

IN PRACTICE

ENVIRONMENTAL

The Regulatory Next Steps in Gov. Murphy's 'PACT' to Address Climate Change

NJDEP is currently drafting rules to undertake comprehensive regulatory reform to reduce greenhouse gas emissions and address climate impacts within the state.

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The New Jersey Department of Environmental Protection (NJDEP) recently held virtual meetings, informing the public of the regulations it seeks to implement as part of the Protecting Against Climate Threats initiative ("NJ PACT"). This initiative was created after Governor Murphy signed Executive Order 100 in January 2020, tasking NJDEP to undertake comprehensive regulatory reform to reduce greenhouse gas emissions (GHG) and address climate impacts within the state.

To achieve these goals, NJDEP is currently drafting rules on: 1) flood control measures; 2) electric generating units; 3) commercial and industrial boilers; 4) liquid heavy fuels; 5) medium- and heavy-duty vehicles; and 6) cargo equipment. NJDEP seeks to formally propose these rules within the April 2021 New Jersey Register. Each of these proposed rules will have a separate public hearing and comment period.

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1. Proposed Resilient Environments and Landscapes (REAL) Rule Amendments

NJDEP is proposing amendments to the REAL rules to address the rising sea level, chronic flooding, and extreme weather. NJDEP is still in the stakeholder process, holding informational sessions on their broad proposals and seeking public input to draft rules on the following:

Inundation Risk Zone. NJDEP is establishing a new regulatory area known as the "inundation risk zone." This zone will be inundated with tidal waters permanently by 2100, even though now it is currently dry land. At this time, the inundation risk zone has not been finalized and it is unclear how this new "zone" will impact permitting and compliance programs.

- **Elevation:** Under the rules, new buildings must be elevated to the new Climate Adjusted Flood Elevation (CAFE) plus one foot. It is proposed that non-residential buildings can be flood-proofed to the CAFE plus one foot if elevating the building is impracticable.
- **Hardship Exception:** New buildings within the "inundation risk zone" will require the developer to establish a hardship exception, necessitating the applicant to prove that there is no other reasonable use for location and that

preventing construction of a new building within this zone would constitute an exceptional and undue hardship.

Adjustment of Flood Hazard Areas.

NJDEP proposes to adjust FEMA's 100-year floodplain to make it reflect current trends in the rising sea level, by redefining the tidal and fluvial flood hazard areas. A CAFE will expand the tidal area by five additional feet to FEMA's current 100-year flood elevation. For fluvial areas, NJDEP is considering two different options:

- Calculating the highest of either FEMA's 500-year flood elevation plus one foot, NJDEP's flood hazard area design flood elevation plus two feet, or FEMA's 100-year flood elevation plus three feet; or
- Calculating the flood hazard area using hydrologic and hydraulic calculations based on 125% of the 100-year discharge.

National Flood Insurance Program (NFIP).

NJDEP seeks to amend the regulations to better align with the NFIP. These proposals include:

- Automatically pausing a permit and requiring the applicant to reinstate it if work within a flood hazard area is not

commenced within 180 days of approval.

- Clarifying the regulations to ensure that a permit will not be issued if it violates minimum NFIP standards.
- Ensuring that buildings approved under the hardship exception still meet the minimum NFIP standards or comply with FEMA's waiver process.

Renewable Energy. Amending the Coastal Zone Management Rules to encourage renewable energy, such as offshore wind and solar energy.

Permits-by-Registration. NJDEP is proposing to modify some "permits-by-rules" with a "permit-by-registration" system. This rule creates an online permitting portal, which would allow NJDEP to track climate impacts of these permits. It is unclear which permits will be modified.

Environmentalists have criticized that these rules allow developers to build at their own risk in flood prone areas and fail to adequately address climate impacts. Opponents assert the sea-level forecasts are based on hypothetical information based too far in the future. Others have claimed these proposals may damage the economy by making it harder to develop flood-prone areas. NJDEP asserts the regulations will not prohibit development within the new inundation risk zone; instead, the regulations will require developers to assess how a proposed property or road will be affected by the rising sea level or flooding. These proposals are anticipated to be published within the first quarter of 2021.

2. Proposed Rules for Stationary Air Sources

Governor Murphy also seeks to achieve 100% carbon neutral power generation by 2050. In order to accomplish this feat, NJDEP is formally proposing regulations on stationary air sources as follows:

EGUs. NJDEP is proposing to implement rules establishing carbon dioxide emissions limits on existing and new fossil-fuel fired electric generating units (EGUs). Existing EGUs will have an efficiency standard that will implement emissions limits, regardless of fuel type, that ratchets down over time.

In contrast, the new base loads EGUs will limit CO₂ emissions based on the rate achieved by most efficient combined cycle. Additionally, NJDEP seeks to introduce a new non-base load standard for modified EGUs that will be reviewed on a case-by-case basis. As nuclear power plants do not produce greenhouse gases, they are not within the purview of this proposed new rule.

Commercial and Industrial Boilers. This rule seeks to phase out small commercial and industrial fossil-fuel based boilers, those under 5 million British thermal units (MMBTu), by imposing conditions for permit approvals as well as requiring boiler fleet owners to submit to a boiler fleet report and replace small fossil-fuel combustion boilers with non-fossil fuel boilers.

Heavy Fuel Sales Ban. NJDEP is drafting a regulation to ban No. 4 and No. 6 liquid heavy fuels. This rule will provide an exception for marine vessels.

Opponents have expressed concerns over the cost of implementation and have claimed that impactful change would be better suited through the legislative process rather than by regulation. These rules will be proposed in the April 2021 New Jersey Register.

3. Proposed Rules for Mobile Air Sources

Governor Murphy also seeks to achieve an 80% reduction in GHG emissions by 2050. As transportation accounts for 42% of New Jersey's total GHG emissions, and diesel emissions pose a higher cancer risk than any other air toxin emitted within the state, NJDEP's priority has been on drafting regulations to reduce mobile air sources. New Jersey is not alone in seeking to reduce transportation-related emissions. In July 2020, New Jersey and 14 other states signed on to the Multi-State Medium- and Heavy-Duty Zero Emission Vehicle Memorandum of Understanding (MOU), which commits the signatories to achieve 100% zero-emission vehicles by 2050.

NJDEP is pursuing "electrification" as the most cost-efficient way to meet the 80% reduction and is currently drafting rules on the following:

Advanced Clean Truck and Fleet Reporting. NJDEP is adopting by reference California's Advanced Clean Truck Rule, making it the first state to formally adopt this progressive regulation, which is focused on commercial vehicles.

- This rule imposes a manufacturer zero-emission phased-in sales requirement.
- Beginning with 2025 models, sales of Class 2b (delivery vans) to Class 8 (long haul tractor trailers) vehicles will incrementally increase and become more stringent until they reach the required percentage by 2035.
- This rule includes a New Jersey specific reporting requirement on shipment and shuttle services as well as their existing fleet operations.

Low NO_x Rule. NJDEP is formally adopting by reference California's Medium- and Heavy-Duty Vehicle Omnibus Rule.

Effective with 2025 models, this rule establishes stricter oxides of nitrogen (NO_x) limits on medium and heavy duty vehicles, which reduces the current NO_x standard of 20 grams per brake horsepower-hour (g/bhp-hr) to 0.050 g/bhp-hr.

It also includes longer warranty requirements on original parts to ensure future emissions controls are covered by the manufacturer, ensuring vehicles that are not transitioned to zero-emission will provide less damage to the environment.

Medium-Duty Vehicle Inspection. NJDEP is drafting a rule establishing formal inspection standards for Class 2b through Class 5 vehicles (such as large pickup trucks, step vans, and delivery trucks).

Currently, medium duty vehicles are "self-inspected," which requires owners to submit period reports to the Motor Vehicle Commission (MVC) to show that these vehicles are in compliance.

This new rule will require these vehicles to undergo the same inspection requirements as heavy duty vehicles.

NJDEP has asserted that these inspections are cost-effective, mitigate tampering, reduce health risks for populations already at an

increased risk from vehicle pollution, and ensure compliance with the Omnibus Rule.

This regulation will require the MVC to promulgate commentary rules to implement these proposed inspections.

Cargo Handling. NJDEP is adopting by reference California's diesel-powered fleet rule to achieve zero-emissions on cargo handling. This new rule will utilize a phased-in approach beginning in 2023 and requires all existing diesel cargo equipment to update to clean technology and meet the EPA's strictest Tier 4 standard in order to establish the lowest NOx. NJDEP seeks to fully electrify cargo handling equipment in future regulations.

Supporters have expressed a demand for zero-emission vehicles as well as noted there is a savings associated with the switch. Opponents have expressed concerns over costs and the potential supply chain issues with mass electrification, as electric vehicles require minerals and rare earth elements that are not currently mined within the United States. These rules will be proposed in the April 2021 New Jersey Register.

Conclusion

Many NJPACT regulatory changes will be taking place in 2021. As these regulatory proposals have the potential to impact development throughout the state, businesses will need to be mindful of any further rule developments affecting their industries. •