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EPA PROPOSES TO LOOSEN NSR "BEGIN ACTUAL CONSTRUCTION" LIMITS: WHAT IT COULD MEAN FOR DATA CENTERS AND OTHER CAPITAL PROJECTS

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EPA Proposes to Loosen NSR "Begin Actual Construction" Limits: What It Could Mean for Data Centers and Other Capital Projects

A new proposal from the US Environmental Protection Agency (EPA) would allow construction projects to conduct more site work before the New Source Review (NSR) permitting process, a change that could speed up large construction projects, especially data centers. EPA rolled out a proposed rule on May 11 that would revise the NSR permitting regulations for new construction under the Clean Air Act to narrow what counts as prohibited pre-permit construction activity. Here's everything you need to know about the proposal and four steps to consider now.

In a Nutshell

In practical terms, the EPA is proposing to allow more site activity and construction of non-emitting infrastructure before an owner or operator obtains an NSR permit. However, the proposal would still require a permit before physical construction begins on equipment or components that emit or have the potential to emit regulated NSR pollutants. If finalized, the proposal could materially affect how developers plan large projects, which could grease the wheels of fast-moving data center developments, semiconductor facilities, energy infrastructure, and other industrial

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builds that often face friction between construction schedules and permitting timelines.

What the EPA Proposed

The EPA said the current NSR definitions of "begin actual construction" and related terms have been interpreted to bar certain permanent on-site work before a permit is issued. Types of work that have fallen into that category include: installation of supports and foundations, laying underground pipework, and construction of permanent storage structures. The EPA also explained that the existing approach has created "uncertainties, delays, and regulatory burdens" and does not reflect what the agency now views as the best reading of the Clean Air Act.

To solve these issues, the EPA proposed to revise the definition of "begin actual construction" to mean, in general, the "initiation of physical on-site construction of pollutant-emitting activities on a stationary source."

The new definition would exclude several activities, allowing them to begin prior to the permitting process including:

- engineering and design planning,
- geotechnical investigation,
- clearing vegetation,
- grading, surveying, soil compacting and stabilization,
- excavation,
- ordering equipment and materials, storing equipment, and
- temporary construction trailers, and paving surfaces.

The EPA also proposed a new definition of "pollutant-emitting activities." Under that proposed definition, pollutant-emitting activities would include **equipment or components in a process or operation that emit or have the potential to emit a regulated NSR pollutant.**

The proposal would exclude several categories of structures and systems that were previously subject to at least a portion of the regulation, including:

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- office buildings, retail stores, certain storage buildings,
- certain concrete pads and building foundations,
- walls, and roofs not specifically configured to support emitting equipment,
- HVAC for human workspaces,
- utility-service wiring and piping, and
- certain sealed junctions or tie-ins.

The EPA's stated policy objective is to move away from a test focused on whether work is "permanent" or "costly" and instead require a permit only before construction begins **on components or equipment that emit air pollution**.

Why This Matters for Data Center Projects

For data center developers, the proposal could be significant for projects that need to move quickly while air permitting for emissions-related equipment is still pending. The EPA specifically stated that the rule is intended to allow construction of non-emitting components such as utility service infrastructure, concrete pads, and some buildings and building components **before** an NSR permit is obtained. The EPA also acknowledged that the proposed changes are intended to help owners and operators expedite completion of construction projects and to manage seasonal construction constraints more effectively.

For large developers, this could offer more schedule flexibility, preserve procurement windows, reduce weather-related delay, and better align commissioning schedules. That said, the proposal would not eliminate NSR permitting obligations for emissions-related units, and the EPA repeatedly emphasizes that the owner or operator is still responsible for compliance with applicable regulations for any pre-permit construction allowed under the rule.

That caveat matters in the data center context. If later permitting requires design changes, additional controls, or reconfiguration of emissions-related systems, the EPA's proposal makes clear that prior site investment should not justify permit issuance. So, while the proposal could improve schedule optionality, it doesn't prevent permitting authorities from requiring redesign or denying a permit if the Clean Air Act's criteria are not satisfied.

Broader Implications Beyond Data Centers

The proposal is not data center-specific andindustries unrelated to data centers may see similar opportunities and risks.

For example, advanced manufacturing, semiconductors, life sciences, logistics, food processing, energy, chemicals, and other sectors often build substantial non-emitting infrastructure before or alongside installation of emissions-related equipment. The EPA also noted that stakeholders have raised concerns for years that the current rule delays projects and frustrates staged construction schedules, including where seasonal conditions constrain construction windows. Those concerns are hardly unique to data centers.

Key Cautions for Project Sponsors

Even if finalized, the rule would not give project sponsors a blank check to build first and permit later. The EPA made clear reviewing authorities will still need to make case-by-case, project-specific judgments, because it will be difficult to draw a regulatory line that addresses every circumstance. The EPA also stressed that other federal, state, and local requirements may continue to limit pre-permit activity, including other Clean Air Act requirements, other environmental statutes, and non-EPA permitting or licensing requirements.

If finalized, the rule is likely to become an important project-planning tool – but not a substitute for careful air permitting strategy. Working with subject matter experts in the environmental permitting space to collaborate with onsite planning will be key if the proposal goes into effect. Fisher Phillip's Workplace Safety Team can assist planning and development teams in ensuring compliance while expediting construction.

Accordingly, companies planning large construction projects should consider:

1. reassessing project sequencing assumptions for non-emitting site and structural work;
2. identifying which components may be viewed as specifically and uniquely configured to serve emitting equipment;

3. preserving flexibility in design and procurement in case permit conditions later require changes; and

4. evaluating state and local implementation issues, especially where approved SIP rules, delegated programs, or local interpretations may affect how quickly any federal revisions translate into practice.

Conclusion

Fisher Phillips will continue to monitor the EPA rulemaking process and update employers as needed, so make sure you are signed up for Fisher Phillips' Insight System to receive updates straight to your inbox. If you have questions about permitting or compliance with EPA rules, contact your Fisher Phillips attorney, the authors of this Insight, or any member of our Workplace Safety and Catastrophe Management Practice Group.