

**Notice of Final-Omitted Rulemaking  
Department of Environmental Protection  
Environmental Quality Board  
25 Pa. Code Chapters 121, 129 and 145  
(Clean Air Interstate Rule - Repeal)**

**Order**

The Environmental Quality Board (EQB or Board) hereby amends Chapters 121, 129 and 145 (relating to general provisions; standards for sources; and interstate pollution transport reduction) pertaining to the Clean Air Interstate Rule (CAIR) and related amendments, as set forth in Annex A.

These amendments will repeal all changes to 25 Pa. Code Chapters 121, 129 and 145 made by the rulemaking of April 12, 2008 entitled Clean Air Interstate Rule (CAIR), except for the revision of Section 129.204(b)(2)(iv). These amendments will clarify that provisions of the State's NOx Budget Trading Program and related provisions codified before adoption of CAIR continue, consistent with the Commonwealth's approved state implementation plan (SIP).

Notice of proposed rulemaking is omitted under section 204 (3) of the act of July 31, 1968, P.L. 769, No. 240 (45 P.S. §1204 (3)). Paragraph (3) provides that an agency may omit the notice of proposed rulemaking if the agency for good cause finds that notice of proposed rulemaking procedure is in the circumstances impracticable, unnecessary, or contrary to the public interest. Omission of notice of proposed rulemaking is appropriate because the notice of proposed rulemaking procedure specified in sections 201 and 202 of the Commonwealth Documents Law (45 P.S. §§1201 and 1202) is, in this instance, impracticable, unnecessary and contrary to the public interest. The CAIR model regulations adopted by the U.S. Environmental Protection Agency (EPA) and incorporated by reference in the Pennsylvania regulations have been vacated by Federal court order, necessitating prompt repeal in order to avoid lost emission reductions, undue confusion and conflict with the Federal court decision and the Commonwealth's Federally-approved state implementation plan (SIP).

These amendments were adopted by order of the EQB at its meeting of

\_\_\_\_\_.

**A. Effective Date**

These amendments are effective upon publication in the *Pennsylvania Bulletin*.

**B. Contact Persons and Information**

For further information contact Randy Bordner, Chief, Stationary Sources Section, Bureau of Air Quality, P.O. Box 8468, Rachel Carson State Office Building, Harrisburg, PA 17105-8468, (717) 772-3921 or Kristen Campfield Furlan, Assistant Counsel, Bureau of Regulatory Counsel, P.O. Box 8464, Rachel Carson State Office Building, Harrisburg, PA 17105-8464, (717) 787-7060. Persons with a disability may use the AT&T Relay Service by

calling 1-800-654-5984 (TDD users) or 1-800-654-5988 (voice users). This regulation is available electronically through the DEP Web site (<http://www.depweb.state.pa.us>).

### **C. Statutory Authority**

The final-omitted rulemaking is being made under the authority of section 5 of the Air Pollution Control Act (APCA) (35 P.S. §4005). Section 5(a) of the APCA grants the Board the authority to adopt rules and regulations for the prevention, control, reduction and abatement of air pollution in this Commonwealth.

### **D. Background of the Amendments**

This final-omitted rulemaking will repeal all changes to 25 Pa. Code Chapters 121, 129 and 145 made by the rulemaking of April 12, 2008, entitled Clean Air Interstate Rule (CAIR), 38 Pa.B. 1705, except for the revision of Section 129.204(b)(2)(iv). By repealing those amendments, this final-omitted rulemaking will ensure that provisions of the Commonwealth's NOx Budget Trading Program and related provisions codified before the Commonwealth's adoption of CAIR are to continue, consistent with the court's July 11, 2008 *vacatur* of CAIR and with the Commonwealth's approved SIP.

The Commonwealth's April 12, 2008 Clean Air Interstate Rule (CAIR) amendments (see 38 Pa.B. 1705) adopted and incorporated by reference the EPA's CAIR NOx Annual Trading Program and CAIR NOx Ozone Season Trading Program model rules as a means of mitigating the interstate transport of fine particulates (PM<sub>2.5</sub>) and NOx. The amendments also adopted and incorporated by reference the EPA's CAIR Sulfur Dioxide (SO<sub>2</sub>) Trading Program model rules as a means of mitigating the interstate transport of PM<sub>2.5</sub> and SO<sub>2</sub>.

The April 12, 2008 amendments also made minor changes to the requirements applicable to small sources of NOx in the five-county Philadelphia area. The amendments required those sources to surrender CAIR NOx annual allowances and CAIR NOx Ozone Season allowances rather than NOx Budget Trading Program allowances if the sources' NOx emissions exceeded their NOx emission limits beginning in 2009. A similar change was made for NOx emissions from large stationary internal combustion engines and Portland cement kilns that are not subject to the NOx Budget Trading Program but are subject to the NOx SIP Call. (See description of NOx SIP Call, below.)

The April 12, 2008 CAIR amendments also addressed the transitioning of NOx allowance allocations, NOx emission limitations and NOx monitoring requirements from the NOx Budget Trading Program to CAIR and addressed certain compliance issues. The amendments established requirements for non-electric generating units (non-EGUs) that were already subject to the NOx Budget Trading Program, including new non-EGUs, and also for electric generating units (EGUs) that were exempt from CAIR but were subject to the NOx Budget Trading Program.

The April 12, 2008 amendments provided that the Commonwealth's NOx Budget Trading Program budgets are to be retired as of January 1, 2009 and that the NOx Budget

Trading Program allowances already allocated for 2009 or later are terminated. CAIR budgets and allowances were to be used in their stead.

On July 11, 2008, the Federal Court of Appeals for the District of Columbia Circuit ruled that the CAIR promulgated by the EPA was “fundamentally flawed” and vacated it. The court’s decision rendered the Department’s April 12, 2008 regulatory amendments meaningless and unreasonable to implement. In addition, the court stated that the NO<sub>x</sub> SIP Call continues in the absence of the CAIR, since EPA terminated the program only as part of the now vacated CAIR rulemaking.

The NO<sub>x</sub> SIP Call was promulgated in 1998. In it, EPA imposed seasonal NO<sub>x</sub> reduction requirements on 22 states and the District of Columbia, in order to reduce interstate transport of precursors for both the 1-hour and 8-hour ozone National Ambient Air Quality Standards (NAAQS). See 63 FR 57356 (October 27, 1998). In response to the EPA’s NO<sub>x</sub> SIP Call, the Commonwealth adopted the NO<sub>x</sub> Budget Trading Program in Chapter 145, Subchapter A (relating to NO<sub>x</sub> Budget Trading Program), on September 23, 2000 (30 Pa.B. 4899), and adopted rules for Portland cement kilns and large stationary internal combustion engines on December 11, 2004 (34 Pa.B. 6509). States subject to the NO<sub>x</sub> SIP Call, including the Commonwealth, submitted SIP revisions incorporating the NO<sub>x</sub> SIP Call requirements. The EPA approved the Commonwealth’s SIP revisions on August 21, 2001 (66 FR 43795) and September 29, 2006 (71 FR 57428).

On April 25, 2005, the EPA made national findings that states had failed to submit the required SIPs to address interstate transport with respect to the PM<sub>2.5</sub> and 8-hour ozone NAAQS. 70 Fed. Reg. 21,147 (Apr. 25, 2005). Publication of the EPA’s findings started a 2-year time clock under section 110(c)(1) of the Clean Air Act (CAA), 42 U.S.C. § 7410(c)(1), for publication of a Federal implementation plan (FIP) for any state that failed to submit a SIP approved by the EPA that satisfies the interstate transport requirements of CAA section 110(a)(2)(D)(i) within the 2 years.

The EPA adopted the CAIR in 2005. The EPA’s CAIR included model rules for a 28-state and District of Columbia emission trading program to reduce the interstate transport of nitrogen oxides (NO<sub>x</sub>) and sulfur dioxide (SO<sub>2</sub>). 70 FR 25162 (May 12, 2005), as amended 71 Fed. Reg. 25288 (Apr. 28, 2006), 71 Fed. Reg. 25328 (Apr. 28, 2006), 71 Fed. Reg. 74792 (Dec. 13, 2006) and 72 Fed. Reg. 55657 (Oct. 1, 2007).

The EPA issued a FIP for each State covered by the CAIR on April 28, 2006 (71 Fed. Reg. 25,328). The FIPs were designed to regulate EGUs in the affected States and to achieve the emission reduction requirements established by the CAIR until States have approved SIPs to achieve the reductions. As the control requirement for the FIPs, the EPA adopted the model trading rules provided in the CAIR, with minor changes to account for Federal rather than State implementation.

The EQB adopted the Pennsylvania CAIR and related amendments on April 12, 2008, incorporating by reference the EPA’s CAIR model rules. The Department submitted the

Commonwealth's CAIR and related amendments to the EPA for approval as a revision to the Commonwealth's SIP, but the EPA did not act on the CAIR SIP submittal.

The Department is repealing the amendments made in the April 12, 2008 CAIR rulemaking in response to the Federal court's July 11, 2008 decision, in order to avoid lost emission reductions, undue confusion and conflict with the court decision and the Commonwealth's Federally-approved SIP.

By repealing the amendments made in the April 12, 2008 rulemaking and returning the regulations to their previous form by January 1, 2009, this final-omitted rulemaking will help ensure that the NOx Budget Trading Program already in the Commonwealth's approved SIP can continue to be implemented effectively in Pennsylvania. The rulemaking will ensure that the NOx Budget Trading Program allowances that the April 12, 2008 rulemaking terminated beginning January 1, 2009 will instead continue in full force and effect. Those allowances were allocated in 2005, for the 2008 through 2012 control periods. *See* 35 Pa.B. 1714 (March 12, 2005). In the April 12, 2008 CAIR rulemaking, the Department terminated the allowances for 2009 through 2012 based on the understanding that the EPA would no longer administer the NOx SIP Call beginning 2009, as EPA would be administering CAIR instead. The Department also noted that EPA had already allocated CAIR NOx allowances to EGU owners and operators under the FIP to replace the NOx SIP Call allowances for 2009. 25 Pa.B. 1707-08. Based on the Federal court's July 11, 2008 decision, however, CAIR is vacated, the CAIR FIP is vacated, the NOx SIP Call continues, and EPA is expected to resume administering the NOx SIP Call beginning 2009. NOx allowances issued under the NOx SIP Call will, therefore, continue uninterrupted as the valid currency as allocated under the NOx Budget Trading Program in 2005 for the 2009 through 2012 control periods.

This rulemaking will repeal the transition provisions for transitioning from the NOx Budget Trading Program to CAIR and will assure owners and operators of certain boilers, stationary combustion turbines and stationary internal combustion engines in the five-county Philadelphia area, as well as owners and operators of Portland cement kilns and large stationary internal combustion engines statewide, of the flexibility to surrender NOx Budget Trading Program allowances as a compliance strategy.

This final-omitted rulemaking will retain a clarification made in the April 12, 2008 rulemaking to § 129.204 (relating to emission accountability) regarding alternative calculation and recordkeeping procedures for the calculation of actual emissions from small sources of NOx in the five-county Philadelphia area, since this clarification was unrelated to CAIR.

#### **E. Summary of Changes to the Proposed Rulemaking**

This final-omitted rulemaking deletes the definition in section 121.1 (relating to definitions) of "vintage or vintage year".

This final-omitted rulemaking restores the language of sections 129.201, 129.202 and 129.204 (relating to boilers; and stationary combustion turbines; and emission accountability) to the SIP-approved language that preceded the April 12, 2008 rulemaking.

This final-omitted rulemaking deletes the transition provisions in section 145.8 (relating to transition to CAIR NOx trading programs).

This final-omitted rulemaking restores the language of sections 145.113 and 145.143 (relating to standard requirements; and standard requirements) to the SIP-approved language that preceded the April 12, 2008 rulemaking.

This final rulemaking reserves and deletes 25 Pa. Code Chapter 145, Subchapter D in its entirety.

## **F. Benefits, Costs and Compliance**

### **Benefits**

The citizens of the Commonwealth and the regulated community will benefit from this rulemaking. The citizens will benefit because having the NOx emissions cap during the ozone season will help reduce air pollution. The owners and operators of EGUs and non-EGUs will benefit because they will continue to receive NOx allowances under the NOx Budget Trading Program.

### **Compliance Costs**

This rulemaking will not require additional costs for compliance. The Court's *vacatur* of the EPA's CAIR generated the costs associated with eliminating the CAIR program. Repealing the Pennsylvania CAIR rulemaking will facilitate prevention of further losses, possibly exceeding \$26 million a year based on current prices, that would occur if the NOx Budget Trading Program allowances were not utilized

### **Compliance Assistance Plan**

The Department will ensure that regulated entities are aware that the NOx Budget Trading Program is the operative program in Pennsylvania through the Department's website, information provided to industry associations and direct contact.

### **Paperwork Requirements**

No additional paperwork will be required as a result of this rulemaking. The final-omitted rulemaking will remove the Pennsylvania CAIR recordkeeping and reporting requirements and restore the regulatory requirements for recordkeeping and reporting under the NOx Budget Trading Program, which sources already follow and which are consistent with the Commonwealth's Federally-approved SIP.

## **G. Sunset Review**

This regulation will be reviewed in accordance with the sunset review schedule published by the Department to determine whether the regulation effectively fulfills the goals for which it was intended.

## **H. Regulatory Review**

Under section 5(f) of the Regulatory Review Act (71 P. S. § 745.5(f)), on \_\_\_\_\_, the Department submitted a copy of this final-omitted rulemaking with notice of proposed rulemaking omitted to the Independent Regulatory Review Commission (IRRC) and the Chairpersons of the House and Senate Environmental Resources and Energy Committees. On the same date, the Department also submitted this rulemaking to the Office of Attorney General for review and approval under the Commonwealth Attorneys Act (71 P.S. §§ 732-101-732-506). In addition to the final rulemaking, IRRC and the Committees were provided with a copy of a detailed regulatory analysis form prepared by the Department.

Under section 5.1(j.2) of the Regulatory Review Act, on \_\_\_\_\_, the final-omitted rulemaking was deemed approved by the House and Senate committees. Under section 5.1(e) of the Regulatory Review Act, IRRC met on \_\_\_\_\_, and approved the final-omitted rulemaking.

## **K. Findings of the Board**

The Board finds that:

- (1) The amendments as set forth in Annex A are appropriate to implement the requirements of the NOx SIP Call.
- (2) Use of the omission of notice of proposed rulemaking procedure is appropriate because the notice of proposed rulemaking procedure specified in sections 201 and 202 of the Commonwealth Documents Law (45 P.S. §§1201 and 1202) is, in this instance, impracticable, unnecessary and contrary to the public interest. The Federal regulations incorporated by reference in the Pennsylvania regulations have been vacated by Federal court order, necessitating prompt repeal.
- (3) The good cause to use the omission of the notice of proposed rulemaking procedures is also based upon the need to restore several key elements of the existing NOx Budget Trading Program that CAIR regulations amended to help transition to the CAIR program. Now that CAIR has been vacated and the existing NOx Budget Trading Program has been continued, the Board needs to quickly restore the NOx Budget Trading Program regulations to their prior form by the end of the year to allow for continued implementation of this program.
- (4) These amendments are necessary and appropriate for administration and enforcement of the authorizing acts identified in section C of this order and in the public interest.

(5) These amendments are necessary for the Commonwealth to achieve and maintain ambient air quality standards and to satisfy related Clean Air Act requirements.

**L. Order of the Board**

The Board, acting under the authorizing statutes, orders that:

(a) The regulations of the Department of Environmental Protection, *25 Pennsylvania Code*, Chapters 121, 129 and 145 are amended by amending §§ 121.1, 129.201, 129.202, 129.204, 145.8, 145.113, 145.143; and by reserving and deleting Chapter 145, Subchapter D to read as set forth in Annex A, with ellipses referring to the existing text of the regulations.

(b) The Chairperson of the Board shall submit this order and Annex A to the Office of General Counsel and the Office of Attorney General for review and approval as to legality and form, as required by law.

(c) The Chairperson of the Board shall submit this order and Annex A to the Independent Regulatory Review Commission and the Senate and House Environmental Resources and Energy Committees as required by the Regulatory Review Act.

(d) The Chairperson of the Board shall certify this order and Annex A and deposit them with the Legislative Reference Bureau, as required by law.

(e) This order shall take effect immediately.

BY:

JOHN HANGER  
Acting Chairman  
Environmental Quality Board