MICHELLE LUJAN GRISHAM
GOVERNOR

JAMES C. KENNEY
CABINET SECRETARY

June 29, 2026

The Honorable Lee Zeldin
Administrator
U.S. Environmental Protection Agency
EPA Docket Center
1200 Pennsylvania Ave NW
Washington, DC 20460

Submitted electronically via: https://www.regulations.gov

RE: Begin Actual Construction in the New Source Review Preconstruction Permitting Program Docket ID No. EPA–HQ–OAR–2025–0618

Dear Administrator Zeldin:

The New Mexico Environment Department (NMED) submits the attached comments to the U.S. Environmental Protection Agency (EPA) on the proposed rule *Begin Actual Construction in the New Source Review (NSR) Preconstruction Permitting Program*, Docket ID No. EPA-HQ-OAR-2025-0618 for EPA's consideration.

New Mexico administers the State Implementation Plan (SIP)-approved Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR) permitting programs, as well as a broader New Source Review (NSR) minor source permitting program. Accordingly, NMED has a strong interest in ensuring that revisions to the NSR preconstruction permitting program remain clear, enforceable, administratively workable, and consistent with cooperative federalism principles.

We respectfully request that EPA takes into account the enclosed comments as it develops the final rule and provide clear direction regarding SIP implementation, state authority, broader NSR program applicability, and how the proposed rule will prevent the waste of resources.

Sincerely,

DocuSigned by:
James C. Kenney
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James C. Kenney
Cabinet Secretary

Attachment (1)

Cc: Courtney Kerster, Senior Advisor, Office of Governor Michelle Lujan Grisham
John Rhoderick, Deputy Cabinet Secretary of Administration, NMED
Michelle Miano, Director, Environmental Protection Division, NMED
Zachary Ogaz, General Counsel, NMED

**Attachment**

**Comments on Proposed Rule Begin Actual Construction in the New Source Review (NSR) Preconstruction Permitting Program**
**Docket ID No. EPA-HQ-OAR-2025-0618**

**Comment 1: EPA should state expressly whether SIP revisions are required and how states are to implement the rule during any transition.**

**Responsive to EPA Questions 8, 9, 10, and 11.**

New Mexico Environment Department (NMED) requests that EPA clarify how the proposed revisions would interact with existing SIP-approved Prevention of Significant Deterioration (PSD), Nonattainment New Source Review (NNSR), and New Source Review (NSR) permitting programs.

Many states, including New Mexico, administer SIP-approved permitting programs that contain state-specific regulatory requirements and permitting procedures developed and administered over many years under EPA-approved state frameworks. The proposal creates uncertainty regarding whether states would be expected to revise existing SIP provisions or permitting procedures if EPA finalizes a revised definition of "begin actual construction."

EPA should clearly identify in the final rule whether implementation of the proposal would require SIP revisions to SIP-approved PSD, NNSR, and general NSR programs. If EPA concludes that SIP revisions are required, EPA should identify the provisions that would need to be revised, clearly state that existing SIP-approved provisions remain effective unless and until EPA approves a revision, and identify any applicable submission deadlines. If EPA concludes that SIP revisions are not required, EPA should explain how the revised federal interpretation is intended to operate in SIP-approved states.

EPA should also state whether reviewing authorities may continue implementing existing SIP-approved definitions, permit procedures, and preconstruction requirements while any required revisions are being developed and reviewed. If EPA expects states to implement a revised federal approach before EPA has approved a SIP revision, EPA should identify the legal basis for that approach and explain how states are expected to administer any conflict between an approved SIP and the revised federal interpretation. Section 110 of the Clean Air Act establishes the SIP framework for state implementation, and 40 CFR 51.166(a)(6) shows that EPA has previously provided transition provisions when SIP revisions are expected.

If EPA expects states to revise SIP-approved programs because of any final rule, EPA should also provide an express transition schedule. For PSD, EPA should confirm whether the existing three-year SIP-revision timeline in 40 CFR 51.166(a)(6) applies. For NNSR, EPA should either add a parallel provision to 40 CFR 51.165 or state expressly why no analogous timeline is needed. Clear transition provisions would assist states in understanding the timing of any required program revisions. PSD already contains a clear SIP-revision timetable and prospective-effect language; if EPA expects comparable implementation changes for NNSR programs, the final rule should provide comparable clarity there as well.

EPA should also confirm that, if SIP revisions are required, existing SIP-approved provisions remain in effect until EPA approves the revisions and that any revised requirements operate prospectively unless EPA says otherwise in the final rule. That would align the agency's transition approach with the existing PSD structure and would reduce unnecessary implementation uncertainty in SIP-approved states.

**Comment 2: EPA should preserve state authority to retain more stringent preconstruction requirements.**

**Responsive to EPA Questions 1, 8, and 10.**

NMED requests that EPA confirm that states may retain more stringent permitting requirements consistent with the Clean Air Act, including sections 110 and 116.

States implementing approved NSR programs often develop approaches tailored to state-specific regulatory structures, permitting workloads, enforcement considerations, and local air quality conditions. Preserving state flexibility would allow permitting authorities to continue administering programs in a manner that is protective, enforceable, and administratively workable while remaining consistent with federal requirements.

EPA should expressly state in the final rule or preamble that nothing in the rule is intended to limit state authority under Clean Air Act sections 110 and 116 to adopt or retain more stringent preconstruction permitting requirements, including within approved SIP programs. Section 116 preserves the authority of states to adopt or enforce more stringent air pollution control requirements, and EPA's PSD regulations already recognize that state provisions may be approved when they are more stringent or at least as stringent as federal requirements. Cooperative federalism recognizes that states have individual needs that may require more restrictive practices than federal rules may require.

If EPA intends the proposal to affect a state's ability to retain a more protective preconstruction permitting requirement, EPA should identify that intent and explain the statutory basis for that result in the final rule or preamble. If EPA does not intend such an effect, EPA should state that conclusion clearly in the final rule or preamble. Such clarification would provide greater certainty for permitting authorities and regulated entities regarding the continued applicability of SIP-approved requirements following any federal definitional change.

**Comment 3: EPA should clarify how the proposal applies to NNSR and PSD programs and preserve the integrity of preconstruction review.**

**Responsive to EPA Questions 1, 5, 8, 10, and 11.**

NMED requests that EPA explain how the proposed approach will specifically affect the PSD and NNSR programs. The current statutory and regulatory framework treats attainment-area PSD and NNSR differently in important aspects. NNSR is built around a permit structure requiring Lowest Achievable Emission Rate (LAER) and emissions offsets, and is more protective and stringent than the PSD program. If EPA intends for a less protective NNSR program, EPA should explain how that is consistent with Part D of the Clean Air Act. If EPA intends a different approach for NNSR versus PSD, EPA should identify those differences clearly in the final rule or preamble. Clarification of this issue would assist permitting authorities in understanding how EPA intends the proposal to apply across different NSR programs.

NMED requests EPA to consider how the proposal may affect the role of preconstruction review under the NSR program and public confidence in the integrity of the permitting process. The federal NSR program is intended to ensure that permitting review occurs before construction or modification of major sources. EPA should ensure that implementation of the final rule preserves meaningful permitting review and transparency while providing the intended regulatory flexibility. NMED also encourages EPA to consider how pre-permit construction activities may affect public perception of the permitting process and whether additional measures may be appropriate to maintain confidence in the integrity of permit decisions.

NMED also encourages EPA to keep any pre-permit construction flexibility narrow and clearly defined. Certain pre-permit activities could create practical pressure on permitting decisions or effectively install the permanent infrastructure needed for an emitting project to operate before permit review is completed. The existing definitions of "begin actual construction" in both PSD and NNSR are tied to permanent on-site physical construction activities required for an emissions unit. Therefore, EPA should ensure that permanent tie-ins and support systems whose purpose is to enable operation of the emitting unit would not be allowed. For example, the proposed definition of "pollutant-emitting activities" provides that the construction of structures that do not have elements "specifically and uniquely configured" to serve emitting units is not considered pollutant-emitting activities. Such a provision will potentially lead to the prohibition on construction or modification of a stationary source without a permit unenforceable so long as a permittee asserts the construction occurring is not specifically and uniquely configured to serve the emitting unit despite it being capable of such at any time. Furthermore, that definition may result in confusion among permittees and regulators, potentially leading to fraudulent permitting and wasted government resources. Any expansion of allowable pre-permit activities should be narrow, clearly defined, and implemented in a manner that preserves the integrity of preconstruction review and public confidence in permit decisions.

**Comment 4: EPA should make clear that pre-permit activity occurs at the owner or operator's risk and that sunk costs and pre-permit investments are not relevant to permit decisions.**

**Responsive to EPA Questions 5, 7, and 11.**

If EPA finalizes any flexibility for pre-permit activity, EPA should add explicit text stating that any activity undertaken before permit issuance occurs solely at the owner's or operator's risk and does not create any entitlement, expectation, claim of reliance, or presumption that a permit will be issued. EPA should also state expressly that permitting authorities may not consider sunk costs, schedule impacts, financing impacts, partially completed project components, clean-up of abandoned project assets, or other pre-permit investments when determining whether a permit should be issued or what permit conditions are required. That is the clearest way to preserve the integrity of preconstruction review and public confidence in the permitting process.

If EPA chooses not to include such provisions, EPA should explain how the final rule will ensure that pre-permit investments do not influence permitting decisions. Absent that clarification, substantial pre-permit expenditures could create practical pressure on reviewing authorities to approve permits, weaken permit conditions, or narrow review because the applicant has already invested heavily in the project. Beyond the practical pressure, the absence of such provisions may lead to a substantial increase in litigation by owners and operators asserting permit denials or conditions affecting the pre-construction activity amounts to an unconstitutional taking,

thereby wasting more government resources and harming the integrity of the permitting process. The existing NSR regulations already define “commence” to include binding agreements that cannot be canceled or modified without substantial loss, which underscores the need to keep pre-permit investment risk from the permit decision itself.