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ENVIRONMENTAL PROTECTION

SUSTAINABILITY AND GREEN ENERGY

CO₂ Budget Trading Program

Proposed Repeals: N.J.A.C. 7:27-22.28 and 7:27C

Proposed Amendments: N.J.A.C. 7:27-22.16 and 7:27A-3.2, 3.5, and 3.10

Authorized By: Bob Martin, Commissioner, Department of Environmental Protection.

Authority: N.J.S.A. 13:1B-3.e, 13:1D-9, and 26:2C-1 et seq., particularly 26:2C-45 et seq.

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

DEP Docket Number: 04-14-15

Proposal Number: PRN 2014-103.

A **public hearing** concerning this proposal will be held on Friday, August 8, 2014, at 10:00 A.M. at:

New Jersey Department of Environmental Protection
First Floor Hearing Room
401 East State Street
Trenton, New Jersey

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

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<http://www.nj.gov/dep/where.htm>.

Submit comments by September 5, 2014, electronically at <http://www.nj.gov/dep/rules/comments>. Each comment should be identified by the applicable N.J.A.C. citation, with the commenter's name and affiliation following the comment. The Department of Environmental Protection (Department) encourages electronic submittal of comments. In the alternative, comments may be submitted on paper to:

Alice A. Previte, Esq.
Attention: DEP Docket Number 04-14-15
Office of Legal Affairs
Department of Environmental Protection
401 East State Street, 7th Floor
Mail Code 401-04L
P.O. Box 402
Trenton, New Jersey 08625-0402

The rule proposal may be viewed or downloaded from the Department's website at <http://www.nj.gov/dep/rules>.

The agency proposal follows.

Summary

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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.

In accordance with the order of the Superior Court of New Jersey, Appellate Division, *In re Regional Greenhouse Gas Initiative (RGGI)*, Docket No. A-4878-11T4 (App. Div. March 25, 2014) (*In re RGGI*), the Department proposes to repeal the CO₂ Budget Trading Program rules at N.J.A.C. 7:27C, and to repeal or delete related provisions of the Air Pollution Control rules at N.J.A.C. 7:27-22, Operating Permits, and the Air Administrative Procedures and Penalties, N.J.A.C. 7:27A. The rules to be repealed and provisions to be deleted are no longer necessary because New Jersey withdrew from participation in the Regional Greenhouse Gas Initiative (RGGI), for which the rules were promulgated.

In December 2005, New Jersey's then-Governor signed a memorandum of agreement with the governors of six other states (Connecticut, Delaware, Maine, New Hampshire, New York, and Vermont), agreeing to take legislative and regulatory action to implement a regional carbon dioxide (CO₂) budget trading program. (Maryland, Massachusetts, and Rhode Island signed the memorandum of agreement in 2007.) (These 10 states are referred to collectively as RGGI states.) The memorandum called for the creation of a regional organization to assist and coordinate the trading program. The regional organization came to be known as RGGI. Legislation authorizing, but not mandating, the State's participation in RGGI became effective in 2008 (N.J.S.A. 26:2C-45 et seq.), and in the same year the Department promulgated the CO₂ Budget Trading

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Program rules, N.J.A.C. 7:27C, to implement New Jersey's component of the trading program. (40 N.J.R. 3792(a) and 6541(b)). The CO₂ Budget Trading Program rules were never intended to create a stand-alone program within New Jersey, independent of RGGI.

The CO₂ Budget Trading Program is a cap and trade program, which is a market-based approach used to control pollution by providing economic incentives for achieving reductions in CO₂ emissions from power plants. The RGGI states established a regional emissions cap, which was then apportioned among the participating states. RGGI issued CO₂ allowances to each participating state in an amount equivalent to each state's emissions cap, thereby limiting total emissions among participants to the regional cap. Each allowance represented the right to emit or discharge one ton of CO₂. The CO₂ Budget Trading Program rules codified the limit for New Jersey sources. The rules required CO₂ budget sources to hold allowances equivalent to their emissions. The vast majority of the allowances were distributed through quarterly, regional CO₂ auctions, which were the main platform where CO₂ budget sources could purchase the CO₂ allowances. The CO₂ Budget Trading Program was designed to facilitate the auction or sale of the majority of the CO₂ allowances. Any CO₂ allowances not subject to auction or sale were directly allocated to cogeneration units meeting certain efficiency criteria, or were retired to support the functioning of the voluntary renewable energy market, as provided in the rules.

The first three-year control period of the regional CO₂ budget trading program ran from January 1, 2009 through December 31, 2011. During this time, the Department and New Jersey sources participated in 14 regional auctions and administered yearly fixed-

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price CO₂ allowance sales to CO₂ budget sources (primarily power plants, as discussed below) meeting the criteria in the CO₂ Budget Trading Program rules.

In May 2011, Governor Christie announced that the State would withdraw from RGGI by the end of 2011, which coincided with the end of the first control period of the regional CO₂ budget trading program. Consistent with the Governor's announcement, New Jersey formally notified the RGGI states on November 29, 2011, that it was withdrawing from RGGI and would no longer participate as of January 1, 2012.

(http://www.rggi.org/docs/Documents/NJ-Statement_112911.pdf.) The Department posted a notice to that effect on its website, explaining that because New Jersey was a participant in RGGI through the first control period (2009 through 2011), budget sources in New Jersey remained subject to the CO₂ Budget Trading Program rules for only this three-year control period. The budget sources would not be subject to compliance with CO₂ Budget Trading Program rules for control periods that commenced on or after January 1, 2012. Thus, New Jersey and CO₂ budget sources within New Jersey no longer participate in RGGI.

New Jersey's CO₂ Budget Trading Program rules, N.J.A.C. 7:27C, applied to large, fossil fuel-fired electricity generating units (25 MW or larger) in the State, referred to as CO₂ budget units. A CO₂ budget source consists of one or more CO₂ budget units. There were 40 such sources in the State that were subject to the cap-and-trade provisions and reporting provisions of the rules. One additional source was subject only to the reporting requirements, because it fell within the exemption provisions of the rules. Each of the 40 non-exempt CO₂ budget sources was required to have sufficient CO₂ allowances available to cover the amount of its reported CO₂ emissions for the three-year control

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period within two months after the end of a control period, that is, by March 1 of the succeeding year. Because New Jersey withdrew from the RGGI program as of the end of the first control period, the State's 40 non-exempt CO₂ budget sources were required to have sufficient allowances to cover their CO₂ compliance obligations for only the first control period, and each of these sources complied with that obligation.

The CO₂ Budget Trading Program rules contain reporting requirements for both non-exempt and exempt sources, which requirements extended beyond the State's withdrawal from RGGI. The rules required CO₂ budget sources to submit reports in 2012 that related to activities that took place on or before December 31, 2011. The reporting requirements allowed the Department to ensure that the CO₂ budget sources complied with the CO₂ Budget Trading Program rules during the first control period. Each of the State's sources complied with the reporting requirements in a timely manner.

On March 25, 2014, the Superior Court of New Jersey, Appellate Division, issued an opinion in *In re RGGI* and noted that the appellants "do not challenge the legality of New Jersey's withdrawal from RGGI." (*In re RGGI*, Slip op. at 11.) With respect to the CO₂ Budget Trading Program rules, the Court recognized that "there can be little doubt...that they were intended to enable New Jersey's participation in RGGI, rather than to establish a stand-alone carbon dioxide cap-and-trade program in New Jersey." (*In re RGGI*, Slip op. at 12). However, the Court also acknowledged that "the Trading Program regulations are worded quite broadly and can be read to require action by the Department absent participation in a regional greenhouse program." (*In re RGGI*, Slip op. at 12). The Court therefore remanded the matter to the Department, directing the Department to take the necessary action under the New Jersey Administrative Procedure Act (APA) to

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formally repeal the CO₂ Budget Trading Program rules, or amend the rules to provide that they are applicable only when New Jersey is a participant in a regional or other established greenhouse gas program. (*In re RGGI*, Slip op. at 13). The Court ordered the Department to begin the APA process to repeal or amend the CO₂ Budget Trading Program rules, in accordance with N.J.S.A. 52:14B-4, within 60 days. (*In re RGGI*, Slip op. at 13). Accordingly, the Department is proposing to repeal the CO₂ Budget Trading Program rules at N.J.A.C. 7:27C, and related provisions of N.J.A.C. 7:27-22 and 7:27A, as the Department never intended the CO₂ Budget Trading Program rules to create a stand-alone program within New Jersey, independent of RGGI.

Social Impact

The Department anticipates that the proposed repeals and amendments will have no social impact. These rules implemented the State's participation in RGGI, which ended December 31, 2011, and, therefore, the rules have not been applied since that time.

Economic Impact

The Department anticipates that the proposed repeals and amendments will have no economic impact. These rules implemented the State's participation in RGGI, which ended December 31, 2011, and, therefore, the rules have not been applied since that time.

Environmental Impact

The Department anticipates that the proposed repeals and amendments will have no environmental impact. These rules implemented the State's participation in RGGI,

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which ended December 31, 2011, and, therefore, the rules have not been applied since that time.

Federal Standards Statement

Executive Order No. 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 regulations that exceed any Federal standards or requirements to include in the rulemaking document a Federal standards analysis.

The CO₂ Budget Trading Program rules at N.J.A.C. 7:27C are not promulgated under the authority of, or in order to implement, comply with or participate in any program established under Federal law, or under a State statute that incorporates or refers to Federal law, Federal standards, or Federal requirements. Accordingly, no Federal standards analysis is required.

Jobs Impact

The Department anticipates that the proposed repeals and amendments will have no impact on the creation or retention of jobs in the State. These rules implemented the State's participation in RGGI, which ended December 31, 2011, and, therefore, the rules have not been applied since that time.

Agriculture Industry Impact

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The Department anticipates that the proposed repeals and amendments will have no impact on agriculture in the State. These rules implement the State's participation in RGGI, which ended December 31, 2011, and, therefore, the rules have not been applied since that time.

Regulatory Flexibility Statement

As required by the New Jersey Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq., the Department has evaluated any reporting, recordkeeping, and other compliance requirements that the proposed repeals and amendments would impose upon small businesses. The Regulatory Flexibility Act defines the term "small business" as any business that is a resident in this State, independently owned and operated, and not dominant in its field, and that employs fewer than 100 full-time employees. Based upon this definition, the Department does not believe any of the large stationary combustion units impacted by the CO₂ Budget Trading Program rules are owned or operated by small businesses since the program, by its nature, was designed to apply only to large fossil fuel-fired electricity generating units (25 MW or larger). Each of these units is owned or operated by a business that employs 100 or more employees full-time. Moreover, the rules proposed for repeal and amendment implemented the State's participation in RGGI, which ended December 31, 2011, and all sources have met the compliance and reporting requirements for the first control period. There are no further applicable compliance, recordkeeping, or reporting requirements in the rules. Accordingly, no regulatory flexibility analysis is required.

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Housing Affordability Impact Analysis

Pursuant to N.J.S.A. 52:14B-4, the Department has evaluated the proposed repeals and amendments to determine the impact, if any, on the affordability of housing. The Department does not anticipate that the proposed repeals and amendments will have an impact on the affordability of housing units or result in a change in the average costs associated with such housing, as the rules implemented the State's participation in RGGI, which ended December 31, 2011, and, therefore, the rules have not been applied since that time.

Smart Growth Development Impact

Pursuant to N.J.S.A. 52:14B-4, the Department has evaluated the proposed repeals and amendments to determine the impact, if any, on housing production in Planning Areas 1 or 2, or within designated centers, under the State Development and Redevelopment Plan. The Department does not anticipate that the proposed repeals and amendments will have an impact, as the rules implemented the State's participation in RGGI, which ended December 31, 2011, and, therefore, the rules have not been applied since that time.

Full text of the rules proposed for repeal may be found in the New Jersey Administrative Code at N.J.A.C. 7:27-22.28 and 7:27C.

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Full text of the proposed amendments follows (additions indicated in boldface **thus**; deletions indicated in brackets [thus]):

CHAPTER 27

AIR POLLUTION CONTROL

SUBCHAPTER 22. OPERATING PERMITS

7:27-22.16 Operating permit contents

(a)-(l) (No change.)

(m) [The operating permit shall contain all applicable requirements of the CO₂ budget trading program at N.J.A.C. 7:27C and 7:27-22.28. The operating permit shall contain sufficient monitoring, recordkeeping, and reporting requirements necessary to assure compliance with applicable requirements of the CO₂ budget trading program at N.J.A.C. 7:27C and 7:27-22.28.] **(Reserved)**

(n)-(t) (No change.)

7:27-22.28 (Reserved)

CHAPTER 27A

AIR ADMINISTRATIVE PROCEDURES

AND PENALTIES

SUBCHAPTER 3. CIVIL ADMINISTRATIVE PENALTIES AND REQUESTS FOR ADJUDICATORY HEARINGS

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7:27A-3.2 Definitions

The following words and terms, when used in this subchapter, have the following meanings unless the context clearly indicates otherwise. Unless otherwise specified below, all words and terms are as defined in N.J.S.A. 26:2C-2[,] and N.J.A.C. 7:27 [and N.J.A.C. 7:27C].

...

7:27A-3.5 Civil administrative penalty determination—general

(a)-(c) (No change.)

(d) The Department may assess a civil administrative penalty for a violation of any provision of N.J.A.C. 7:27 [or 7:27C] for which no penalty amount is specified under N.J.A.C. 7:27A-3.6 through 3.11. The Department shall base the amount of such a penalty assessment upon the following factors:

1.-2. (No change.)

(e)-(h) (No change.)

[(i) For violations of N.J.A.C. 7:27C, indicated by a continuous monitoring system or when a continuous monitoring system operates out of control or is out of service, the Department shall calculate penalties in accordance with N.J.A.C. 7:27A-3.10(u).]

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

(a)-(t) (No change.)

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[(u) The violations of N.J.A.C. 7:27C, whether the violation is minor or non-minor in accordance with (q) through (t) above, and the civil administrative penalty amounts for each violation are as set forth in the following Civil Administrative Penalty Schedule.

The numbers of the following paragraphs correspond to the numbers of the corresponding subchapter in N.J.A.C. 7:27C. The rule summaries (Class) 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.

CIVIL ADMINISTRATIVE PENALTY SCHEDULE

1. The violations of N.J.A.C. 7:27C-1, General Provisions, and the civil administrative penalty amounts for each violation are as set forth in the following table:

<u>Citation</u>	<u>Class</u>	Type	First	Second	Third	Fourth
		of	<u>Offense</u>	<u>Offense</u>	<u>Offense</u>	and Each
		<u>Violation</u>				Subsequent
						<u>Offense</u>
N.J.A.C. 7:27C-1.3(e)	Submit an exemption report	M	\$2,000	\$4,000	\$10,000	\$30,000
N.J.A.C. 7:27C-1.3(f)	Retain exemption records	M	\$2,000	\$4,000	\$10,000	\$30,000
N.J.A.C. 7:27C-1.3(g)	Submit and obtain a Title V	NM	\$10,000	\$20,000	\$50,000	\$50,000

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1.4(a) permit

N.J.A.C. 7:27C- Obtain a CO ₂ budget permit	NM	\$10,000	\$20,000	\$50,000	\$50,000
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1.4(b)

N.J.A.C. 7:27C- Monitoring requirements	NM	\$10,000	\$20,000	\$50,000	\$50,000
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1.4(c)

N.J.A.C. 7:27C- Hold CO ₂ allowances	NM	\$10,000	\$20,000	\$50,000	\$50,000
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1.4(f)

N.J.A.C. 7:27C- Excess emissions in any	NM	\$2,000 ¹	\$4,000 ¹	\$10,000 ¹	\$30,000 ¹
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1.4(g) control period

N.J.A.C. 7:27C- Keep documents on site	M	\$2,000	\$4,000	\$10,000	\$30,000
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1.4(n)

N.J.A.C. 7:27C- Submit a compliance	M	\$2,000	\$4,000	\$10,000	\$30,000
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1.4(o) certification report

¹ For each ton of CO₂ emitted in excess of the CO₂ budget emissions limitation

2. The violations of N.J.A.C. 7:27C-2, CO₂ Authorized Account Representative of a CO₂ Budget Source, and the civil administrative penalty amounts for each violation are as set forth in the following table:

<u>Citation</u>	<u>Class</u>	Type	First	Second	Third	Fourth
		of	<u>Offense</u>	<u>Offense</u>	<u>Offense</u>	and Each

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		<u>Violation</u>				Subsequent
						<u>Offense</u>
N.J.A.C. 7:27C-2.1(b)	Select a CO ₂ authorized account representative	NM	\$10,000	\$20,000	\$50,000	\$50,000
N.J.A.C. 7:27C-2.1(f)	Submit a certified report	M	\$2,000	\$4,000	\$10,000	\$30,000
N.J.A.C. 7:27C-2.3(c)	Submit an account representative revision	M	\$2,000	\$4,000	\$10,000	\$30,000

3. (Reserved)

4. The violations of N.J.A.C. 7:27C-4, Compliance Certification, and the civil administrative penalty amounts for each violation are as set forth in the following table:

<u>Citation</u>	<u>Class</u>	Type	First	Second	Third	Fourth
			of	<u>Offense</u>	<u>Offense</u>	<u>Offense</u>
		<u>Violation</u>				Subsequent
						<u>Offense</u>
N.J.A.C. 7:27C-4.1(a)	Submit a certified report	M	\$2,000	\$4,000	\$10,000	\$30,000

5. The violations of N.J.A.C. 7:27C-5, CO₂ Allowance Allocations, and the civil administrative penalty amounts for each violation are as set forth in the following table:

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<u>Citation</u>	<u>Class</u>	Type	First	Second	Third	Fourth
		of	<u>Offense</u>	<u>Offense</u>	<u>Offense</u>	and Each
		<u>Violation</u>				Subsequent
						<u>Offense</u>
N.J.A.C. 7:27C- 5.2(c)2	Establish a general account	M	\$2,000	\$4,000	\$10,000	\$30,000
N.J.A.C. 7:27C-5.4(d)	Provide on-site access to records	M	\$2,000	\$4,000	\$10,000	\$30,000
N.J.A.C. 7:27C-5.4(d)	Provide false or misleading information	NM	\$500,000 ¹	Not Applicable ¹	Not Applicable ¹	Not Applicable ¹
N.J.A.C. 7:27C- 5.12(g)	Provide false or misleading information	NM	\$2,000	\$4,000	\$10,000	\$30,000

¹ The facility referenced in the sworn affidavit shall not be eligible to be certified as a dispatch agreement facility. In addition to these penalties, the court may assess against the violator the amount of any economic benefit accruing to the violator from the

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violation.

6. The violations of N.J.A.C. 7:27C-6, CO₂ Allowance Tracking System, and the civil administrative penalty amounts for each violation are as set forth in the following table:

<u>Citation</u>	<u>Class</u>	Type	First	Second	Third	Fourth
		of	<u>Offense</u>	<u>Offense</u>	<u>Offense</u>	and Each
		<u>Violation</u>				Subsequent
						<u>Offense</u>
N.J.A.C. 7:27C-6.5(d)	Submit a revised application	M	\$2,000	\$4,000	\$10,000	\$30,000
N.J.A.C. 7:27C-6.9(e)	Transfer required allowances	M	\$2,000	\$4,000	\$10,000	\$30,000

7. (Reserved)

8. The violations of N.J.A.C. 7:27C-8, Monitoring and Reporting, and the civil administrative penalty amounts for each violation are as set forth in the following table:

<u>Citation</u>	<u>Class</u>	Type	First	Second	Third	Fourth
		of	<u>Offense</u>	<u>Offense</u>	<u>Offense</u>	and Each
		<u>Violation</u>				Subsequent
						<u>Offense</u>

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N.J.A.C. 7:27C-8.1(a) and (d)	Monitoring requirements	NM	\$10,000	\$20,000	\$50,000	\$50,000
N.J.A.C. 7:27C-8.1(e) and(f)	Monitor, record and report data	NM	\$10,000	\$20,000	\$50,000	\$50,000
N.J.A.C. 7:27C-8.2(g)	Submit dates of certification	M	\$2,000	\$4,000	\$10,000	\$30,000
N.J.A.C. 7:27C-8.2(h)	Submit certification application	M	\$2,000	\$4,000	\$10,000	\$30,000
N.J.A.C. 7:27C-8.2(o)	Substitute data	NM	\$10,000	\$20,000	\$50,000	\$50,000
N.J.A.C. 7:27C-8.2(q)	Alternate Monitoring system	NM	\$10,000	\$20,000	\$50,000	\$50,000
N.J.A.C. 7:27C-8.3(a)	Substitute data	NM	\$10,000	\$20,000	\$50,000	\$50,000
N.J.A.C. 7:27C-8.4	Written notice	M	\$2,000	\$4,000	\$10,000	\$30,000
N.J.A.C. 7:27C-8.5(a), (b), (c) and (d)	Recordkeeping and reporting	M	\$2,000	\$4,000	\$10,000	\$30,000
N.J.A.C. 7:27C-8.7(a) and (b)	Submit report	M	\$2,000	\$4,000	\$10,000	\$30,000
N.J.A.C. 7:27C-8.8(a), (b), (c), (d), (e) and (f)	Submit additional data	M	\$2,000	\$4,000	\$10,000	\$30,000
N.J.A.C. 7:27C-8.8(g)	Quality control	M	\$2,000	\$4,000	\$10,000	\$30,000

NOTE: THIS IS A COURTESY COPY OF THIS RULE PROPOSAL. THE OFFICIAL VERSION WILL BE PUBLISHED IN THE JULY 7, 2014 NEW JERSEY REGISTER. SHOULD THERE BE ANY DISCREPANCIES BETWEEN THIS TEXT AND THE OFFICIAL VERSION OF THE PROPOSAL, THE OFFICIAL VERSION WILL GOVERN.

activities							
N.J.A.C. 7:27C-8.8(h)	Retain data	M	\$2,000	\$4,000	\$10,000	\$30,000	
N.J.A.C.7:27C-8.8(i)	Submit annual report	M	\$2,000	\$4,000	\$10,000	\$30,000	

9. (Reserved)

10. The violations of N.J.A.C. 7:27C-10, CO₂ Emissions Offset Projects, and the civil administrative penalty amounts for each violation are as set forth in the following table:

<u>Citation</u>	<u>Class</u>	Type	First	Second	Third	Fourth
		of	<u>Offense</u>	<u>Offense</u>	<u>Offense</u>	and Each
		<u>Violation</u>				Subsequent
						<u>Offense</u>
N.J.A.C. 7:27C-10.3(j)	Access agreement	M	\$2,000	\$4,000	\$10,000	\$30,000
N.J.A.C. 7:27C-10.11(e)	Submit monitoring and verification report]	M	\$2,000	\$4,000	\$10,000	\$30,000