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ENVIRONMENTAL PROTECTION

COMPLIANCE AND ENFORCEMENT

Air Administrative Procedures and Penalties

Adopted Amendments: N.J.A.C. 7:27A-3.5 and 3.10

Proposed: August 20, 2012 at 44 N.J.R. 2092(a).

Adopted: August 7, 2013 by Bob Martin, Commissioner, Department of Environmental Protection.

Filed: August 20, 2013 as R.2013 d.113, **with substantial changes** not requiring additional public notice and comments (see N.J.A.C. 1:30-6.3).

Authority: N.J.S.A. 13:1B-3; 13:1D-1 et seq.; 13:1D-125 to 134; and 26:2C-1 et seq., particularly 26:2C-8, 9.2, and 19.

DEP Docket Number: 03-12-07

Effective Date: September 16, 2013

Operative Date: October 6, 2013

Expiration Date: March 21, 2020

N.J.A.C. 7:27A-3 contains procedural rules for the assessment, payment, and contesting of civil administrative penalties, as well as rules setting forth the penalties for specific air pollution violations. The Department is adopting amendments at N.J.A.C. 7:27A-3.5(e)3 to expressly allow the Department to take into account environmental impact (if any) when adjusting penalty amounts. The Department is also adopting penalties at N.J.A.C. 7:27A-3.10 for violations of the rules regarding low emission

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vehicles at N.J.A.C. 7:27-26, for which penalties were not previously provided, and amending the penalty matrices to add “minor” or “non-minor” designations for violations of N.J.A.C. 7:27-19, the NO_x RACT rules, which do not already have such designations. Minor violations are eligible for a grace period to correct the violation. Throughout the chapter the Department is redesignating violations that are designated minor, but should be non-minor. Other amendments correct citations to the Air Pollution Control rules, N.J.A.C. 7:27, and clarify language.

Summary of Hearing Officer’s Recommendations and Agency Responses:

A public hearing was held on September 25, 2012, at the Department’s 4th Floor Conference Room, 401 East State Street, Trenton. Edward M. Choromanski, Director of the Department’s Division of Air and Hazardous Materials Compliance and Enforcement, served as the Hearing Officer. No one provided comments at the public hearing. After reviewing the comments received during the public comment period, the Hearing Officer has recommended that the proposal be adopted with the changes described below in the Summary of Public Comments and Agency Responses. The Department accepts the Hearing Officer’s recommendation.

A record of the public hearing is available for inspection in accordance with applicable law by contacting:

Department of Environmental Protection
Office of Legal Affairs
ATTN: DEP Docket No. 03-12-07
401 East State Street
Mail Code 401-04L

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PO Box 402
Trenton, NJ 08625-0402

This adoption document can also be viewed or downloaded from the Department's website at <http://www.nj.gov/dep/rules/adoptions.html>.

Summary of Public Comments and Agency Responses:

The following persons submitted comments on the proposal:

1. David Miller
2. Alfred Tarsitano, Covanta Energy

The comments received and the Department's responses are summarized below. The number(s) in parentheses after each comment identify the respective commenter(s) listed above.

1. **COMMENT:** Emissions resulting from activities under N.J.A.C. 7:27-6.2(d), VOC transfer operations, surface coating activities, low-emission vehicles, NO_x and the other types of emissions enumerated in the proposal, present a serious threat to the environment and public health. Allowing violations of the emissions standards affecting these substances and activities to be considered minor and allowing a grace period would result in an intolerable increase in air pollution in a region that is already rife with polluted air. The Department's actions in this regard are appropriate.

In addition, the approach in rules imposing penalties for violations of the Low Emission Vehicles rules to levy reasonable penalties and consider non-payment a non-

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minor violation while recognizing the impact of increased emissions as a result of non-attainment of California-certification makes good sense as environmental policy. (1)

RESPONSE: The Department acknowledges the commenter's support for the amendments.

2. **COMMENT:** The amendment to N.J.A.C. 7:27 A-3.5 relating to adjustment of penalties amounts based on environmental impact is not necessary in light of the existing catch-all provision allowing adjustment for "any other mitigating, extenuating or aggravating circumstances," which environmental impact clearly falls into. Violators will attempt to use the provision to their benefit by arguing that the environmental impact was minimal.

The amendment will result in increased administrative costs in determining environmental impact of a violation and the possibility that a violation is lessened based on what appears to be minimal environmental impact which then turns out to be more harmful in the long term. Penalties should be increased when environmental impact is worse, but the amendment may result in an abuse of the provision in the reverse, which may allow polluters to escape their entire exposure under the rules. (1)

RESPONSE: As discussed in the proposal summary, the Department is amending N.J.A.C. 7:27A-3.5(e)3 based on stakeholder suggestions. (44 N.J.R. 2092(a) at 2092) The Department has determined that the amendment is consistent with the existing rule and practice, as discussed in the proposal summary. The existing rule at N.J.A.C. 7:27A-

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3.5(e)6 allows the Department to take into account “any other mitigating, extenuating or aggravating circumstances’ when adjusting a penalty. The circumstances considered could include environmental impact; however, the existing rule does not explicitly say so.” (44 N.J.R. at 2092) The Department is not modifying the rule on adoption.

Expressly stating that the Department may take environmental harm into account when adjusting a penalty will not change the Department’s review of penalties assessed under the rules. The Department does, under the authority of N.J.A.C. 7:27A-3.5(e)6, take into account the presence or absence of environmental harm when adjusting a penalty. The Department has not found, in its experience, that the rule has resulted in abuse or increased administrative expense, nor has the rule allowed regulated facilities to avoid appropriate penalties.

3. **COMMENT:** In the case of a permit limit having a rolling average (for example, 100 parts per million, dry volume (ppmvd) carbon monoxide (CO) limit with a 96 hour rolling average based on a one hour block average), a single boiler upset resulting in elevated CO for a couple of hours could take multiple days to drop below the rolling average limit, even though the hourly CO returned to normal shortly after the boiler upset. Under the proposed footnote 8 to Table 3 at N.J.A.C 7:27A-3.10(n) is it the Department's intent to treat each day the CO rolling average is above the 100 ppmdv (solely due to the nature of the rolling average) due to a single boiler upset as a separate and distinct violation for the purpose of assessing a penalty? This is a somewhat harsh result. (2)

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RESPONSE: The entries in the first column of Table 3 at N.J.A.C. 7:27A-3.10(n) apply to two aspects of a violation. As set forth at N.J.A.C. 7:27A-3.10(n)1iii, the periods of time in the left column correspond to either the averaging time applicable to the emissions limit in the Preconstruction Permit or Operating Certificate, or the duration of an offense. For example, the multiplier of “2” in the right column of Table 3 could apply to either an upset with a duration of more than 30 minutes, but less than or equal to one hour, or to a violation of an emissions limit expressed over an averaging time of more than 30 minutes, but less than or equal to one hour. Both the upset and the emissions limit fall within the “>30 min. & ≤ 1 hr” row of the table.

The Department’s intention in proposing new footnote 8 was to indicate that “>24 hr” in the last line of the table refers only to the averaging time for the emissions limit in the permit, and not to the duration of the upset giving rise to the penalty. Therefore, the multiplier of 10 can be applied even if the upset lasts for less than 24 hours, i.e., less than one day, where the averaging time in the permit exceeds 24 hours.

In the example the commenter presents, in which the facility’s limit is based on an averaging time of more than 24 hours and a boiler upset lasts two hours, the boiler upset is considered a single violation for the purpose of assessing a penalty, notwithstanding that the 96-hour rolling average is exceeded for more than one day. Because the averaging time for the emissions limit in the permit is more than 24 hours, the multiplier of 10 (as set forth in Table 3 for an averaging time in excess of 24 hours) applies when calculating the penalty for this single event.

On adoption, the Department is modifying Table 3 at N.J.A.C. 7:27A-3.10(n) to add a superscript at “>24 hr” referring to the footnote; this reference was inadvertently

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omitted in the proposed rule amendment. In addition, the Department is modifying the text of the footnote to remove the repetition of the text of N.J.A.C. 7:27A-3.10(c), which states that each day that a violation continues is a separate and additional violation, and to provide further clarification. N.J.A.C. 7:17A-3.10(c) applies generally to violations for which penalties may be assessed under this chapter. It is not necessary, and is potentially confusing, to repeat it in the footnote to Table 3. Also, as discussed above and in the proposal summary, the Department's intention was to make it clear that "> 24 hr" applies to the averaging time, and not to the duration of an offense. It is not possible for a single violation to last more than 24 hours, because an upset of more than a day would be considered, in accordance with N.J.A.C. 7:27A-3.10(c), at least two violations: one for the first 24 hours, one for the second 24 hours (or portion thereof), and so on. The footnote is also modified on adoption to clarify that the averaging time is established in the Preconstruction Permit or Operating Certificate, as provided at N.J.A.C. 7:27A-3.1(n)1iii.

Federal Standards Analysis

P.L. 1995, c. 65 and Executive Order No. 27 (1994) require State agencies that adopt, readopt, or amend any rule or regulation, to provide a comparison with Federal law, and to provide further discussion and analysis (including cost-benefit analysis) if the standards or requirements imposed by the agency exceed standards or requirements imposed by Federal law.

The Air Administrative Procedures and Penalties, N.J.A.C. 7:27A, were promulgated in order to comply with the state implementation plan (SIP) requirements of

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the Federal Clean Air Act, as well as to provide an enforcement mechanism for the implementation of the State Air Pollution Control Act. The penalties for violations of rules for which no penalty was previously provided are proposed as part of the State's SIPs. The purpose of the penalties is to encourage compliance and discourage noncompliance with the State's air pollution control law and regulations and the Federal Clean Air Act requirements, including the State's Federally-mandated emission reduction commitments set forth in the existing SIPs. The amendment allowing the Department to take into account environmental impact (or the lack of impact) in assessing a penalty amount is consistent with the Federal requirements. The amendments designating certain violations as minor or non-minor are made in order to comply with the State's Grace Period Law and do not exceed any standard or requirement imposed by Federal law.

Full text of the adoption follows (additions to proposal indicated in boldface with asterisks ***thus***; deletions from the proposal indicated in brackets with asterisks *[thus]*).

7:27A-3.10 Civil administrative penalties for violation of rules adopted pursuant to the Act

(a)-(m) (No change.)

(n) The Department shall determine the amount of civil administrative penalty for violations of N.J.A.C. 7:27-8 and 7:27-22 as follows: for violations detected by continuous monitoring systems in accordance with (n)1 below; for continuous

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monitoring systems not installed, out of service or out of control in accordance with (n)2 below; and for violations of continuous monitoring systems recordkeeping and reporting requirements in accordance with (n)3 below. The rule summaries for the requirements set forth in the Civil Administrative Penalty Schedule in this subsection are provided for informational purposes only and have no legal effect.

1. The Department shall determine the amount of civil administrative penalty for violations of N.J.A.C. 7:27-8.3(e) and 7:27-22.3(e) as indicated by continuous monitoring systems on the basis of the severity level, duration of the offense and the size or nature of the source operation associated with the violation as follows:
 - i. - iii.(No change from proposal)

CONTINUOUS MONITORING SYSTEMS

Table 1, 2a and 2b (No change from proposal.)

TABLE 3

Averaging time or duration	Multiplier
≤ 30 minutes	1

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>30 min. & ≤ 1 hr	2
>1 hr & ≤ 3 hr	4
>3 hr & ≤ 8 hr	6
>8 hr & ≤ 24 hr	8
>24 hr ^{*8*}	10

2.- 3. (No change from proposal.)

¹⁻⁷ (No change from proposal.)

⁸ *[Each day during which the violation continues shall constitute an additional, separate, and distinct offense; the > 24 hr standard is for the averaging time only]* ***> 24 hr refers to the length of the averaging time established in the Preconstruction Permit or Operating Certificate, and does not refer to the duration of the offense*.**

(o)-(u) (No change from proposal.)