activities that do not constitute beginning of actual construction, such as “ordering of equipment and materials” and “paving surfaces,” and no examples of activities that do. 90 Fed. Reg. at 26,970.

This definition uses the term “pollutant-emitting activities,” which the proposal would also define to “include any equipment or component in a process or operation that emits or has the potential to emit a regulated NSR pollutant.” *Id.* Similarly, this definition includes seven non-exhaustive examples of activities that are not included, such as “office buildings” or “wiring, piping, and associated support structures that supply utility services,” while not providing examples of activities that must be considered pollutant-emitting activities. *Id.*

Beyond listing numerous specific activities in its proposed new definitions, EPA’s proposal also expounds on activities that it argues “could precede the construction of a variety of things that are not stationary sources of air pollutants,” 90 Fed. Reg. at 26,929, including leveling land to prepare for construction, building structures that are capable of supporting multiple uses, and forming foundations not specifically configured for emitting equipment.

EPA also grants that some “surfaces and structures” may exhibit certain “distinctive characteristics” that enable some construction-related activities “to be identified as a part of a source of air pollutant emissions.” *Id.* Without providing examples or otherwise explaining what those distinctive characteristics could be, EPA “recognizes that it will be difficult” to write a regulation to delineate when construction begins on a pollutant-emitting activity. *Id.* The Agency advises that the permit-writing States should “exercise their judgment . . . on a case-by-case, project-specific basis in accordance with general criteria.” *Id.*

II. The States oppose EPA’s Proposal

A. EPA’s interpretation is not the best reading of the Clean Air Act

EPA’s proposal to allow construction of large portions of a major emitting facility prior to obtaining an NSR permit violates the CAA’s plain language and badly undermines the integrity of the NSR program. Its interpretation is not the best reading of the CAA’s language and

²⁰ In addition to definitions discussed here, EPA also proposes to revise definitions under Tribal minor NSR regulations to similar effect. *See* 90 Fed. Reg. 26,970.

contradicts the fundamental premise of the CAA. EPA should abandon its proposed regulatory revisions and return to its longstanding understanding of when a permit must be secured.

1. The best reading of the statute is that the owner or operator of a major emitting facility must obtain a preconstruction permit before commencing construction of any portion of the “facility” or “source”

The best reading of the Clean Air Act’s preconstruction requirements under the NSR program is that an owner or operator of a major emitting facility or source must obtain a preconstruction permit before commencing construction of any portion of the facility or source in question. The “best reading” controls and EPA must implement that reading without any consideration of the agency’s “policy preferences.”²¹ However, EPA’s radical interpretive shift sharply conflicts with the Act’s plain text, context, and design.

Analysis of statutory meaning, as always, begins with the statutory text itself. For the PSD program, 42 U.S.C. § 7475(a) states:

No major emitting facility on which construction is commenced after August 7, 1977, may be constructed in any [attainment area] unless ... a permit has been issued for such proposed facility in accordance with this part setting forth emission limitations for such facility which conform to the requirements of this part.²²

In turn, 42 U.S.C. § 7479(2)(A) provides that:

The term “commenced” as applied to construction of a major emitting facility means that the owner or operator has obtained all necessary preconstruction approvals or permits required by Federal, State, or local air pollution emissions and air quality laws or regulations 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.

²¹ See *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 403–04 (2024). As EPA acknowledges, 91 Fed. Reg. at 26,970, the NSR provisions at issue do not “expressly delegate to [EPA] the authority to give meaning to a particular statutory term.” *Loper Bright*, 603 U.S. at 394 (internal punctuation omitted). Accordingly, the agency gets no deference on its interpretation of relevant statutory terms or phrases. The “best reading” controls and EPA must implement that reading without any consideration of the agency’s “policy preferences.”

²² Section 7479(2)(C) provides that the term construction “when used in connection with any source or facility, includes the modification . . . of any source or facility.”

For the NNSR program, 42 U.S.C. § 7502(c)(5) similarly requires state plans for nonattainment areas to “require permits for the construction and operation of new or modified major stationary sources anywhere in the nonattainment area, in accordance with section 7503 of this title.” Notably, the scope of the NNSR term “major stationary source” is synonymous in pertinent respects with the PSD term “major emitting facility. *See Id.* at § 7602(j) (indicating that the terms “major stationary source” and “major emitting facility” as used in the Act are equivalent and refer to “any stationary facility” which emits or has the potential to emit one hundred tons or more of any air pollutant, except as otherwise expressly provided in the Act.).

These collective core permitting provisions plainly require permits to be obtained before construction of a major emitting “facility” or “major stationary source”—and they say nothing to suggest that construction may begin on portions of a facility so long as the construction does not involve a “pollutant-emitting activity.”

The operative words “facility” and “source” mean the facility or source as whole, not merely some subset of pollutant-emitting activities within it. The Act specifically defines “major emitting facility” in the PSD program to include a list of “stationary sources of air pollutants” which emit, or have the potential to emit, one hundred tons per year or more of any air pollutant, and among the identified covered “sources” are *entire* facilities or plants, such as “fossil-fuel fired steam electric plants,” “coal cleaning plants,” “kraft pulp mills,” “Portland Cement plants,” “primary zinc smelters,” “iron and steel mill plants,” as well as “any other source with the potential to emit two hundred and fifty tons per year of any air pollutant.” *Id.* at § 7479(1). Any of these listed “plants” is plainly composed of more than *just* their pollutant-emitting activities. No one would say that an “iron and steel mill plant” refers only to a smokestack or furnace—the term “plant” plainly connotes an entire industrial facility,²³ and Congress used that term because that is precisely what it meant.

In addition, the scope of the phrases “major emitting facility” and “major stationary source” has already been considered by the Supreme Court in *Chevron U.S.A. v. NRDC*, 467 U.S. 837, 860 (1984), and EPA’s present interpretation is incompatible with the substantive holding of that case. In *Chevron*, the Supreme Court observed that the phrases “major emitting facility” and “major stationary source” were “synonymous” in scope. *Chevron*, 467 U.S. at 860. Noting that the ordinary meaning of a “facility” is “some collection of integrated elements which has been designed and constructed to achieve some purpose,” the Court stated that “it is certainly no affront to common English usage to take a reference to a major facility or a major source to connote an entire plant as opposed to its constituent parts.” *Id.* Applying this very broad plain meaning, the Court then upheld as lawful EPA’s interpretive definition of the term “facility” or “source” as encompassing the plant “as a whole,” for both PSD and NNSR purposes. *Id.* at 856-

²³ *See Plant*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/plant> (last visited June 23, 2026) (defining “plant” as “the land, buildings, machinery, apparatus, and fixtures employed in carrying on a trade or an industrial business”).

66; *see also* 46 Fed. Reg. 16280 (Mar. 12, 1981) (setting forth the EPA interpretation upheld in *Chevron* and clarifying that the source is “in essence, an entire plant,” enabling EPA to treat all pollution-emitting devices within the same industrial grouping as though they were encased within a single bubble).

To be sure, the deference applied in *Chevron* was later overruled in *Loper Bright*. But the Supreme Court made very clear that the substantive EPA interpretations that were upheld in *Chevron* remained valid and are subject to statutory *stare decisis*. *See Loper Bright*, 603 U.S. at 376 (noting that statutory *stare decisis* applies to holdings of prior cases applying the *Chevron* framework, “including the *Clean Air Act* holding of *Chevron* itself”) (emphasis added). Accordingly, the Supreme Court has already ruled that the terms “facility” and “source” as used in the NSR program refer to an entire plant. This is the best reading of the statute.

And there is considerably more textual and contextual evidence refuting EPA’s proposed interpretation. For one thing, EPA’s proposed interpretation is wholly incompatible with the definition of when construction is “commenced” set forth in Section 7479(2)(A). That definition provides that the time at which a construction project is “commenced” and thus in need of a permit is when the owner or operator 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.

42. U.S.C. § 7479(2)(A). The first of these two “commenced” triggers encompasses the construction of any portion of a facility that is the subject of a “continuous program” and is not limited to construction of pollutant-emitting activities. The *second* trigger, which is in the disjunctive, would arise even before the first in time because it merely requires having entered into *contracts* to “undertake” that program of construction. As the Proposal concedes, “Contracting will generally precede physical on-site construction because an owner or operator of a facility would typically need to hire construction services to begin physical on-site construction.” 91 Fed. Reg. at 26,968. Any owner or operator who has constructed significant portions of a facility would very likely meet both of the triggers in the “commenced” construction definition: the owner or operator would almost certainly have begun a “continuous” program of physical construction, and the owner or operator would also almost certainly have entered into “binding” contractual agreements which could not be “canceled or modified without substantial loss to the owner or operator.”

The best reading is thus supported by the definition of “commenced construction.” This term demonstrates Congress’s intent that the NSR program not place owners or operators in the position of risking substantial financial loss absent a construction permit, thereby disproving EPA’s claim that no CAA text “suggests” construction is prohibited “because it may be costly or

permanent beyond a certain point to change course.” *Id.* Indeed, the legislative history of this definition makes Congress’ intent quite clear. The Senate Report addressing the “commence construction” definition explains:

The amendments provide a definition of when a major emitting facility can be said to have “commenced construction.” This definition was adopted to allow a determination as to whether any particular facility is subject to the review and other requirements of the provisions for the prevention of significant deterioration. The date at which construction is said to have commenced is the time at which the owner or operator has obtained all necessary preconstruction approvals or permits required by Federal, State or local laws and has committed itself to a program of construction. The test of commitment is whether physical on-site construction has begun or whether the owner or operator has entered into contractual obligations which cannot be canceled or modified without substantial loss. The committee does not expect that this test will necessarily be met by penalty clauses in contracts. ***Rather, the committee intends a factual determination as to whether a source has so committed itself, financially and otherwise, to the use of a particular site for a particular facility that relocation is not an option and delay or substantial modification would be severely disruptive.***

...

The new definition of “commenced construction” contained in these amendments is intended to subject many sources to the requirements of section 110(g) who previously would have been exempt on the basis of a contractual obligation entered into before June 1, 1975. ***The committee believes it is appropriate to require review of facilities which have not actually begun construction or so changed their position as to risk substantial loss if the project is canceled or modified.***

S. Rep. No. 95-127 (pp. 32–33) (emphasis added).

In short, through the “commence construction” definition, Congress made very clear that it wished for PSD permitting decisions to be made *prior* to the time at which owners or operators would risk substantial loss if they did not receive a permit and their project had to be canceled. EPA’s proposed interpretation, however, would authorize permit applicants to construct large portions of a facility prior to a permitting decision, and would put operators at risk of substantial

financial loss if the permit application were denied. *See* 91 Fed. Reg. at 26,969 (explaining that under EPA’s interpretation owners or operators will assume the risk of financial loss if a permit application is ultimately denied or an issued permit requires additional construction).

2. Related CAA provisions further show a preconstruction permit is necessary before commencing any portion of a facility or source

And there is yet more. In the NNSR program, the Act requires a permitting agency to determine that “an analysis of alternative sites, sizes, production processes, and environmental control techniques for such proposed source demonstrates that the benefits of the proposed source significantly outweigh the environmental and social costs imposed as a result of its location, construction, or modification.” 42 U.S.C. § 7503(a)(5). To undertake this task, the permitting agency must look beyond the pollutant-emitting activities within the facility to the entire facility design, including evaluating its location and size. This requirement would make no sense if much of the facility (all except the pollutant-emitting activities) has already been built before the permit application. At that point many of the adverse environmental and social costs imposed as a result of the location and design of the facility will have already occurred, and it will be too late to meaningfully consider alternatives. Moreover, the alternative site analysis is generally a cost-benefit comparison of different potential sites. Permit applicants routinely point to the amount they have invested in site acquisition as relevant to the analysis, and if they have invested in actual construction that is likely to further skew the analysis towards the applicant’s preferred site even if a different site would be better suited.

Similarly, the statute further requires EPA to adopt rules for PSD permitting, which must require “an analysis of the ambient air quality, climate and meteorology, terrain, soils and vegetation, and visibility at the site of the proposed major emitting facility and in the area potentially affected by the emissions from such facility ... which will be emitted from, or which results from the construction or operation of, such facility, the size and nature of the proposed facility ... and such other factors as may be relevant in determining the effect of emissions from a proposed facility.” *Id.* at § 7475(e)(3)(B). And the “results of such analysis should be available at the time of the public hearing on the application for such permit. *Id.* at § 7475(e)(3)(C). These statutory requirements likewise plainly contemplate that an analysis of the specific proposed site and associated emissions—including those arising from construction of the facility—will be completed *before* the location is determined and many of the construction emissions have already occurred that might adversely affect regional air quality.

In addition, in the PSD program, permitting agencies must weigh “any air quality impacts projected for the area as a result of growth associated with such facility.” *Id.* at § 7475(a)(6). “Growth” as used in this provision does not relate just to the emissions from the proposed facility itself, but also from residential, commercial and industrial growth in the area that is expected due to an increase in jobs, traffic, and economic activity generated by locating the new major emitting facility in the area. *See, e.g.*, 40 C.F.R. §§ 51.166(o) and 52.21(o) (requiring owner or

operator to provide an analysis of the air quality impact and impairment to visibility, soils and vegetation projected for the area as a result of general commercial, residential, industrial, and other growth associated with the proposed new source or modification). This requirement also makes no sense if much of the facility has already been constructed and concomitant air quality impacts from that construction and accompanying area growth have already occurred.²⁴

EPA's proposed interpretation is not consistent with these substantive requirements. When significant construction has already occurred at a site, that can very much limit what technologies could be feasibly or cost-effectively installed and materially affect the BACT and LAER analyses.²⁵ Indeed, as the Proposal concedes, “[i]t should be more cost-effective to install and integrate [advanced] pollution control technology into a pollutant emitting facility *before* its construction is substantially completed.” 91 Fed. Reg. at 26,968 (emphasis added). As EPA further acknowledges, Congress designed the NSR program around this understanding, recognizing that advanced pollution control would be most cost effective and sensible to install where the integration of pollution control technology occurred *prior* to substantial construction. *See id.* at n. 94 (calling attention to House Committee report describing hearing testimony that “it costs 25 percent less to build flue gas desulfurization systems as part of a new source at time of construction than to retrofit the same source after construction.”).

This logic underscores that EPA's proposed interpretation would undermine Congress's program design. The NNSR and PSD programs are intended to facilitate the cost-effective integration of the best pollution control technology by allowing it to be designed into a source *before* it is substantially constructed, not to thwart such integration by creating a reality on the ground that is incompatible with installation of the most advanced pollution control technologies. Once utility lines, foundations, storage units and all manner of other non-emitting components have been constructed and installed, those in-the-ground changes may make installation of advanced pollution controls infeasible or cost-ineffective.²⁶ *See* section II.C.1, *infra*.

²⁴ In the same vein, the substantive pollution control requirements of the PSD and NNSR programs—best available control technology (BACT), 42 U.S.C. § 7503(4) and lowest achievable emissions rate (LAER), 42 U.S.C. § 7503(a)(2)—also very clearly support a conclusion that no source construction should begin prior to the design and permitting of pollution controls. The term “best available control technology” used in PSD means the maximum degree of reduction of each pollutant which results from a major emitting facility as determined by a permitting authority on a case-by-case basis, taking into account energy, environmental and economic impacts and other costs. 42 U.S.C. § 7479(3). The term “lowest achievable emissions rate” used in NNSR similarly requires advanced pollution control technology to achieve “the most stringent emission limitation” reflected in a state implementation plan or achieved in practice by a category of sources. 42 U.S.C. § 7501(3).

²⁵ Although EPA claims that the application of BACT and LAER requirements would be unaffected by EPA's interpretation, 91 Fed. Reg. at 26,973, the analyses are inextricably intertwined with the realities on the ground. Considerations of technical feasibility and economic cost-effectiveness are inherent parts of such analyses and those considerations are affected when construction activity is commenced before a permitting decision is reached.

³¹ For example, suppose selective catalytic reduction (SCR) is the advanced pollution control technology that will achieve the lowest exhaust gas emissions at a new proposed fossil fuel-fired power plant and that an SCR reactor will require its own deep, engineered foundation for a massive steel structure. If an operator were to lay a foundation over the entire power plant property not designed to accommodate an SCR reactor, it might be infeasible and cost-prohibitive to accommodate the installation of SCR—there may not even be room to locate the reactor. Yet, under

The enforcement provisions of the NSR programs add yet further contextual evidence that EPA's proposed reading is incorrect. Congress specifically provided both civil and criminal penalties for such construction without a permit and even for attempting to construct without a permit. 42 U.S.C. § 7413(a)(5), (b)(3), (c)(1), (d)(1)(C). Further, 42 U.S.C. § 7477 requires the Administrator to take measures "to prevent the construction or modification of a major emitting facility which does not conform to the requirements of this part or which is proposed to be constructed in any area" designated attainment or unclassifiable and not subject to a SIP that meets the requirements of Part C. This provision bars construction of the facility in its entirety and even applies to merely "proposed" construction. These related statutory provisions further show that, under the best reading of the Clean Air Act, an NSR permit must be obtained before commencing construction on any portion of a facility or source.

3. EPA's proposed new reading is contrary to the text, context, and design of the Act

While acknowledging that best reading of the statute "is not one that delegates to the EPA the discretion to determine 'what' a permit is required to construct or 'when' construction of a stationary source begins," *id.* at 26,970, the Proposal twists itself in knots trying to evade the best reading and smuggle in EPA's current policy preferences, all the while unsuccessfully avoiding reliance on obsolete *Chevron* deference principles. *See id.* at 26,970 and 26,968 & n.102 (disclaiming *Chevron* deference but also quoting a discussion of *Chevron* deference from a 2005 D.C. Circuit case for the proposition that "there can be no doubt that EPA is entitled to balance environmental concerns with economic and administrative concerns, at least to a point") (quoting *New York v. EPA*, 413 F.3d 3, 23 (D.C. Cir. 2005)). EPA, however, is not entitled to adopt a reading based on its judgment of the best policy balance; rather, it *must* adopt the "best reading" of the text without resort to its preferences. EPA fails to do so here.

The Proposal reads the terms "major emitting facility" and "stationary source" to include only "the components of a facility that 'emit' or are a 'source' of air pollution." *Id.* at 26,967. For this limitation, it argues that the "essential characteristic of a stationary source under these statutory provisions is that it emits air pollutants." *Id.* From this, the Proposal contends "[t]hese provisions are best read to mean that the CAA does not require a permit for all activities that could be considered construction." *Id.* Rather, EPA reasons that "the statute clearly prohibits construction without a permit of [only] the components of a facility that 'emit' or are a 'source' of air pollution, but does not require a permit for construction of something that does not have that characteristic." *Id.*

EPA's interpretive proposal, construction of that building foundation would not qualify as the type of construction triggering the need for an NSR permit. In this manner, the proposed interpretation would undermine Congress's objective to ensure new facilities are designed up front to accommodate the most advanced pollution controls.

The specification that the facility or source have a certain level of emissions serves to distinguish those facilities that come within the ambit of the statutory provision from those that do not, but that specification does not change the natural reading of a “facility” or “source” as the *whole* facility or source to a *partial* facility or source. Had Congress wished to create such a scheme, it could easily have done so by specifying construction of pollutant-emitting activities within the larger facility or source as the event that requires permitting.

Moreover, as explained *supra*, and ignored entirely by the Proposal,²⁷ statutory context defeats this statutory reading. None of the analytical permitting requirements make any sense in a world where the permitting agency is *only* looking narrowly at specific pollutant-emitting activities and not the larger facility.

EPA also misreads the statutory text and context in pointing to the state implementation plan provisions in the Act, noting that “CAA section 110(a)(2)(C) requires regulation of construction ‘as necessary’ to protect the NAAQS.” 91 Fed. Reg. at 26,967. From this, EPA asserts that there is no “mandate to regulate construction of something that does not emit air pollutants,” and opines that it “does not consider it clearly ‘necessary’ to regulate something that does not emit air pollutants in order to protect the NAAQS.” *Id.* But part of the need for regulation of construction is to ensure that major emitting facilities and stationary sources are built in locations where they will not threaten the attainment of the NAAQS (or further contribute to non-attainment), through the construction or operation of the facility or source, or through the surrounding growth spurred by the facility or source. So in “protect[ing] the NAAQS,” the preconstruction program is absolutely concerned with aspects of the facility—including its location, construction emissions, and attendant growth—beyond the pollutant-emitting activities themselves.

The Proposal acknowledges the statutory definition of “commenced” and even concedes that definition is “part of the context of the NSR provisions,” but dismisses it by arguing that “its function was to identify construction projects pending in 1977 that had progressed to the point that they were exempt from the newly enacted requirements to obtain a PSD permit.” *Id.* at 26,968. But the plain terms of the statute cannot be so easily dismissed. First, while the definition of commenced certainly functioned to draw a line between those projects that needed to comply with the newly enacted requirements and those that did not, its language is clearly not limited to projects pending in 1977. Recall that the operative pre-construction permit requirement in the PSD program reads: “No major emitting facility on which *construction is commenced after August 7, 1977*, may be constructed ... unless ... a permit has been issued” in accordance with the PSD program. 42 U.S.C. § 7475(a). Quite obviously, major emitting facilities in contemplation in 2026 would have their construction commenced after August 7, 1977 regardless

²⁷ EPA was not ignorant of these provisions or arguments. *See, e.g.*, Letter from Earthjustice, Natural Resources Defense Council, Sierra Club to Administrator Zeldin, Re: Clean Air Act preconstruction permits for major new sources (Oct. 30, 2025), <https://www.4cleanair.org/wp-content/uploads/Ltr-to-EPA-re-pre-permit-construction-10-30-2025.pdf>.

of how that term is understood and may not be constructed “unless a permit *has been* issued” (in the past tense). *Id.* (emphasis added). The most natural reading of the word “constructed” in “may be constructed” is that it refers back to and has the same meaning as “construction” trigger used earlier in the very same statutory sentence—and requires a permit before that “construction is commenced.” And the statute tells us when “construction is commenced”—it is when the owner/operator *either* has “begun, or caused to begin, a continuous program of physical on-site construction” *or* “entered into binding agreements or contractual obligations, which cannot be canceled or modified without substantial loss.” *Id.* at § 7479(2).

Further, even if the definition of “commenced” were intended to function solely to address construction initiated prior to the passage of the CAA—and it is not drafted as such—it would still serve to provide important context for *when* the statute contemplated a major emitting facility should need a PSD permit. In exempting certain sources from compliance, Congress plainly contemplated that *after* “a continuous program of physical on-site construction” or *after* entry into binding agreements, which cannot be canceled or modified without substantial loss, was *too late*. The statute exempted such sources from the new obligations because, as the agency previously acknowledged, they had equity in the ground in 1977 and it would be unfair to subject them to the uncertainty of the permitting process. The Proposal claims that there is no basis for this equity-in-the-ground principle that the agency has understood and relied upon for decades, *id.* at 26,968, but that is incorrect. Through the definition of “commenced” Congress indicated its concern with requiring permits *after* owners and operators had sunk equity into the ground—either through actual construction or through binding contracts. And, as explained *supra*, the statutory history demonstrates that this concept is precisely what the statute had in mind—“a factual determination as to whether a source has so committed itself, financially and otherwise, to the use of a particular site for a particular facility that relocation is not an option and delay or substantial modification would be severely disruptive.” S. Rep. No. 95-127 (pp. 32-33). EPA states that it “has not identified text in the NSR provisions of the CAA or discussion in the legislative history that suggests the Agency of States should prohibit construction on a site because it may be costly or permanent beyond a certain point to change course,” 91 Fed. Reg. at 26,968, but the foregoing discussion demonstrates that such text and history are readily identifiable.

4. EPA’s revised and new proposed regulatory definitions, including “begin actual construction” and “pollutant-emitting activities” do not follow from the best reading of the statute

EPA proposes to revise its regulatory definition of “begin actual construction,” governing the point at which a permit is necessary, to mean, in relevant part:

In general, initiation of physical on-site construction of pollutant-emitting activities on a stationary source. This does not include the following: (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; (6) paving surfaces. This list is not intended to be exhaustive.

91 Fed. Reg. at 26,970. But this regulatory definition reads words and limitations into the statute that Congress did not adopt. As discussed *supra*, 42 U.S.C. § 7475(a) does *not* include the following italicized and underlined language:

No *pollutant-emitting activities on a* major emitting facility on which construction is commenced after August 7, 1977, may be constructed in any [attainment area] unless ... a permit has been issued

Likewise, 42 U.S.C. § 7502(c)(5) does *not* read to “require permits for the construction and operation of *pollutant-emitting activities on a* new or modified major stationary source anywhere in the nonattainment area, in accordance with section 7503 of this title.”

Thus, the statute simply does not include the additional (italicized, underlined) language the EPA would presently like to read into it. And as discussed at length, *supra*, that reading is contrary to the text, context, and history of these statutory provisions. Moreover, many of the activities contained within this explicitly non-exclusive list would both create pollutant emissions with which the NSR programs are concerned and constrain the permitting authority’s ability to comply with the statute by considering these emissions as well as considering alternative sites.

EPA further proposes to add a new provision to its regulations to define “pollutant-emitting activities” as follows:

Pollutant-emitting activities, as used in 40 CFR 52.21(b)(6)(i) and (b)(11), include any equipment or component in a process or operation that emits or has the potential to emit a regulated NSR pollutant. Pollutant-emitting activities do not include the following: (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; (7) sealed junctions or tie-ins within one process that may serve equipment or components in another process constructed at a later time. This list is not intended to be exhaustive. For purposes of this definition, classification as pollutant-emitting is based on emissions from a process or operation after construction, not emissions of pollutants during the construction process.

91 Fed. Reg. at 26,970. This definition serves to even further expand (again, in a non-exhaustive way) the expansive carve-out EPA now proposes. In particular, without pointing to *anything* in the legislative text or context for support, the definition carves out *all* of the emissions associated with construction. But as explained *supra*, the Act is concerned with “any air quality impacts projected for the area as a result of growth associated with such facility,” 42 U.S.C. § 7475(a)(6), demonstrating that Congress was concerned with more than the emissions from operation of the facility, including those associated with construction and growth attendant to the facility. This makes sense. From the perspective of the NAAQS, it does not matter whether the emissions stem from construction or operation. Either way they may contribute to non-attainment or a threat of non-attainment. Moreover, many of these activities would fundamentally alter what the permitting authority may consider under the NSR programs, including, for example, the amount of power the site may have to support emissions controls or the space available at the facility for emissions controls. Indeed, EPA’s proposal is specifically aimed at overturning its prior understanding that a permit must be obtained before construction begins on “any installations necessary to accommodate” the emissions unit. 91 Fed. Reg. at 26,960. EPA’s proposed definition would allow such necessary installations thereby unlawfully constraining the permitting process.

B. EPA fails to address States’ reliance on existing policy and fundamental issues with the Proposal that will inhibit States from effectively implementing the NSR program

For decades, States have relied on EPA’s existing regulatory approach for major sources. The NSR permitting program has provided state regulatory agencies the ability to proactively address air quality by assessing proposed facilities’ emissions before construction begins. This foundational program is essential for many States to continue ensuring air quality. However, the

Proposal undermines state programs in the entire process from SIP writing to permit application through permit implementation. EPA must give due consideration to the reliance interests, else any final rule will be arbitrary and capricious.

EPA recites its duty to “consider relevant factors including any serious reliance interests,” 90 Fed. Reg. at 26,969, citing *FDA v. Wages & White Lion Invs., LLC*, 604 U.S. 542, 567-69 (2025); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 202 (2009), and solicits comments concerning “reliance on the current regulations.” 90 Fed. Reg. at 26,975. But despite this tacit acknowledgement, EPA does not indicate awareness that States (or any other party) could have engendered reliance interests under the existing rules.

EPA’s duty to consider reliance is particularly acute here, when the Proposal would upset the approach to air permitting that has endured for decades. “When an agency changes course, . . . it must be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account.” *Dep’t of Homeland Sec. v. Regents of Univ. of Cal.*, 591 U.S. 1, 30 (2020) (internal quotation marks omitted). In these circumstances, too, agencies must provide a more detailed justification.” *Fox Television Stations*, 556 U.S. at 515; *accord Smiley v. Citibank (South Dakota), N.A.*, 517, U.S. 735, 742 (1996). In particular, the agency is “required to assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns.” *Regents*, 591 U.S. at 33. Again, EPA does not even attempt to provide any justification for why its policy preferences override major state reliance interests, much less the detailed justification required by law.

Although EPA asserts that its “best reading” of the statute “is a sufficiently good reason for the EPA to make a change,” *id.* at 26,971, this does not absolve EPA from the requirement to consider reliance interests supporting how it has chosen to implement the “best reading.” *See Dep’t of Homeland Security v. Regents of the Univ. of California*, 591 U.S. 1, 33 (2020) (reliance interests must be considered even where agency believes a prior interpretation is unlawful); *New York v. Dep’t of Justice*, 804 F. Supp. 3d 294, 319-20 (D.R.I. 2025) (*Loper Bright* is not a “get out of considering reliance interests free card”). Indeed, EPA freely articulates “other good reasons,” 91 Fed. Reg. at 26,971, for its proposal beyond the “best reading” of the Clean Air Act.

As explained below, the States strong reliance interests relate to State Implementation Plans, clarity on regulatory requirements, and the environmental protections gained through appropriate permitting. EPA must thoroughly consider these interests.

1. State implementation of the proposal raises fundamental issues that are ignored by EPA

Where discussing the Unfunded Mandates Reform Act, EPA states that the proposal “imposes no enforceable duty on any State[.]” 90 Fed. Reg. at 26,975. Yet, EPA’s Proposal creates ambiguity on whether it would require states to incorporate its new provisions into respective State Implementation Plans (SIPs). If EPA finalizes its proposal, it must recognize

“that air pollution prevention . . . and air pollution control at its source is the primary responsibility of States and local governments[.]” 42 U.S.C. § 7401(a)(3).

The Act clearly authorizes states to adopt provisions that are as stringent as—or more stringent than—federal standards. Section 116 of the Act provides that nothing “shall preclude or deny the right of any State . . . to adopt or enforce (1) any standard or limitation respective emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution,” except limitations in an implementation plan which is “less stringent” than federal standards. 42 U.S.C. § 7416. Requiring a preconstruction permit at an earlier phase of a facility’s construction is clearly not “less stringent” than EPA’s proposed approach, so therefore section 116 explicitly authorizes state authority to retain existing definitions.²⁸

Indeed, EPA’s minimum requirements for NNSR and PSD permits specifically recognize this statutory protection of state authority. When listing defined terms for use in SIPs, EPA’s regulations state that SIPs “shall use the specific definitions. Deviations from the following wording will be approved only if the State specifically demonstrates that the submitted definition is more stringent, or at least as stringent, in all respects as the corresponding definition[.]” 40 C.F.R. § 51.165(a)(1) (NNSR regulations). See also 40 C.F.R. § 51.166(b) (substantially similar PSD regulations).

However, EPA specifically requests comments on whether the Agency “[s]hould . . . require revisions to existing approved plans reflect any final revisions to the Agency’s regulations[.]” 91 Fed. Reg. at 26,974. To the extent this question implies that states lack authority to adopt more stringent standards than those in the Agency’s regulations, EPA should not require such revisions, because the Agency cannot legally do so.

Elsewhere, the Proposal is ambiguous when describing whether it might attempt to require states to adopt its revised definitions. In the subsection describing “implications for proposing changes to regulations,” 91 Fed. Reg. at 26,971, EPA cites to its regulatory procedures for required SIP amendments. Under this regulatory provision, addressing amendments to SIPs, any “State required to revise its implementation plan by reason of an amendment to this section . . . shall adopt and submit such plan revision to the Administrator for approval no later than 3 years after such amendment is published in the Federal Register.” 40 C.F.R. § 51.166(a)(6). However, in the next sentence, EPA alludes to state authority to set “more stringent rules[.]” 91 Fed. Reg. at 26,971. If EPA finalizes its proposal, the Agency must resolve this ambiguity and affirm that States need not adopt the revised definitions.

If EPA determines upon adoption that the new regulations must be incorporated into every SIP, this would not only be contrary to the statutory text, it would impose a tremendous

²⁸ Likewise, as EPA acknowledges in its Proposal, CAA regulations do not clearly “displace traditional State authority to regulate land use and require general building permits for construction.” 91 Fed. Reg. at 26,967, citing *Sackett v. EPA*, 598 U.S. 651, 679 (2023).

burden on states. The administrative effort of revising SIPs alone is considerable, and the administrative burden would only be the beginning. States would need to rapidly reevaluate how the changed regulations would affect air quality, as reflected by environmental concerns discussed below. States could not simply rewrite a few definitions but would need to reexamine entire regulatory approaches for major sources to ensure continued progress toward pollution control. EPA must adequately consider this burden because it may adopt any final rule.

2. The Proposal's deliberate lack of clarity on what construction requires a permit impedes state's ability to administer the NSR program

Despite EPA's claimed goal "to enhance clarity [and] regulatory certainty" with this proposal, 91 Fed. Reg. at 26,965, the actual effect on the permitting process will likely be the opposite. Instead of providing useful guidance on exactly how state permitting agencies should implement this proposed definition in a consistent manner or fully considering the impact of the Proposal on states, EPA is silent.

In attempting to redefine "begin actual construction," the Proposal expands at length on the many specific instances where construction *has not* begun, *see* Summary of Proposal above. However, it is far less specific when delineating when construction *has begun*. The Proposal's circular definition of "pollutant-emitting activities"—"any equipment or component in a process or operation that emits or has the potential to emit a regulated NSR pollutant," 91 Fed. Reg. at 26,970, offers no further clarity. The meaning of this passage will be left to state regulators to divine, likely through investing significant state resources to increase the time and effort devoted to air permitting programs and potentially leading to lengthy disputes and even increases in pollution.

The Agency's stated "objective in this rulemaking is to [implement] criteria that identify those characteristics of construction-related activities . . . to distinguish something that generates and emits air pollution from something that does not emit air pollution." 91 Fed. Reg. at 26,965. EPA grants that "surfaces or structures may also exhibit distinctive characteristics that enable them to be identified as part of a source of air pollutant emissions." *Id.* The Proposal, however, leaves unclear how surfaces or structures themselves emit pollutants, seemingly expanding the scope of the definition.

Further, in attempting to draw new lines around what constitutes a "facility," EPA's explanation borders on incomprehensible. EPA explains that the line it proposes "can be accomplished by considering the characteristics of the equipment or components being constructed that enable them to be identified as a source of air pollution and distinguished from something that is not." 91 Fed. Reg. at 26,968. But this explanation is entirely circular. EPA offers no coherent principle for identifying "characteristics" that mark something as a pollution source other than the conclusion it seeks to establish. EPA's proposed line also ignores the engineering reality that modern industrial facilities are designed as integrated systems, with

many components that may not emit pollution in isolation, but will still be commonly engineered and sized to accommodate precisely the emission-generating equipment that will follow.

EPA concedes the difficult task it is imposing on permitting authorities, stating that “it will be difficult to draw a line in a regulation that addresses every circumstance when construction begins of something that emits air pollutants.” 91 Fed. Reg at 26,969. If EPA cannot elucidate this distinction in its regulatory definition or proposal preamble, then state permitting agencies are left no better off. To resolve any issues, EPA directs permitting authorities “to exercise their judgment to resolve questions on a case-by-case, project-specific basis.” 91 Fed. Reg. at 26,969.

The Proposal purports to allow developers to “quickly and confidently,” *id.* at 26,970, proceed on specific defined construction tasks while providing no such confidence for permitting authorities to diligently ensure all necessary permitting procedures are being followed. This manifest disparity places immense burden on permitting authorities to conduct case-by-case determinations. Furthermore, the ambiguity of case-by-case determinations could in fact *reduce confidence* for prudent developers who desire regulatory certainty about permitting requirements before committing resources to a project. EPA’s formulation provides no administrable standard for distinguishing what constitutes part of the “facility” and what does not, converting Congress’s clear direction into a vague muddle

C. EPA has failed to consider environmental impact from rule changes

Despite EPA proposing a significant change to how permitting authorities have administered the NSR program for nearly five decades, the agency asserts that the change “should not allow greater emissions of air pollution from the operation of new or modified stationary sources than under existing rules.” 91 Fed. Reg. at 26,974. This is the case, EPA says, because the proposal does not “change any requirements of the NSR permit programs pertaining to the control of air pollutant emissions.” *Id.*

But EPA’s assurance here ignores the substantial environmental risks that would be created were the Proposal made law. If finalized and adopted into state implementation plans, the Proposal would (a) constrain permitting authorities’ decision-making in a way that could increase air pollution; (b) reduce the role of the public in the permitting process and hobble communities’ ability to protect themselves from air pollution; and (c) lead to the emission of more criteria pollutants and greenhouse gases, with harmful effects to the environment and human health.

1. The Proposal would constrain permitting authorities' decision-making in a way that could increase air pollution.

Since the inception of its NSR regulations, EPA has acknowledged the pressure on permitting agencies that can be created by allowing projects to establish "equity in the ground."²⁹ EPA's abandonment of its previous concerns is misguided. The practical reality of allowing construction to begin without a permit would pressure permitting agencies to issue an NSR permit for a major source when the permitting requirements and underlying regulation have not been fully met. It puts permitting agencies in the position of needing to defend permitting requirements against the possibility that doing so will lead to wasted investments in facilities that sources cannot use. Indeed, the CAA recognizes this reality. As discussed in Section III.A.1, under the Act construction has commenced if the owner or operator has entered into binding agreements or contracts "which cannot be canceled or modified without substantial loss to the owner or operator." 42 U.S.C. § 7479(2)(A).

Despite this directive, EPA now inappropriately reverses course, declaring that permitting authorities now have sufficient experience to resist such pressure. 91 Fed. Reg. at 26,973. The Proposal claims, without explanation, that concerns about the practical realities of permitting are no longer warranted "given that permitting authorities have been implementing the NSR permitting program for nearly 50 years." *Id.* at 26,969, 26, 973. But implementation experience shows the opposite. Even under the current rules, permitting agencies still face pressure to bend the rule to accommodate applicants who have made preliminary investments they say cannot be abandoned or recovered. EPA's proposal would only exacerbate the problem by allowing and encouraging applicants to make even more investments.

Although the Proposal would not alter substantive NSR permitting requirements, EPA also ignores the key role that equity in the ground plays in determining exactly how these requirements are implemented in permits. The Act makes a distinction between the highest emission standards ("lowest achievable emission rate" or "best available control technology") required for new or voluntarily modified sources and a lesser standard ("reasonably available control technology") required of existing sources. This distinction rests on the existing sources having equity in the ground and therefore enjoying the presumption of fewer feasible, cost-effective control options.³⁰ Clearly, if a new major source facility has been substantially built before these determinations are even begun, the physical layout and design of the pre-permitted construction may practically constrain which control technologies are feasible to integrate.

EPA's proposal also limits the influence a permitting authority's analysis of alternative sites could have on its permitting decision. *See* 42 U.S.C. § 7503(a)(5) (requiring that, prior to

²⁹ *See* EPA, Source Construction Prior to Issuance of PSD Permit (1978), *supra* note 8 ("It is extremely difficult to deny issuance of a permit when it results in a completed portion of a project having to remain idle.")

³⁰ *See, e.g.*, 42 U.S.C. §§ 7475(a)(4), 7502(c)(1), 7503(a)(2).

issuing a nonattainment NSR permit, a permitting authority analyze “alternative sites . . . for such proposed source”). A permitting authority would be hard pressed, as a practical matter, to deny a permit based on an alternative-site analysis when a developer has already spent millions constructing a facility at its preferred location.

The Proposal may also have consequences on other environmental approvals that rely on timely NSR permitting. For example, in New York City, environmental permits and permissions must go through an environmental review process before they can be granted or denied. The New York City Environmental Quality Review law, RCNY Tit. 43, Ch. 6-06(b), provides that “the action shall be deemed to include other contemporaneous or subsequent actions . . . which are likely to be undertaken as a result thereof, or which are dependent thereon.” Only requiring an NSR permit to construct “emitting” portions of a facility could potentially segment New York City’s environmental review process, which generally requires agencies to consider a project in its entirety before making decisions.

EPA’s rationale for the Proposed Rule includes a disclaimer that owners or operators who begin construction before permitting “do so at their own economic risk.” 91 Fed. Reg. at 26,969, 26,973. EPA discounts that applicants will use all available leverage to influence the permitting decision, especially when public funds secured for the project would be at risk. This approach is also inconsistent with the Clean Air Act. *Id.* Under the Act, construction has “commenced” when an owner or operator has obtained all necessary permits and approvals and entered into binding agreements or contracts “which cannot be canceled or modified without substantial loss to the owner or operator.” 42 U.S.C. § 7479(2)(A). Even though it is clear that Congress sought to prevent owners and operators from making costly investments in the construction of a major source before securing a permit, EPA’s proposal is encouraging it.

EPA cannot blithely dismiss these concerns. Even if the NSR program’s substantive permitting criteria is unchanged by this Proposal, the actual effect will be to functionally limit the set of practical pollution-control options. Claiming that any pre-permit construction is “at your own risk” does not satisfy EPA’s obligations to examine the consequences of its Proposal. The Proposal will inevitably lead to a shift in the NSR program toward less pollution control and, consequently, worse environmental outcomes.

2. The Proposal would reduce the role of the public in the permitting process and hobble communities’ ability to meaningfully participate

The Proposal would also undermine public involvement in the permitting process, depriving the public the ability to provide input and pose questions about facilities that could begin construction near where our residents live and ultimately pollute the air that they breathe. *See* 42 U.S.C. § 7470(5) (CAA’s purpose is to assure permit decisions are made “only after . . . adequate procedural opportunities for informed public participation”). EPA has chosen to ignore this harmful consequence of its Proposal even though, as discussed above, the Act requires analysis of the environmental and social effects of new major sources. *See id.* at § 7475(a)(6)

(requiring that, prior to issuing a PSD permit for a facility, “an analysis of any air quality impacts projected for the area as a result of growth associated with such facility” be conducted). Although NSR’s preconstruction review process is intended to inform public comment on a permit application, this statutory intent could be invalidated if a facility has nearly completed construction by the time a developer files an air permit application.

Under a robust notice and comment process, residents can comment on the new emissions source in a way that could lead to alternatives to proposed siting and construction plans. Indeed, state air agencies often solicit public comments on NSR permits to ensure public engagement in agency decision-making.³¹ By allowing more of a facility to be constructed before a developer must seek a permit, the Proposal would delay community engagement in the decision-making process for the development of major sources like data centers and other polluting facilities. However, public comment after-the-fact would instead serve only as a record of what has already taken place. Besides having less information, the public would also have less practical ability to influence permitting outcomes if, when it comes time to comment, substantial construction activity has already taken place, locking in a certain development path.

Communities with environmental justice concerns would suffer most from a permitting process that provides a comment period so belated it becomes pro forma. Major industrial facilities subject to NSR permitting are disproportionately sited in lower-income communities and communities of color, which are often in or near nonattainment areas and already carry high cumulative pollution burdens.³² The NSR program’s public comment period represents one of the most meaningful opportunities for these communities to have a voice in decisions that directly affect their air quality and health. Without a meaningful comment period—one that can affect not only permitting decisions and conditions, but the very siting of industrial facilities—communities with environmental justice concerns lose an important mechanism provided by the CAA to protect themselves from further degradation of their environment. EPA must consider the affect of its Proposal on the ability of residents to meaningfully comment on potential new sources of emissions.

3. The Proposal would lead to the emission of more criteria pollutants and greenhouse gases, with harmful effects to the environment and human health.

By allowing construction to begin before a permit application can be reviewed by either permitting authorities or public commenters, EPA’s proposal would effectively tilt the permitting

³¹ See, e.g., Mass. Dep’t of Env’t Prot., *Schedule of Permit Application Fees and Timelines* (Nov. 3, 2023), <https://www.mass.gov/doc/massdep-permit-timelines-and-fees/download> (detailing the timelines for various air permits, including public comment periods).

³² EPA, *Interim Framework for Advancing Consideration of Cumulative Impacts* 4 (Nov. 2024), <https://perma.cc/JP4K-CGE9> (“Environmental public health research has shown that the cumulative impacts of longstanding place-based inequalities in exposures to environmental hazards are significant, with health disparities linked to these inequalities.” (citations omitted)).

process toward less effective pollution control. This structural shift will likely lead to a greater emissions of criteria pollutants. A greater volume of fine particulate matter, for example, contributes to acid rain and can disrupt the pH balance in ecosystems,³³ and is also causally related to premature mortality³⁴ and cardiovascular effects; consistently associated with asthma and chronic obstructive pulmonary disease exacerbation; and associated with negative birth outcomes, such as low birth weight and negative fetal growth outcomes.³⁵ Concentrations of environmental lead, as another example of a criteria pollutant, would also increase, contributing to a loss of biodiversity and causing neurological problems in vertebrates, including humans, and especially young people.³⁶ As EPA has recognized, underserved communities and communities with environmental justice concerns bear a disproportionate burden of environmental harms and adverse health outcomes from these emissions, including “heart or lung diseases, such as asthma and bronchitis, increased susceptibility to respiratory and cardiac symptoms, greater numbers of emergency room visits and hospital admissions, and premature deaths.”³⁷

The concentration of criteria pollutants is already increasing due to the rapid build out of AI infrastructure, which EPA’s the Proposal was designed to accelerate.³⁸ A recent study of air pollution in Northern Virginia found that emissions of criteria pollutants from AI data centers increased significantly from 2015 to 2023: particulate matter rose 139%, while carbon monoxide jumped 196%.³⁹ Researchers found the highest levels of these pollutants near poorer communities.⁴⁰ And this kind of pollution severely harms human health: one study estimated that the air pollution emitted from a single data center in Virginia resulted in \$53–99 million per year

³³ EPA, Integrated Science Assessment for Oxides of Nitrogen, Oxides of Sulfur, and Particulate Matter—Ecological Criteria at ES.5.1 (2020), https://ordspub.epa.gov/ords/eims/eimscomm.getfile?p_download_id=541298.

³⁴ Karn Vohra et al., Global mortality from outdoor fine particle pollution generated by fossil fuel combustion: Results from GEOS-Chem, 195 *Env’t Rsch.* 1 (Apr. 2021), <https://doi.org/10.1016/j.envres.2021.110754> (Researchers “estimate[d] a global total of 10.2...million premature deaths annually attributable to the fossil-fuel component of PM_{2.5}”; see also Devin Henry, Identifying sources of deadly air pollution in the U.S., *Stan. U. Doerr Sch. of Sustainability* (July 15, 2020), <https://perma.cc/242W5GN4> (air pollution responsible for 100,000 deaths annually in the United States, half of which come from fossil fuel combustion); Ekta Chaudhary et al., Cumulative effect of PM_{2.5} components is larger than the effect of PM_{2.5} mass on child health in India, 14 *Nature Commc’ns* 1 (2023), <https://doi.org/10.1038/s41467-023-42709-1>.

³⁵ See CARB, Comment Letter on Proposed Reconsideration of the National Ambient Air Quality Standards for Particulate Matter (June 29, 2020), <https://perma.cc/ET42-Z5GE>.

³⁶ EPA, Integrated Science Assessment for Lead at Figures at ES-5, ES-6 (2024), https://ordspub.epa.gov/ords/eims/eimscomm.getfile?p_download_id=548355.

³⁷ EPA, Powerplants and Neighboring Communities, <https://www.epa.gov/power-sector/power-plants-and-neighboring-communities> (last visited Feb. 4, 2024), [<https://web.archive.org/web/20240204134322/https://www.epa.gov/power-sector/power-plants-and-neighboring-communities>].

³⁸ EPA, *EPA Proposes Redefining “Begin Actual Construction” to Remove Unnecessary Impediments to Building and Advance Economic Progress* (May 2026), <https://www.epa.gov/newsreleases/epa-proposes-redefining-begin-actual-construction-remove-unnecessary-impediments>.

³⁹ Damian Pitt et al., Localized Air Pollution Impacts from Data Centers in Northern Virginia (Va. Commonwealth Univ. Inst. For Sustainable Energy & Env’t 2026), https://scholarscompass.vcu.edu/cgi/viewcontent.cgi?article=1003&context=isee_pubs/.

⁴⁰ *Id.*

in health-related damages.⁴¹ Another study of a data center in Mississippi similarly found that its air pollution would cause tens of millions of dollars annually in harm to human health.⁴² These damages would only increase due to a distorted NSR permitting process.

Greenhouse gas emissions could also increase as result of the biased permitting process proposed in the Rule. This would tend to exacerbate the effects of the continued increase of these gases in our atmosphere: rising temperatures, wildfires, sea level rise, and coastal flooding, to name a few.⁴³ As EPA recently acknowledged, the “most recent information demonstrates that the climate is continuing to change in response to the human-induced buildup of GHGs in the atmosphere,” and “these elevated concentrations endanger our health by affecting our food and water sources, the air we breathe, the weather we experience, and our interactions with the natural and built environments.” 89 Fed. Reg. 29,440, 29,673 (Apr. 22, 2024). The Proposal, if finalized, would only exacerbate this dangerous trend.⁴⁴

D. EPA cannot justify its Proposal based on a policy directive to accelerate development of AI data centers

The Presidential administration has made it its explicit policy to promote and facilitate the construction of new data centers at the expense of environmental protections, permitting requirements, and public health. These policy rationales conflict with the statute’s purpose to “insure that economic growth will occur in a manner consistent with the preservation of existing clean air resources.” 42 U.S.C. § 7470(3). And encouraging data center development has no relevance to the “best reading” of the Clean Air Act.

EPA acknowledges the data center policy directive as a driving force behind its Proposal. In its press release announcing the Proposal, EPA stated that the regulatory “change will support the development of Artificial Intelligence (AI) infrastructure and power generation, a significant step forward in the Trump EPA’s efforts to provide affordable baseload power for American families and to advance the data centers essential to making the U.S. the AI capital of the world.”⁴⁵ Moreover, where the press release described the background of the rule, EPA pointed to

⁴¹ Michael Cork et al., Air Quality, Health and Economic Impacts of the Vantage Data Center Facility, Piedmont Environmental Council (Feb. 27, 2026), <https://www.pecva.org/wp-content/uploads/Health-Impacts-Vantage-Data-Center-Report-2.pdf>.

⁴² Southern Environmental Law Center, New Study Finds Proposed xAI Gas Plant Could Worsen Regional Air Pollution, Cause Millions of Dollars in Annual Health Damages (Feb. 2026), <https://www.selc.org/press-release/new-study-finds-proposed-xai-gas-plant-could-worsen-regional-air-pollution-cause-millions-of-dollars-in-annual-health-damages>.

⁴³ Intergovernmental Panel on Climate Change, Climate Change: 2023 Synthesis Report 5–7 (2023), <https://perma.cc/PUK3-W57E>.

⁴⁴ States’ ability to adopt rules more stringent than federal rules in their SIPs does not alleviate EPA’s burden to examine environmental impacts from its proposed rule changes, as even strictly controlled states receive air pollution from upwind states who may choose to implement EPA’s less stringent rules, if the Proposal is made final.

⁴⁵ See note 41, *supra*.

President Trump’s Executive Order 14,179, “Removing Barriers to American Leadership in AI,” indicating that the Proposal is intended to facilitate those goals.⁴⁶

Despite clearly articulating this policy rationale in its press release, EPA makes no mention of Executive Order 14,179 or the associated intent to facilitate the permitting of new data centers. Instead, EPA handwaves at general deregulatory efforts and claims to be proposing the best reading of the Clean Air Act. In this way, EPA obfuscates its true intentions—to unleash a flurry of data center development, tilting the scales in favor of development and limiting public review of new proposed facilities from the communities harmed by the proliferation of data centers that emit toxic air pollutants, strain water resources, and disrupt neighborhoods.

EPA must consider the impact of the Proposal on the siting process for data centers. The Proposal could allow a data center to commence construction on non-emitting elements before receiving an NSR permit. By the time a permit application is made publicly available, it would be too late for the public to fully participate in the decision of where to site the data center. Without adequate public notice, the Proposal could accelerate data center development in Brownfields and Superfund sites, which are disproportionately located in low-income communities and communities of color, another related policy of this federal administration.⁴⁷

EPA must also consider the serious environmental and health impacts from implementing this Proposal to speed data center development. These facilities require constant power, so many data centers employ diesel generators, including “Tier 2” generators⁴⁸—high-polluting generators that emit hundreds of times more nitrogen oxide than traditional gas power plants.⁴⁹ The air pollution emitted from data centers is associated with an elevated risk of respiratory diseases, heart conditions, and cancer in communities surrounding these facilities, driven in large part by emission of particulate matter, nitrogen oxides, and carbon monoxide.

As a result, the health burdens of data centers are unevenly distributed across counties and communities, particularly affecting low-income counties that could experience roughly 200x per-household health costs than others.⁵⁰ By unreasonably delaying the point at which the permitting process begins and that communities are engaged in the decision-making, the rule

⁴⁶ *Id.*; see also Executive Order 14,179, 90 Fed. Reg. 8741 (Jan. 31, 2025).

⁴⁷ Among other measures to encourage siting of data centers in overburdened areas, the President has signed Executive Order 14,318, 90 Fed. Reg. 35,385 (July 28, 2025), titled “Accelerating Federal Permitting of Data Center Infrastructure.” These siting decisions have serious environmental consequences. See Lelia Marie Hampton and Eric Nost, *Communities Close to EPA-Regulated Data Centers Face Heightened Air Pollution*, <https://envirodatagov.org/blogs/communities-close-to-epa-regulated-data-centers-face-heightened-air-pollution/> (last visited June 5, 2026).

⁴⁸ Joint Legislative Audit & Review Comm’n, *Data Centers in Virginia* at 60 (Dec. 9 2024), <https://jlarc.virginia.gov/pdfs/reports/Rpt598-2.pdf>.

⁴⁹ Adam Wierman and Shaolei Ren, *We Need to Talk About AI’s Impact on Public Health: Datacenter pollution is linked to asthma, heart attacks, and more* (May 1, 2025), <https://spectrum.ieee.org/data-centers-pollution>.

⁵⁰ See Stax Engineering, *The Environmental Impact of Data Centers* (Jan. 9, 2025), <https://www.staxengineering.com/stax-hub/the-environmental-impact-of-data-centers/>.

threatens to facilitate the continued siting of polluting facilities like data centers in already overburdened communities.

Despite these concerns, EPA opted instead to not even evaluate whether there are environmental and health impacts from the Proposal. Instead, EPA plows ahead with its deregulatory efforts, leaving our communities to bear the burden of increased emissions of air pollutants in its disguised attempts to promote data center construction.

III. The States request EPA withdraw its Proposal

EPA's Proposal misinterprets central provisions in the Clean Air Act to arrive at its preferred "best reading" of the statute. As explained above, under the best reading of both those central statutory provisions as well as the broader statutory structure, the Act requires an NSR permit for regulated facilities or sources before any portion begins construction.

EPA also cannot adopt its Proposal because it is arbitrary and capricious. The Agency has entirely ignored the adverse consequences that its Proposal, if adopted, would have on state permitting agencies who have relied on the prior policy. Finally, EPA has ignored the consequences of its Proposal for public participation, the environment, and public health while trumpeting how the new regulations would facilitate faster development of AI data centers.

For these reasons, the States request EPA withdraw its Proposal.

STATE OF ILLINOIS
KWAME RAOUL
ATTORNEY GENERAL

/s/ Jason E. James

Jason E. James

Assistant Attorney General

Joanna Brinkman

Complex Litigation Counsel

Matthew J. Dunn

Chief, Environmental Enforcement/

Asbestos Litigation Division

Illinois Attorney General's Office

201 W. Pointe Drive, Suite 7

Belleville, IL 62226

(217) 843-0322

jason.james@ilag.gov

STATE OF COLORADO
PHILIP J. WEISER
ATTORNEY GENERAL

/s/ Carrie Noteboom

Carrie Noteboom
Assistant Deputy Attorney General
Ralph L. Carr Judicial Center
Colorado Department of Law
1300 Broadway, 10th Floor
Denver, CO 80203
(720) 508-6285
carrie.noteboom@coag.gov

STATE OF CONNECTICUT
WILLIAM TONG
ATTORNEY GENERAL

/s/ Scott N. Koschwitz

Matthew I. Levine
Deputy Associate Attorney General
Scott N. Koschwitz
Assistant Attorney General
Connecticut Office of the Attorney General
165 Capitol Avenue
Hartford, Connecticut 06106
(860) 808-5250
scott.koschwitz@ct.gov

STATE OF DELAWARE
KATHLEEN JENNINGS
ATTORNEY GENERAL

/s/ Vanessa L. Kassab

Ian R. Liston
Director of Impact Litigation
Ralph K. Durstein III
Vanessa L. Kassab
Deputy Attorney General
Robin L. Jacobs
Assistant Attorney General
Delaware Department of Justice
820 N. French Street
Wilmington, DE 19801
(302) 683-8899
vanessa.kassab@delaware.gov

STATE OF CALIFORNIA
ROB BONTA
ATTORNEY GENERAL

/s/ Heather M. Lewis

Heather M. Lewis
Deputy Attorney General
California Department of Justice
1515 Clay Street, 20th Floor
P.O. Box 70550
Oakland, CA 94612-0550
(510) 879-1008
Heather.Lewis@doj.ca.gov

DISTRICT OF COLUMBIA
BRIAN L. SCHWALB
ATTORNEY GENERAL

/s/ Lauren Cullum

Lauren Cullum
Special Assistant Attorney General
Office of the Attorney General
for the District of Columbia
400 6th Street, N.W., 9th Floor
Washington, D.C. 20001
lauren.cullum@dc.gov

STATE OF HAWAII
ANNE E. LOPEZ
ATTORNEY GENERAL

/s/ Lyle T. Leonard

Lyle T. Leonard
Deputy Attorney General
State of Hawai'i
Department of the Attorney General
465 South King Street, Room 200
Honolulu, HI 96813
(808) 587-3050
Lyle.t.leonard@hawaii.gov

STATE OF MARYLAND
ANTHONY G. BROWN
ATTORNEY GENERAL

/s/ Steven J. Goldstein

Steven J. Goldstein
Assistant Attorney General
Office of the Attorney General of Maryland
200 Saint Paul Place, 20th Floor
Baltimore, Maryland 21202
(410) 576-6414
sgoldstein@oag.maryland.gov

**PEOPLE OF
THE STATE OF MICHIGAN⁵¹**
DANA NESSEL
ATTORNEY GENERAL

/s/ Benjamin C. Houston

Benjamin C. Houston
Assistant Attorney General
Environment, Natural Resources, and
Agriculture Division
6th Floor G. Mennen Williams Building
525 W. Ottawa Street
P.O. Box 30755
Lansing, Michigan 48909
(517) 335-7664
HoustonB1@michigan.gov

**COMMONWEALTH OF
MASSACHUSETTS**
ANDREA JOY CAMPBELL
ATTORNEY GENERAL

/s/ Amy Laura Cahn

Amy Laura Cahn
Luca Greco
Jon Whitney
Special Assistant Attorneys General
Energy and Environment Bureau
Massachusetts Office of the Attorney General
One Ashburton Place
Boston, MA 02108
(617) 963-2281
Amy.Laura.Cahn@mass.gov

STATE OF MINNESOTA
KEITH ELLISON
ATTORNEY GENERAL

/s/ Cat Rios-Keating

Cat Rios-Keating
Special Assistant Attorney General
Office of the Minnesota Attorney General
445 Minnesota St., Suite 600
St. Paul, MN 55101
(651) 300-7302
Catherine.Rios-Keating@ag.state.mn.us

⁵¹ The People of the State of Michigan are represented by Attorney General Dana Nessel. The Attorney General is Michigan's chief law enforcement officer and is authorized to bring this action on behalf of the People of the State of Michigan pursuant to Mich. Comp. Laws § 14.28.

STATE OF NEW YORK
LETITIA JAMES
ATTORNEY GENERAL

/s/ Rita Burghardt McDonough
Rita Burghardt McDonough
Assistant Attorney General
Environmental Protection Bureau
NYS Office of the Attorney General
28 Liberty St., 19th Floor
New York, NY 10005
(212) 416-8742
rita.mcdonough@ag.ny.gov

STATE OF RHODE ISLAND
PETER F. NERONHA
ATTORNEY GENERAL

/s/ Nicholas Vaz
Nicholas Vaz
Assistant Attorney General
Environment and Energy Unit Chief
Rhode Island Office of the Attorney General
150 South Main Street
Providence, RI 02903
(401) 274-4400 ext. 2297
nvaz@riag.ri.gov

STATE OF WASHINGTON
NICK BROWN
ATTORNEY GENERAL

/s/ Jenna Slocum
Jenna Slocum
Assistant Attorney General
Office of the Attorney General
P.O. Box 40117
Olympia, Washington 98504-0117
(360) 586-6741
jenna.slocum@atg.wa.gov

STATE OF OREGON
DAN RAYFIELD
ATTORNEY GENERAL

/s/ Paul Garrahan
Paul Garrahan
Attorney-in-Charge
Natural Resources Section
Oregon Department of Justice
1162 Court Street NE
Salem, Oregon 97301-4096
(503) 947-4540
Paul.Garrahan@doj.oregon.gov

STATE OF VERMONT
CHARITY R. CLARK
ATTORNEY GENERAL

/s/ Melanie Kehne
Melanie Kehne
Assistant Attorney General
Vermont Attorney General's Office
109 State Street
Montpelier, VT 05609-3201
(802) 828-3186
melanie.kehne@vermont.gov

STATE OF WISCONSIN
JOSHUA L. KAUL
ATTORNEY GENERAL

/s/ Evan D. Steck
Evan D. Steck
Assistant Attorney General
Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-2228
evan.steck1@wisdoj.gov

CITY OF CHICAGO
MARY B. RICHARDSON-LOWRY
CORPORATION COUNSEL

/s/ Gabrielle Sigel
Gabrielle Sigel
Assistant Corporation Counsel Supervisor
Bradley R. Ryba
Assistant Corporation Counsel
City of Chicago Department of Law
2 N. LaSalle Street, Suite 540
Chicago, IL 60602
(312) 744-1438
(312) 742-6432
gabrielle.sigel@cityofchicago.org
bradley.ryba@cityofchicago.org

**CALIFORNIA AIR
RESOURCES BOARD**

/s/ Jonathan Wiener
Jonathan Wiener
Deputy Attorney General
Natural Resources Law Section
455 Golden Gate Ave., Suite 11000
San Francisco, CA 94114
(415) 510-3549
jonathan.wiener@doj.ca.gov

CITY OF NEW YORK
STEVEN BANKS
CORPORATION COUNSEL

/s/ Marissa Lieberman-Klein
Marissa Lieberman-Klein
Senior Counsel
New York City Law Department
100 Church Street
New York, NY 10007
(212) 356-2459
mlieberm@law.nyc.gov