



September 5, 2014

*Via Electronic Mail (rulemakingcomments@dep.state.nj.us)*

Alice A. Previte, Esq.  
Office of Legal Affairs  
Department of Environmental Protection

Attention: NJDEP Docket Number 04-14-15

Re: Proposed Repeal of N.J.A.C. 7:27-22.28 and 7:27C, and Proposed Amendment to N.J.A.C. 7:27-22.16, 7:27A-3.2, 3.5 and 3.10.

Dear Ms. Previte:

On behalf of Sierra Club and its more than 17,000 New Jersey members, we submit the following comments on NJDEP Docket No. 04-14-15. The comments focus on the legal defects of the Department of Environmental Protection's (DEP) proposal to repeal and amend regulations<sup>1</sup> pursuant to the Global Warming Response Act and Global Warming Solutions Act, namely 1) DEP lacking the requisite statutory authority to repeal or amend the regulations, and 2) DEP failing to disclose the socio-economic impacts of its proposal.

**I. New Jersey's Global Warming Response and Solutions Acts Impose Non-Discretionary Duties on DEP to Administer a Cap-and-Trade Program to Achieve Specific Carbon Reduction Targets.**

The Global Warming Response Act (Response Act) imposes non-discretionary duties on DEP to establish a greenhouse gas (GHG) emissions reduction program limiting the level of in-state GHG emissions and GHG

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<sup>1</sup> Proposed repeals codified in N.J.A.C. 7:27-22.28 and 7:27C.  
Proposed amendments codified in N.J.A.C. 7:27-22.16 and 7:27A-3.2, 3.5, and 3.10.

emissions from electricity generated outside the State but consumed in the State.<sup>2</sup> The Global Warming Solutions Act (Solutions Act) imposes non-discretionary duties on DEP to administer a carbon dioxide (CO<sub>2</sub>) emissions allowance trading program.<sup>3</sup> In 2008, DEP promulgated implementing regulations, as required by the Response and Solutions Acts. DEP's proposal to repeal or amend some of those regulations exceeds the authority vested in DEP by the Legislature. In situations where agencies fail to fulfill their non-discretionary duties, judicial<sup>4</sup> and legislative<sup>5</sup> remedies are available.

## **II. DEP Lacks Authority to Repeal or Amend its Regulations and Doing So Contravenes DEP's Non-Discretionary Duties under the Response and Solutions Acts.**

DEP has not met the New Jersey Administrative Procedure Act's (APA) requirement that an agency repealing regulations demonstrate the "specific legal authority under which" its actions are authorized.<sup>6</sup> None of the statutes DEP cites grant it authority to repeal or amend regulations. Instead, DEP seems to rely on a bald claim that the "rules to be repealed and provisions to be deleted are no longer necessary because New Jersey withdrew" from RGGI.<sup>7</sup> Combined, the Acts reference RGGI exactly twice.<sup>8</sup> Neither Act conditions DEP's non-discretionary duties to administer CO<sub>2</sub> emissions allowance trading and to achieve certain CO<sub>2</sub> reductions on New Jersey's participation in RGGI. Further, the Superior Court, Appellate Division directed DEP to take "necessary action under the APA" because "the Trading Program regulations are worded quite broadly and can be read to require action by the Department absent participation in a regional greenhouse

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<sup>2</sup> N.J.S.A. 26:2C-37 through 44. *See e.g.*, N.J.S.A. 26:2C-41(a) (stating that DEP "shall adopt, pursuant to the [APA] rules and regulations establishing a greenhouse gas emissions monitoring and reporting program to monitor and report Statewide greenhouse gas emissions").

<sup>3</sup> N.J.S.A. 26:2C-45 through 57. *See e.g.*, N.J.S.A. 26:2C-47(a)(1) (requiring DEP to "take any measures necessary to sell, exchange, retire, assign, allocate, or auction any or all allowances that are created by, budgeted to, or otherwise obtained by the State in furtherance of any [GHG] emissions allowance trading program implemented to reduce or prevent emissions" of GHGs).

<sup>4</sup> *See In re Freshwater Wetlands Prot. Act Rules*, 180 N.J. 478, 489 (2004) (explaining that if administrative agency's regulation contravenes the statute which created it, the rule "will be set aside").

*See also Des Champs Laboratories, Inc. v. Martin*, 427 N.J. Super. 84, 107 (App. Div. 2012) (invalidating, as arbitrary, capricious and *ultra vires*, a DEP regulation that conflicted with terms and enumerated objectives of applicable statute).

<sup>5</sup> N.J. CONST. art. V, § 4, ¶ 6.

<sup>6</sup> N.J.S.A. 52:14B-4(a) & (a)(2) (stating that prior to any amendment or repeal, the agency "shall" provide "specific legal authority under which its adoption is authorized").

<sup>7</sup> *See* 46 N.J.R. 1510(a) (July 7, 2014) (claiming the rules are "no longer necessary" and claiming "authority" to repeal and amend is found in "N.J.S.A. 13:1B-3.e, 13:1D-9, and 26:2C-1 et seq., particularly 26:2C-45 et seq" but failing to identify any specific statutory language).

<sup>8</sup> *See* N.J.S.A. 26:2C-45 (legislative findings); 26:2C-46 (definitions).

program.”<sup>9</sup> Additionally, courts invalidate agency action when an agency fails to eliminate all reasonable doubt as to whether it possesses the requisite authority.<sup>10</sup>

**a. DEP Cannot Overcome New Jersey’s Strong Presumption Against Implied Rule Repeal Authority.**

Nothing in the Response and Solutions Acts suggests that the Legislature intended to grant DEP authority to repeal or amend its regulations, or for DEP to somehow decide on its own when to eschew its non-discretionary duties under the Acts. “Absent a statute or regulation authorizing the waiver of otherwise valid and enforceable administrative regulations, an agency generally should not waive its own duly-enacted regulations by disregarding them.”<sup>11</sup>

Similarly, when a new law is enacted and it conflicts with an existing law, the newer law does not simply trump the existing law. New Jersey courts impose upon the Legislature an even stronger presumption against an implied repeal. To overcome that strong presumption, the newer law must include “clear and compelling evidence of legislative intent, and such intent must be free from reasonable doubt.”<sup>12</sup> There is no new law that includes the requisite evidence for DEP to overcome the plain language of the Response and Solutions Acts.

**b. The Legislature Can, and Should, Impose Its Legislative Veto Authority with a Simple Majority Vote.**

The New Jersey Constitution grants authority to the Legislature to override DEP’s proposed amendments and repeals of the regulations with a simple majority vote.<sup>13</sup> The Senate has already introduced legislation finding DEP’s proposed amendments and repeals contrary to the Acts.<sup>14</sup>

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<sup>9</sup> *In re Regional Greenhouse Gas Initiative (RGGI)*, Not Reported in A.3d (2014).

<sup>10</sup> *See Matter of Closing of Jamesburg High Sch.*, 83 N.J. 540, 549 (1980) (explaining that where “reasonable doubt as to whether [a particular] power is vested in the administrative body, the power is denied”).

<sup>11</sup> *In re N.J.A.C. 7:1B-1.1 Et Seq.*, 431 N.J. Super. 100, 124, (App. Div. 2013) (quoting *Cnty. of Hudson v. Dep’t of Corr.*, 152 N.J. 60, 64, 703 A.2d 268 (1997)). *Cf. Commc’ns Workers of Am., AFL-CIO v. Christie*, 413 N.J. Super. 229, 272, (App. Div. 2010) (stating that an “executive order cannot bypass the Legislature and carry out what would be, in effect, an implied repealer of existing legislation”).

<sup>12</sup> *New Jersey Ass’n of Sch. Adm’rs v. Schundler*, 211 N.J. 535, 555-56 (2012) (internal quotes omitted)

<sup>13</sup> N.J. CONST. art. V, § 4, ¶ 6. *See also* N.J.S.A. 52:14B-4.1 (“Every rule hereafter proposed by a State agency shall be submitted by the Office of Administrative Law to the Senate and General Assembly within two business days of its receipt by the office, and the President of the Senate and the Speaker of the General Assembly shall immediately refer the proposed rule to the appropriate committee in each House”).

<sup>14</sup> 2014 New Jersey Senate Concurrent Resolution No. 125, Two Hundred Sixteenth Legislature (Introduced July 31, 2014).

### **III. DEP’s Failure to Make Any Attempt at Quantifying or Describing the Socio-Economic Impacts of its Proposal Violates the APA.**

When a state agency gives notice of a proposed rule<sup>15</sup> it must issue a statement describing the rule’s expected socio-economic impact.<sup>16</sup> DEP has failed to do so by stating in the proposed rule, without any supporting documentation, that DEP “anticipates that the proposed repeals and amendments will have no social impact,” “no economic impact,” and “no environmental impact.”<sup>17</sup>

DEP’s bald “no impact” claims deny the public an opportunity to meaningfully comment on its proposed actions. It is the Department’s burden to provide a sufficient record to allow the public to understand, among other things, how DEP’s proposed actions can be reconciled with the legislative findings underlying the Response and Solutions Acts. Notably, the Legislature found the Response Act to be in the “public interest” because climate change poses a “risk of catastrophic changes to the Earth’s ecosystems and environment” that may be “seriously detrimental to the ecosystems and environment,” and climate change may have “catastrophic” effects on “human, animal and plant life on Earth.”<sup>18</sup> The Legislative findings that preface the Solutions Act state “that any carbon dioxide emissions allowance trading program established in the State to reduce emissions of [GHGs] should provide both incentives to reduce emissions at their sources and funding or other consumer benefit incentives to reduce the demand for energy, which in turn would reduce the generation and emission of greenhouse gases.” The Legislature also stated that “funding consumer benefit purposes will result in reduced costs to New Jersey consumers, decreased energy use, decreased [GHG] emissions, and substantial and tangible benefits to the energy using business sector.”<sup>19</sup>

To meet its APA obligations, DEP must withdraw its proposal and duly disclose the socio-economic impacts of any new proposal to, at a minimum, account for:

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<sup>15</sup> See N.J.S.A. 52:14B-4.9 (any rule proposed by a State agency which revises, rescinds or replaces either (1) any proposed or existing rule or (2) any rule which has been suspended shall be considered as a new rule and shall be subject to the provisions of this act and the act to which it is a supplement).

<sup>16</sup> See N.J.S.A. 52:14B-4. See also N.J.A.C. 1:30-5.1(c)(3) (the Office of Administrative Law requires agencies proposing adoption of a rule to provide “[a]n economic impact statement which describes the expected costs, revenues, and other economic impacts upon governmental bodies of the State, and particularly any segments of the public proposed to be regulated”).

<sup>17</sup> 46 N.J.R. 1510(a); see also 40 N.J.R. 3816 through 3827 (DEP’s response to public comments regarding DEP’s original regulations, which refer to their socio-economic impacts).

<sup>18</sup> N.J.S.A. 26:2C-38.

<sup>19</sup> N.J.S.A. 26:2C-45.

- i. legislative findings in the Solutions and Response Acts;
- ii. proposed Federal Greenhouse Gas Regulation (EPA’s Clean Power Plan),<sup>20</sup>
- iii. reports by RGGI Member States and other expert analysts documenting the tremendous economic benefits;<sup>21</sup> and
- iv. admissions by the Board of Public Utilities that New Jersey’s energy efficiency programs are underperforming.<sup>22</sup>

### Conclusion

For the foregoing reasons, DEP must withdraw the proposed repeals and amendments until DEP can show that it has the specific legal authority for its proposed actions. Further, DEP must disclose the socio-economic impacts of its proposed actions to allow for meaningful public comment, as required by the APA.

Respectfully Submitted,

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<sup>20</sup> Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 79 Fed. Reg. 34829 (proposed June 18, 2014) (to be codified at 40 C.F.R. pt. 60).

<sup>21</sup> See *RGGI, Regional Investment of RGGI CO2 Allowance Proceeds, 2012* (Feb. 2014) available at <http://www.rggi.org/docs/Documents/2012-Investment-Report.pdf> (projecting RGGI investment returns of more than \$2 billion in lifetime energy bill savings to more than 3million participating households and more than 12,000 businesses; offsetting approximately 8.5m MWh of electricity generation; saving more than 37m mmBTU of fossil fuels; avoiding 8m short tons of CO2 pollution; powering \$700m investment in region’s energy future; and spurring 16,000 new job-years)).

<sup>22</sup> See New Jersey Office of Clean Energy, *2nd Revised CRA [Comprehensive Resource Analysis] Straw Proposal: Proposed Funding Levels FY14- FY17* (June 3, 2013) (“*2nd Revised CRA Straw Proposal*”), at 40 - 42 (recommending “thorough review of the electric and gas portfolio of programs be conducted to ascertain the reasons for this apparent under-performance.”).