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## **ENVIRONMENTAL PROTECTION**

### **ENVIRONMENTAL REGULATION**

#### **Air Quality Management**

##### **NO<sub>x</sub> Budget Program**

**Proposed Repeal:** N.J.A.C. 7:27-31.23

**Authorized By:** Lisa P. Jackson, Commissioner, Department of Environmental Protection.

**Authority:** N.J.S.A. 13:1B-3(e), 13:1D-9, and 26:2C-1 et seq.

**Calendar Reference:** See Summary below for explanation of exception to calendar requirement.

**DEP Docket Number:** 17-08-10/695

**Proposal Number:** PRN 2008-###

A **public hearing** concerning this rule proposal, will be held on December 19, 2008, at 10:00 A.M. at:

First Floor Hearing Room

Department of Environmental Protection

401 East State Street

Trenton, New Jersey

Directions to the hearing room may be found at the Department's website address

<http://www.state.nj.us/dep/where.htm>.

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Written comments may also be submitted at the public hearing. It is requested (but not required) that anyone submitting oral testimony at the public hearing provide a copy of any prepared text to the stenographer at the hearing.

Submit written comments by close of business on January 16, 2009 to:

Alice A. Previte, Esq.

Attn: DEP Docket No. 17-08-10/695

Department of Environmental Protection

P.O. Box 402

401 East State Street, 4th Floor

Trenton, New Jersey 08625-0402

The Department of Environmental Protection (Department) requests that commenters submit comments on disk or CD as well as on paper. Submittals on disk or CD must not be access-restricted (locked or read-only) in order to facilitate use by the Department of the electronically submitted comments. Microsoft Word 6.0 or above is preferred. Macintosh formats should not be used. Each comment should be identified by the applicable N.J.A.C. citation, with the commenter's name and affiliation following the comment.

This rule proposal can be viewed or downloaded from the Department's web site at <http://www.nj.gov/dep>.

The agency proposal follows:

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### **Summary**

As the Department has provided a 60-day comment period on this notice of proposal, this notice is excepted from the rulemaking calendar requirement pursuant to N.J.A.C. 1:30-3.3(a)5.

The Department is proposing to repeal N.J.A.C. 7:27-31.23, the expiration of the NO<sub>x</sub> Budget Program. The proposed repeal also constitutes a proposed revision to New Jersey's State Implementation Plan (SIP), in accordance with Section 110(a)(2)(D)(i)(I) of the Federal Clean Air Act, 42 U.S.C. §7410.

The NO<sub>x</sub> Budget Program, N.J.A.C. 7:27-31, is a cap and trade program for ozone season NO<sub>x</sub> emissions from major stationary sources, primarily electric generating units and large industrial boilers. The NO<sub>x</sub> Budget Program has governed NO<sub>x</sub> emissions during the ozone season (May through September) since 1999. The existing NO<sub>x</sub> Budget Program rules (N.J.A.C. 7:27-31) are, by their terms, no longer operative after December 31, 2008. Instead, the State's Clean Air Interstate Rule (CAIR) NO<sub>x</sub> Trading Program (State CAIR program) (N.J.A.C. 7:27-30), based upon the Federal Clean Air Interstate Rules at 40 CFR Part 97, is scheduled to take effect on January 1, 2009.

The Federal CAIR program, as established in the Federal rules, was vacated by the U.S. Court of Appeals for the D.C. Circuit on July 11, 2008 (State of North Carolina v. Environmental Protection Agency, 531 F.3d 896 (D.C. Cir. 2008)). The Department proposes to repeal the December 31, 2008 expiration of the NO<sub>x</sub> Budget Program, in order that the NO<sub>x</sub> Budget Program remains applicable during the 2009 ozone season, which begins on May 1, 2009.

### **Background**

The regional nature of ozone formation and transport has been recognized for some time

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(National Research Council; Rethinking the Ozone Problem in Urban and Regional Air Pollution, National Academy Press, 1991). On September 27, 1994, the Ozone Transport Commission (OTC) agreed to develop a regional program to achieve significant reductions in oxides of nitrogen (NO<sub>x</sub>) emissions from large combustion sources. New Jersey signed an OTC Memorandum of Understanding (MOU), which contained the agreement to develop this program. The MOU called for the establishment of NO<sub>x</sub> cap and trade program, and the establishment of an emissions cap or “budget” that all affected sources must not exceed during each ozone season, beginning in 1999. New Jersey adopted its NO<sub>x</sub> Budget Program in 1998 (N.J.A.C. 7:27-31). The rules have governed NO<sub>x</sub> emissions during the May through September ozone seasons starting in 1999. A New Jersey base emission budget of 17,340 tons of NO<sub>x</sub> was established, which was an approximately 65 percent reduction from 1990 emissions.

Based on the Ozone Transport Assessment Group efforts and on its own analysis, on October 27, 1998, the USEPA required that certain states, including New Jersey, adopt and submit revisions to their State Implementation Plans (SIPs) to reduce the NO<sub>x</sub> emissions that are contributing significantly to nonattainment in downwind states or interfere with maintenance of attainment of National Ambient Air Quality Standards (NAAQS) in downwind states (See 63 Fed. Reg. 57,356, at 57,358). This is known as the NO<sub>x</sub> SIP Call. The NO<sub>x</sub> SIP Call imposed a duty on certain states to reduce their NO<sub>x</sub> emissions by establishing ozone season budgets that prohibit the amount of NO<sub>x</sub> emissions that contributes significantly to nonattainment in, or interferes with maintenance by, a downwind State. The USEPA allowed states to meet their NO<sub>x</sub> SIP Call obligations by creating a cap and trade program for NO<sub>x</sub> for major stationary sources, primarily electric generating units (EGUs) and large industrial boilers. New Jersey amended its existing rules for the NO<sub>x</sub> Budget Program to align with the SIP requirements under the NO<sub>x</sub> SIP

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Call and to reduce the allocation budget to 8,200 tons of NO<sub>x</sub> for the ozone season. The trading program is administered by the USEPA, although the State's rules establish the allocation mechanism.

The USEPA promulgated 40 CFR Part 97 to establish the Federal CAIR program, which was to replace the NO<sub>x</sub> SIP Call. In accordance with the Federal CAIR rules, the Department adopted the CAIR NO<sub>x</sub> Trading Program rules, N.J.A.C. 7:27-30 (39 N.J.R. 300(a), 39 N.J.R. 2637(a)) to replace the NO<sub>x</sub> Budget Program beginning January 1, 2009. The substantive requirements of the program are contained in the Federal rules. The State's rules establish the allocation mechanism for allowances, and contain reporting requirements for regulated facilities.

When it adopted the CAIR NO<sub>x</sub> Trading Program rules, the Department inserted N.J.A.C. 7:27-31.23 into the NO<sub>x</sub> Budget Program rules, which provision states that the NO<sub>x</sub> Budget Program would cease to exist on December 31, 2008, and provides for reconciliation in the event a source has insufficient NO<sub>x</sub> Budget allowances to meet its obligations at the end of the program. The expiration provision prevents an overlap of ozone season cap and trade programs for NO<sub>x</sub>.

The Federal CAIR program, as established in the Federal rules, was vacated by the U.S. Court of Appeals for the District of Columbia Circuit on July 11, 2008 (State of North Carolina v. Environmental Protection Agency). Because the State's CAIR Program is contingent on the Federal rules, the court effectively eliminated the State's CAIR program.

In its decision and order, the court in State of North Carolina v. Environmental Protection Agency, the court noted that "in the absence of CAIR, the NO<sub>x</sub> SIP Call trading program will continue, because USEPA terminated the program only as part of the CAIR rulemaking." State of North Carolina v. Environmental Protection Agency, 531 F.3d at 930. On September 2, 2008,

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the USEPA indicated it will continue to operate the cap and trade program under the NO<sub>x</sub> SIP Call if the CAIR program is not reinstated by Congress or through the appeal process (Letter of September 2, 2008, from Robert J. Meyers, USEPA, Principal Deputy Assistant Administrator, to Lisa P. Jackson, NJDEP, Commissioner). Thus, in order to prevent potential backsliding of emissions reduction commitments in its SIP, the Department proposes to reinstate the NO<sub>x</sub> Budget Trading Program in New Jersey by repealing the expiration and final reconciliation provisions at N.J.A.C. 7:27-31.23. To maintain ozone season NO<sub>x</sub> emission reductions, the Department intends to continue the NO<sub>x</sub> Budget Program until it is replaced by the CAIR program or another emissions reduction program.

Although, nominally, the Department will have two NO<sub>x</sub> cap and trade programs in its rules, there will be no conflict. The allocation provisions of the State's CAIR NO<sub>x</sub> Trading Program, discussed below, govern how the Department allocates allowances. If the Federal CAIR program is not in effect, any allocation of allowances is moot. Only the reporting requirements at N.J.A.C. 7:27-30.6 impose an obligation on the regulated community. All other obligations of regulated entities are imposed by the Federal CAIR rules at 40 CFR Part 97. The State's reporting requirements apply only to "CAIR units." By definition, a "CAIR unit" is one that is subject to the Federal CAIR rules. (See N.J.A.C. 7:27-30.2.) In the absence of Federal CAIR rules, there are no "CAIR units," and no entity is required to comply with the State's reporting requirements.

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### **Allocation of Allowances**

Under the CAIR NO<sub>x</sub> Trading Program, the State's NO<sub>x</sub> ozone season budget was reduced by 1,546 tons to 6,654 tons. New Jersey allocated all of its CAIR allowances to sources in the State for compliance years 2009 through 2011.

Although the USEPA indicated it will continue to operate the cap and trade program under the NO<sub>x</sub> SIP Call, it did not provide any guidance on the procedure to transition from the CAIR program to the NO<sub>x</sub> Budget program, or from the NO<sub>x</sub> Budget program to the CAIR program, if it is ultimately reinstated; therefore, the fate of the CAIR allowances is unknown. This includes the fate of the CAIR allowances that have already been distributed and traded on the open market and the mechanics and timing for the resumption of issuance of NO<sub>x</sub> budget allowances. The Department anticipates that these procedural matters will be addressed by the USEPA prior to the 2009 ozone season (which begins May 1, 2009), if the NO<sub>x</sub> SIP Call continues as discussed in the USEPA's September 2, 2008 letter.

It is possible that Federal legislation or action by the Federal courts will reinstate the Federal CAIR program. In light of this, and the pending rehearing request from the USEPA, the Department does not propose to amend N.J.A.C. 7:27-30, CAIR NO<sub>x</sub> Trading Program, or the corresponding penalty provisions at N.J.A.C. 7:27A-3.10.

### **Social Impact**

The Department anticipates that the proposed repeal will have no social impact. The proposed rules suspend the applicability of N.J.A.C. 7:27-30, which has already been invalidated as a result of the decision in State of North Carolina v. Environmental Protection Agency. The

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proposed repeal continues the operation of the existing NO<sub>x</sub> Budget Program, rather than allowing it to expire. The proposed repeal will not result in a social impact.

### **Economic Impact**

The Department anticipates that the proposed repeal will have no economic impact. The proposed rule suspends the applicability of N.J.A.C. 7:27-30, which has already been invalidated as a result of the decision in State of North Carolina v. Environmental Protection Agency. The proposed rule continues the operation of the existing NO<sub>x</sub> Budget Program, rather than allowing it to expire. The proposed repeal will not result in an economic impact.

### **Environmental Impact**

The Department anticipates that the proposed repeal will have no environmental impact. The proposed rule suspends the applicability of N.J.A.C. 7:27-30, which has already been invalidated as a result of the decision in State of North Carolina v. Environmental Protection Agency. The proposed rule continues the operation of the existing NO<sub>x</sub> Budget Program, rather than allowing it to expire. The proposed repeal will not result in an environmental impact.

### **Federal Standards Statement**

Executive Order No. 27(1994) and P.L. 1995, c.65 require State agencies that adopt, readopt, or amend State regulations that exceed any Federal standards or requirements to include in the rulemaking document a comparison with Federal law. The proposed repeal has the effect of continuing the NO<sub>x</sub> Budget Program at N.J.A.C. 7:27-31, which is consistent with the Federal



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NO<sub>x</sub> SIP Call. Thus, the proposed rulemaking is not any more stringent than Federal standards or requirements, and no further analysis is required.

### **Jobs Impact**

The Department anticipates that the proposed repeal will have no impact on employment in New Jersey. The proposed rule suspends the applicability of N.J.A.C. 7:27-30, which has already been invalidated as a result of the decision in State of North Carolina v. Environmental Protection Agency. The proposed rule continues the operation of the existing NO<sub>x</sub> Budget Program, rather than allowing it to expire. The proposed repeal will not result in an impact on employment in New Jersey.

### **Agricultural Industry Impact**

The Department anticipates that the proposed repeal will have no impact on the agricultural industry in New Jersey. The proposed rule suspends the applicability of N.J.A.C. 7:27-30, which has already been invalidated as a result of the decision in State of North Carolina v. Environmental Protection Agency. The proposed rule continues the operation of the existing NO<sub>x</sub> Budget Program, rather than allowing it to expire. The proposed repeal will not result in an impact on the agricultural industry in New Jersey.

### **Regulatory Flexibility Statement**

As required by the New Jersey Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq., the Department needs to evaluate the reporting, recordkeeping, and other compliance requirements that proposed new rules and amendments would impose upon small businesses.

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The proposed repeal imposes no reporting, recordkeeping, or other compliance requirement on small businesses. Accordingly, no further analysis is required.

### **Smart Growth Impact**

Executive Order No. 4 (2002) requires State agencies that adopt, amend, or repeal State regulations to include in the rulemaking document a Smart Growth Impact statement that describes the impact of the proposed rules on the achievement of smart growth and implementation of the State Development and Redevelopment Plan (State Plan).

The proposed repeal does not impact the State's official land use and development policies in a way that would either encourage or discourage any development or redevelopment in this State contrary to the guiding principles of the State Plan. As a result, the Department does not expect this rulemaking to have an impact on the State's achievement of smart growth, or implementation of the State Plan.

Insofar as the proposed repeal continues a program to reduce emissions from large stationary combustion units, the proposed rule support the State Plan's goal of protecting the environment and preventing air pollution by implementing a strategy of reducing air pollution at the unit.

### **Housing Affordability Impact Statement**

Pursuant to N.J.S.A. 52:14B-4, as amended effective July 17, 2008, by P.L. 2008, c. 46, the Department has evaluated the proposed repeal to determine its impact, if any, on the affordability of housing. The Department has determined that the proposed rule will have no impact on the affordability of housing. The proposed rule suspends the applicability of N.J.A.C.

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7:27-30, which has already been invalidated as a result of the decision in State of North Carolina v. Environmental Protection Agency. The proposed rule continues the operation of the existing NO<sub>x</sub> Budget Program, rather than allowing it to expire. The proposed repeal will not have an impact on the affordability of housing.

### **Smart Growth Development Impact Statement**

Pursuant to N.J.S.A. 52:14B-4, as amended effective July 17, 2008, by P.L. 2008, c. 46, the Department has evaluated the proposed repeal to determine their impact, if any, on smart growth development. The Department has determined that the proposed rule will not evoke a change in housing production in Planning Areas 1 or 2, or within designated centers, under the State Development and Redevelopment Plan.

The proposed rule suspends the applicability of N.J.A.C. 7:27-30, which has already been invalidated as a result of the decision in State of North Carolina v. Environmental Protection Agency. The proposed rule continues the operation of the existing NO<sub>x</sub> Budget Program, rather than allowing it to expire. The proposed repeal will not have an impact on smart growth development.

**Full text** of the proposal repeal may be found in the New Jersey Administrative Code at N.J.A.C. 7:27-31.23.