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ENVIRONMENTAL PROTECTION

AIR QUALITY, ENERGY, AND SUSTAINABILITY

DIVISION OF AIR QUALITY

Air Pollution Control

Outer Continental Shelf Air Regulations

Adopted New Rules: N.J.A.C. 7:27-30

Proposed: November 4, 2019, at 51 N.J.R. 1587(a).

Adopted: April 9, 2020, by Catherine R. McCabe, Commissioner, Department of Environmental Protection.

Filed: April 9, 2020, as R.2020 d.055, **with non-substantial changes** not requiring additional public notice and comment (see N.J.A.C. 1:30-6.3).

Authority: N.J.S.A. 13:1B-3, 13:1D-9, 13:1D-134 et seq., 26:2C-1 et seq.; and Executive Order No. 8 (2018).

DEP Docket Number: 04-19-10.

Effective Date: May 4, 2020.

Operative Date: June 8, 2020, in accordance with N.J.S.A. 26:2C-8.a.

Expiration Date: Exempt.

Pursuant to Section 328(a)(1) of the Clean Air Act (CAA), 42 U.S.C. § 7627(a)(1), the U.S. Environmental Protection Agency (EPA) is required to establish air pollution control requirements for sources on the outer continental shelf (OCS), which includes the submerged lands beyond the seaward boundary of coastal states. See 43 U.S.C. § 1331(a). The EPA

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established these air pollution control requirements, as well as procedures for the implementation and enforcement of those requirements, at 40 CFR Part 55. The CAA authorizes the EPA to delegate the authority to implement and enforce air pollution control requirements on the OCS to any state with an adjacent OCS source, if the governor or governor's designee requests delegation and the EPA determines that the state meets certain requirements. See 42 U.S.C. § 7627(a)(3); 40 CFR 55.11. The Department is incorporating by reference the relevant Federal regulations at 40 CFR Part 55 in order to fulfill one of the necessary requirements for delegation of this authority to New Jersey.

Summary of Hearing Officer's Recommendation and Agency's Response:

The Department held a public hearing on this rulemaking on December 12, 2019, at 1:00 P.M., in the Department's Public Hearing Room, 1st Floor, 401 East State Street, Trenton, New Jersey. Kenneth Ratzman, Assistant Director for the Division of Air Quality, Energy and Sustainability, served as hearing officer. There were no oral comments provided at the public hearing. After reviewing the written comments received during the public comment period, the hearing officer recommended that the Department adopt the proposed rules with the modifications described below in the Summary of Agency-Initiated Changes. The Department accepts the hearing officer's recommendations.

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

Department of Environmental Protection

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Office of Legal Affairs

ATTN: Docket No. 04-19-10

401 East State Street, 7th Floor

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This notice of 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 Department accepted comments on the notice of proposal through January 3, 2020. Timely written comments were provided by Jeff Tittel on behalf of the New Jersey Chapter of the Sierra Club.

The comments received and the Department's responses are summarized below.

Fossil Fuel Infrastructure Concerns

1. COMMENT: The Department failed to make transparent that the proposed rules entail permitting for offshore drilling, oil wells, gas wells, LNG ports, burning gases, mining minerals, seismic testing, and more. The proposed rules would give the Department the ability to regulate the fossil fuel infrastructure off New Jersey's coast when the State should be banning it

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instead. The rules would oversee projects like the disastrous LNG port proposal in Gibbstown, New Jersey, and William Transco's Northeast Supply Enhancement Project that would go through the Raritan Bay. New Jersey should not be naïve in adopting this rulemaking that would allow offshore drilling, an LNG facility, or other drilling and industrialization off our coast.

RESPONSE: Multiple Federal agencies have jurisdiction to issue permits for activities on the outer continental shelf (OCS). As explained in the notice of proposal Summary, 51 N.J.R. at 1587, any person or entity that seeks to develop the natural resources on the OCS is required to obtain a lease from the Department of the Interior (DOI) and comply with regulations developed pursuant to the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. §§ 1331 et seq., which is Federal legislation. The notice of proposal Summary further explained that under the OCSLA, the DOI has oversight over the development of oil, gas, and minerals (all natural resources), as well as renewable energy sources on the OCS. 51 N.J.R. at 1587-88. On the other hand, the EPA has authority, pursuant to Section 328 of the Clean Air Act (CAA), 42 U.S.C. § 7627, to regulate air pollution on the OCS. In other words, the Department's notice of proposal Summary made clear that both the DOI and the EPA regulate fossil fuel and offshore wind infrastructure on the OCS, but only to the extent that any given component of the infrastructure falls within an individual agency's scope of authority.

Pursuant to the CAA, the EPA has authority to establish requirements to control air pollution from "OCS sources," as defined at 40 CFR 55.2, for the purpose of attaining and maintaining the Federal and state ambient air quality standards and ensuring compliance with provisions in the CAA for the prevention of significant deterioration. 42 U.S.C. § 7627(a). Thus,

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to the extent that activities associated with offshore drilling, oil wells, gas wells, LNG ports, burning gases, mining minerals, seismic testing, or the specific projects mentioned in the comment consist of OCS sources, those sources will be subject to the air pollution control requirements established by the EPA for the purpose of attaining and maintaining the Federal and state ambient air quality standards on the OCS.

As set forth in the notice of proposal Summary, the EPA will delegate the authority to issue and enforce air permits on the OCS within 25 miles of the state's seaward boundary and/or beyond 25 miles of the state's seaward boundary if the state demonstrates that its regulations are adequate to meet four conditions. One of the four conditions at 40 CFR 55.11(b) requires the state to adopt the appropriate portions of 40 CFR Part 55. Thus, the adoption of this rulemaking is one step the Department must take before it can request delegation from the EPA. The delegation sought by the Department would not increase, or in any way alter, the scope of activities otherwise allowed on the OCS under Federal law, or the air pollution control requirements applicable to an OCS source. If the delegation to the Department is approved by the EPA, the only authority that would be available to the Department is the authority to implement and enforce the air pollution control requirements developed by the EPA, pursuant to the authority conferred by the CAA. Neither this adopted rulemaking nor the delegation being sought would provide the authority necessary for the Department to establish or revise the air pollution control requirements on the OCS.

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2. COMMENT: The Department claims that the purpose of adopting this rulemaking is to help build offshore wind projects, but the rules will also help drilling off our coast because the rules also regulate pollution from fossil fuel infrastructure.

RESPONSE: As discussed in the Response to Comment 1, to the extent that activities associated with offshore drilling or offshore wind projects include OCS sources, those sources will be subject to the air pollution control requirements established by the EPA for the OCS. The Department is adopting this rulemaking to request delegation authority from the EPA. The authority will be limited to the implementation and enforcement of the air pollution control requirements on the OCS. 40 CFR 55.11. The delegation sought by the Department would not authorize the Department to increase, or in any way alter, the scope of activities otherwise allowed on the OCS under Federal law or the air pollution control requirements applicable to OCS sources. Thus, the rules are not projected to “help” or “hurt” OCS sources, regardless of whether those sources fall under the category of offshore wind or fossil fuel infrastructure.

In the notice of proposal Summary, the Department stated that “[g]iven the potential for a significant increase in renewable energy sources that may be developed off of New Jersey’s seaward boundary, the State has an interest in overseeing the implementation and enforcement of the air permitting program for these projects.” 51 N.J.R. 1588. The section in the notice of proposal Summary titled “The Significance of Delegation for New Jersey,” explained that multiple offshore wind projects off the coast of New Jersey are projected to be developed in the next decade. Thus, the pending OCS projects and the Department’s interest in

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overseeing the air permitting of OCS sources were the impetus for the Department's interest in seeking delegation.

3. COMMENT: The Federal rules are for all offshore pollution, including vessels, seismic testing, and offshore gas drilling. Seismic testing will not only harass animals but can cause severe damage and can even lead to mass strandings of mammals and possibly death. Seismic testing is destructive and will lead to drilling that will impact our coastal tourism industry, ecosystems, fisheries and, most importantly, the safety of the people who live along the coast.

RESPONSE: As discussed in the Response to Comment 1, the Federal rules proposed to be incorporated by reference apply only to an "OCS source" as defined at 40 CFR 55.2. To the extent that vessels or activities associated with seismic testing or drilling are, or include, an OCS source, the delegation of authority from the EPA would only authorize the Department to implement and enforce the air pollution control scheme at 40 CFR Part 55. This delegation of authority would not increase or in any way alter the scope of activities otherwise allowed on the OCS under Federal law, or the air pollution control requirements applicable to OCS sources. Therefore, the commenter's concerns regarding specific activities are outside the scope of this rulemaking.

Jurisdiction

4. COMMENT: Section 328 of the Clean Air Act (CAA), 42 U.S.C. § 7627, sets standards for the release of air pollutants including Title V permitting within 25 miles; however, the State does

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not have jurisdiction or standards outside of that zone. The Department is incorporating Federal rules as Department standards for offshore air pollution. It is important for New Jersey to take over jurisdiction from the EPA over air pollution off its coast. Instead of deferring to Federal standards, New Jersey needs to set its own rules and standards for regulating offshore and onshore pollution like GHGs, carbon dioxide (CO₂), and more. This is especially important given the Federal government's push for offshore drilling.

RESPONSE: Pursuant to Section 328(a) of the Clean Air Act, the EPA promulgated rules at 40 CFR Part 55 that establish the Federal air pollution control requirements, and the procedures for the implementation and enforcement of those requirements, on the OCS. As part of those Federal requirements, OCS sources located within 25 miles of a state's seaward boundary must comply with the state and/or local requirements of the corresponding onshore area (COA) that have been incorporated by reference into the Federal rules at 40 CFR 55.14. As noted in the notice of proposal Summary, 51 N.J.R. at 1589, only the EPA is authorized to determine which state and/or local rules from each COA will be applicable to OCS sources within 25 miles of a state's seaward boundary through regularly conducted consistency reviews. If the EPA determines that a state and/or local rule is not "rationally related to the attainment and maintenance of state or Federal ambient air quality standards or to the requirements of part C of title I of the [CAA]," the rule will not be incorporated by reference at 40 CFR 55.14 and will not be applicable to OCS sources within 25 miles of a state's seaward boundary. 40 CFR 55.12(d). Consistency update determinations are a non-delegable duty. 40 CFR 55.11(a). OCS

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sources located beyond 25 miles of a state's seaward boundary are not required to comply with the state and/or local requirements the EPA has incorporated by reference at 40 CFR 55.14.

However, those OCS sources must comply with the Federal air pollution control requirements set forth at 40 CFR 55.13. Thus, all OCS sources are subject to air pollution control standards.

Section 328(a)(3) of the Clean Air Act allows states to seek delegation of the authority to implement and enforce the EPA's Federal air permitting requirements for OCS sources. As discussed in the Response to Comment 1, by adopting the appropriate portions of the Federal rules at 40 CFR Part 55, the Department is taking one of the steps necessary to request delegation from the EPA. Still, the delegation sought by the Department would not increase or in any way alter the scope of activities otherwise allowed on the OCS under Federal law, or the air pollution control requirements applicable to an OCS source. To the extent that the commenter suggests that the Department should set its own rules and standards for regulating pollution on the OCS, the Department is unaware of any provision of Federal law that would allow the State to acquire the jurisdiction or authority necessary to establish air pollution control standards on the OCS. As noted above, certain State standards already apply to OCS sources within 25 miles of the State's seaward boundary where the EPA has incorporated New Jersey's rules by reference at 40 CFR 55.14.

Summary of Agency-Initiated Changes:

N.J.A.C 7:27-32 Outer Continental Shelf Air Regulations

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The Department inadvertently proposed this new chapter as N.J.A.C. 7:27-32; however, there is already a chapter codified as N.J.A.C. 7:27-32. Therefore, upon adoption, the Department is recodifying the proposed new rules as Chapter 30, which is reserved in the existing New Jersey Administrative Code.

N.J.A.C. 7:27-30.1 Applicability

The Department is modifying N.J.A.C. 7:27-30.1 on adoption to correct and to clarify the Federal authority for the air permitting program on the OCS. The reference to the “Federal Clean Air Act Amendments” is being corrected to reflect that the authority should be referenced as the Clean Air Act (CAA). Additionally, the Department’s notice of proposal Summary included an error, which resulted in an inaccurate citation to “42 U.S.C. § 7637(a)(3).” See 51 N.J.R. at 1587. To alleviate any potential confusion, the Department is further modifying N.J.A.C. 7:27-30.1 to include the correct cross-reference to the OCS provisions of the CAA. The adopted rules will reflect that 42 U.S.C. § 7627 is the correct citation for Section 328 of the CAA.

N.J.A.C. 7:27-30.2 Incorporation by reference of the Code of Federal Regulations

The Department is modifying the list of provisions that are being incorporated by reference at N.J.A.C. 7:27-30.2(f). The first set of revisions correct errors in the titles of the seventh, 11th, and 12th, provisions listed at N.J.A.C. 7:27-30.2(f) by: (1) making the word “inspection” in the seventh provision plural; (2) including the word “located,” which was erroneously left out of the 11th provision, (3) using an uppercase “S” in the words “states” and “state” in the eleventh provision; and (4) correcting the word “Area” in the 12th provision to

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“areas.” In addition, the Department notes that due to an editing error, “Appendix A to Part 55” was appended to the end of the 12th provision, “12. 40 CFR 55.15 Specific designation of corresponding onshore area,” rather than being listed as an independent provision to be incorporated by reference. The Department listed this item, including its title, as an independent provision for incorporation by reference in the notice of proposal Summary at 51 N.J.R. 1588. Accordingly, “Appendix A to Part 55,” including its full title, will become the 13th provision listed at N.J.A.C. 7:27-32.2(f). Further, the title will be revised to match the title in the CFR by using upper case letters: “APPENDIX A TO PART 55 – LISTING OF STATE AND LOCAL REQUIREMENTS INCORPORATED BY REFERENCE INTO PART 55, BY STATE.” Finally, the title of each CFR provision being incorporated by reference at N.J.A.C. 7:27-30.2(f) will be revised to end in a period.

N.J.A.C. 7:27-30.3, Document availability

The Department is removing an erroneous “as” from N.J.A.C. 7:27-30.3(a).

Federal Standards Statement

Executive Order (EO) 27 (1994) and N.J.S.A. 52:14B-1 et seq. (P.L. 1995, c. 65) require State agencies that adopt, readopt, or amend State rules to which the EO and statute apply, to provide a Federal standards statement. If those rules exceed any Federal standards or requirements, the agency must also include in the rulemaking document a Federal standards analysis.

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The adopted new rules incorporate Federal rules by reference. The adopted rules meet, but do not exceed, the standards set forth in the Federal rules. Accordingly, no Federal standards analysis is required.

Full text of the adopted new rules follows (additions to proposal indicated in boldface with asterisks ***thus***; deletions from proposal indicated in brackets with asterisks ***[thus]***):

SUBCHAPTER ***[32]* *30***. OUTER CONTINENTAL SHELF AIR REGULATIONS

7:27-***[32.1]**30.1*** Applicability

Upon delegation of authority by the Administrator of the EPA to the Department, this subchapter shall apply to the owner or operator of any OCS source within 25 miles of a state's seaward boundary for which New Jersey is the corresponding onshore area (COA) and to the owner or operator of any OCS source beyond 25 miles of New Jersey's seaward boundary for which New Jersey is the nearest onshore area, as authorized under Section 328 of the ***[Federal]* Clean Air Act ***[Amendments]**, 42 U.S.C. § 7627,*** and 40 CFR Part 55.**

7:27-***[32.2]**30.2*** Incorporation by reference of the Code of Federal Regulations

(a)-(d) (No change from proposal.)

(e) On or after ***[(the operative date of this rule)]* June 8, 2020***, new Federal rules, amendments, supplements, and other changes, brought about through administrative or judicial action, automatically incorporated through the prospective incorporation by reference

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process shall be effective upon publication in the Federal Register and operative on the date listed by the EPA as the effective date in the relevant Federal Register notice.

(f) The following provisions are incorporated by reference within this subchapter:

1. 40 CFR 55.1 Statutory authority and scope*.*
2. 40 CFR 55.2 Definitions*.*
3. 40 CFR 55.3 Applicability*.*
4. 40 CFR 55.4 Requirements to submit a notice of intent*.*
5. 40 CFR 55.6 Permit requirements*.*
6. 40 CFR 55.7 Exemptions*.*
7. 40 CFR 55.8 Monitoring, reporting, inspection*s*, and compliance*.*
8. 40 CFR 55.9 Enforcement*.*
9. 40 CFR 55.10 Fees*.*
10. 40 CFR 55.13 Federal requirements that apply to OCS sources*.*
11. 40 CFR 55.14 Requirements that apply to OCS sources ***located*** within 25 miles of *[states']****States'*** seaward boundaries, by *[state]****State.***
12. 40 CFR 55.15 Specific designation of corresponding onshore *[Area]****areas.***
[Appendix A to Part 55]

***13. APPENDIX A PART 55 -- LISTING OF STATE AND LOCAL REQUIREMENTS
INCORPORATED BY REFERENCE INTO PART 55, BY STATE.***

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7:27-~~[32.3]~~**30.3** Document availability

(a) Copies of 40 CFR Part 55, which is incorporated herein by reference, ~~[as]~~ are available for review at gov.ecfr.io.

(b) (No change from proposal.)

Recodify proposed 7:27-32.4 through 32.7 as ~~7:27-30.4 through 30.7~~ (No change in text.)