



## MULTIMEDIA: ENVIRONMENTAL BULLETIN

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### Inside:

US EPA's Numeric Nutrient Criteria for Florida: A Hurricane on the Horizon? .....	1
Maximum Achievable Control Technology for Boilers and Process Heaters .....	2
Tick-Tock on TSCA Reform .....	4

### US EPA's Numeric Nutrient Criteria for Florida: A Hurricane on the Horizon?

By Brian J. Cross

In July 2008 a coalition of environmental groups sued US EPA alleging that the agency had failed to perform a nondiscretionary duty to set numeric nutrient criteria for Florida as required by the Clean Water Act.<sup>1</sup> In August 2009 the US EPA entered into a consent decree with the environmental groups in which it agreed to an expedited timetable for promulgating numeric nutrient criteria for Florida. In accordance with that consent decree, US EPA proposed numeric nutrient criteria for lakes and streams in January 2010.<sup>2</sup> US EPA's rules are required to be adopted

by October 2010. With respect to estuaries and coastal waters, US EPA must propose criteria by November 2011 and adopt them by early 2012. The rule, in its current form, has the potential to impede economic growth and curtail recovery for certain industries during one of the worst economic downturns since the Great Depression. Industries that may be particularly affected include municipal wastewater utilities, industrial wastewater dischargers and agricultural interests.

Florida currently has narrative nutrient criteria with regulations providing, "[i]n no case shall nutrient concentrations of a body of water be altered so as to cause an imbalance in natural populations of aquatic flora or fauna."<sup>3</sup> The nutrients at issue include nitrogen and phosphorus produced from stormwater runoff, municipal wastewater treatment, fertilization of crops and livestock manure, the burning of fossil fuels and vehicular emissions. High nitrogen and phosphorus loadings cause harmful algal blooms that can lead to reduced spawning grounds and nursery habitats for fish.

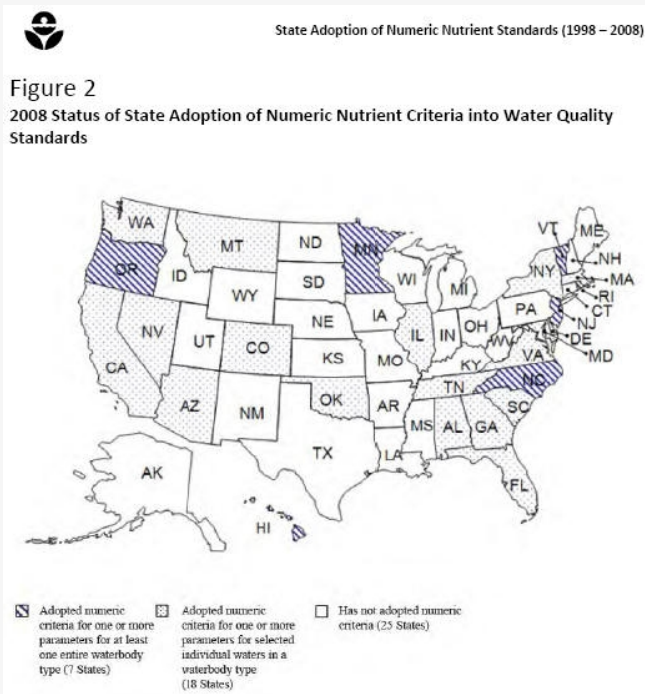
US EPA's proposed numeric nutrient criteria and the methodology used to create them are widely seen as a precursor of what is to come in other states. Currently, only seven states have numeric nutrient criteria covering one or

<sup>1</sup> *Florida Wildlife Federation, et. al. v. the EPA*, Case No. 4:08-CV-324-RH-WCS (N.D. Fla.).

<sup>2</sup> 75 Fed. Reg. 4173 (Jan. 26, 2010).

<sup>3</sup> Rule 62-302.530, Florida Administrative Code.

more nutrients for an entire waterbody category.<sup>1</sup> In addition, 25 states have not adopted any criteria for even a single waterbody, much less an entire category.<sup>2</sup> The figure below shows each state's status as of 2008.



[Source: US EPA, *State Adoption of Numeric Nutrient Standards 1998-2008*, 10 (December 2008)]

Even if US EPA decides not to force other states to adopt numeric nutrient criteria or adopt criteria for them, the environmental groups' successful litigation in Florida is likely to embolden these groups to force US EPA's hand in other states.<sup>3</sup> In fact, environmental groups have filed notices of intent to sue US EPA based on its failure to require numeric nutrient standards in Wisconsin and Kansas.<sup>4</sup> Additionally, environmental groups have been pressuring a number of other states to adopt numeric

nutrient criteria including Illinois, Iowa, Michigan, Minnesota, Mississippi and Ohio.<sup>5</sup>

The impact to affected sources<sup>6</sup> may be staggering, with US EPA estimating that annual costs to affected sources in Florida would be between US\$100 million and US\$300 million.<sup>7</sup> However, the Florida Department of Environmental Protection has estimated annual costs to affected sources as a result of US EPA's current proposal to be significantly higher, between US\$5.7 billion and US\$8.4 billion.<sup>8</sup> While Florida is now in US EPA's crosshairs, it appears that this is only a harbinger of things to come. While US EPA has an October deadline to adopt numeric nutrient criteria, it is anticipated that this rule will be challenged by a number of affected parties. If you happen to be one of the affected sources listed above, you will want to pay special attention to the rule US EPA adopts and the litigation that follows. Numeric nutrient criteria and the costs associated with complying with them may be coming to a neighborhood near you.



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## Maximum Achievable Control Technology for Boilers and Process Heaters

By Douglas A. McWilliams

US EPA is presenting boiler operators with a real dilemma. The agency has proposed emission limits for some existing boilers without identifying a reliable path to achieving a compliant emission rate. This is the apparent result of the proposed Maximum Achievable Control Technology (MACT) standards for the control of hazardous air

<sup>1</sup> US EPA, *State Adoption of Numeric Nutrient Standards 1998-2008* (December 2008).

<sup>2</sup> *Id.*

<sup>3</sup> See D. Guest, Earthjustice, *Historic Decision to Limit Poisoning of Waterway* (November 18, 2009).

<sup>4</sup> See E. Lawton, *Midwest Environmental Advocates, Notice of Intent to Sue the EPA* (November 23, 2009); M. Dugan, *Dugan Schlozman LLC, Notice of Intent to Sue the EPA* (June 2, 2010).

<sup>5</sup> J. Heltman & E. Martinson, *Inside the EPA, Regulators Ramp Up Plans for Nutrient Limits in Mississippi River States* (March 17, 2010).

<sup>6</sup> Affected sources include municipal wastewater treatment plants, industrial and general dischargers, urban stormwater runoff, agriculture and septic systems.

<sup>7</sup> Florida Department of Environmental Protection Comments, *Docket # the EPA-HQ-OW-2009-0596* (April 28, 2010).

<sup>8</sup> *Id.*

pollutants (HAPs) from industrial, commercial and institutional boilers and process heaters.<sup>9</sup> When US EPA set emission limits for new and existing sources for its Gas-2 subcategory based on the best controlled similar sources, none of these sources actually used a control technology to achieve its emission rate. Similarly, most of the top-performing boilers and process heaters for dioxin/furans do not use a control technology or even an identifiable work practice that targets these compounds for emission reduction. As a result, there is no clear technological path for these sources to achieve compliance. US EPA claims its hands are tied by court interpretations of Section 112(d) of the Clean Air Act.

US EPA's initial attempts to set MACT standards based on control technologies did not fare well in the courts. In a series of decisions culminating in the *Brick* MACT decision, the DC Circuit Court expressly rejected US EPA's attempt to set limits based on what was achievable by a common control device or system. *Sierra Club v. EPA*, 479 F.3d 875, 880-81 (D.C. Cir. 2007) (citing *Cement Kiln Recycling Coalition v. EPA*, 255 F.3d 855 (D.C. Cir. 2001) and *National Lime Ass'n v. EPA*, 233 F.3d 625 (D.C. Cir. 2000)). The court admonished US EPA for ignoring non-technology factors that affect emissions, such as raw materials, fuels, unit design and operating practices. The court accepted the premise advanced by environmental interests that strict numeric emission limits based on the best-performing sources will reflect the optimum combination of the full suite of emission reduction options available to sources in the source category. US EPA's discretion was severely limited by the court's determination that the Act unambiguously defines the MACT floor by reference to what is achieved in practice by the top 12 percent of the existing sources in a source category. As a result, US EPA is taking a strict numeric approach to setting the MACT limits in the Boiler MACT rule without regard to achievability. However, US EPA has other tools that could be useful in mitigating the dilemma of the unachievable Boiler MACT standard.

Judge Williams in his concurring opinion in the *Brick* MACT decision directed US EPA to the use of subcategories to

address achievability. If US EPA limits the subcategory to truly similar sources, it increases the likelihood that emission rates achieved by the best performers will be achievable by the rest of the subcategory. Further subcategorization will help the Boiler MACT rule. The Gas-2 subcategory, for instance, could separate units that burn landfill gas from those that burn coke oven gas. These fuels have significantly different emission profiles, and the lower-emitting landfill gas units are setting most of the emission rates for the current subcategory. This makes the emission limitations potentially unachievable for coke oven gas-fired sources. A subcategory for coke oven gas would make the MACT standards more achievable.

Unachievable standards for coke oven gas and other process gases create significant adverse environmental consequences. Process gases with Btu value must be combusted to ensure a safe, non-explosive environment and to oxidize the concentrations of harmful organic compounds. Over-regulation of the emissions from boilers combusting process gases will force these gases to be flared and replaced with fossil fuels, resulting in more emissions and less-efficient energy use. US EPA has excluded the waste heat recovery boiler on the basis that it recovers "normally unused energy and converts it to usable heat." The same justification may apply to exclude process gas combustion from the source category.

US EPA should be encouraged to make choices that will mitigate the achievability problem. These include:

- Best performing sources should be determined based on the achieved emission rates for all pollutants, not for each pollutant. Proposed source categories do not have a single source that is achieving all of the pollutant-specific standards simultaneously.
- Set standards only for those pollutants for which adequate reliable emissions data are available now and require testing in the rule to fill the data gaps for dioxin-furans and others to prepare for the next phase of emission standards.
- Use all available emissions information, not just stack test information, to develop emission

<sup>9</sup> See ICI Boiler MACT Rule at 75 Fed. Reg. 32006 (June 4, 2010).

profiles for all units in the source category so that the MACT standard is set based on the true top performing 12 percent of a category and not a single source when EPA has collected data from only nine sources in the category.

The Clean Air Act as interpreted by the courts has set a rigid procedure for setting MACT standards that limits US EPA's discretion. The rulemaking process offers an opportunity to educate the agency about its unachievable standards and to encourage US EPA to use the discretion that remains to avoid the consequences of unachievable standards. Setting "technology-forcing" regulations on the belief that innovations will emerge in time to meet the standards is a risky tactic in the current global economy. Why would a global company choose to invest capital in the United States on the hope that innovations will allow it to operate when it can invest in Brazil, India or China without that risk? US EPA has a responsibility to use the full measure of its discretion to set standards that offer a clear path to compliance for boilers and process heaters.



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## Tick-Tock on TSCA Reform

By William V. Shaklee

There is a clear push underway to tighten regulation of chemical substances in the United States. This push is in reaction to the headline-grabbing report<sup>10</sup> of the President's Cancer Panel, which suggested that "traces of nearly 300 pollutants" have been found in the blood of newborn babies. While US EPA intends to use its current regulatory structure to make changes, Congress is instead considering a major overhaul to the Toxic Substances Control Act (TSCA).<sup>11</sup> It appears only a matter of time

before more-stringent regulation becomes a reality, so understanding the direction of the movement is critical.

The Safe Chemicals Act of 2010, which, if enacted, would amend TSCA to require (1) chemicals to meet risk-based safety standards; (2) chemical manufacturers to provide enhanced "health and environmental information" on chemical substances and (3) expanded access to information on chemical safety and use.<sup>12</sup>

The most fundamental change to TSCA would be a shift in who has the burden of proving that a chemical is safe. Currently, TSCA requires US EPA to explicitly find that a chemical substance or mixture either presents or will present an "unreasonable risk of injury to health or the environment" before it takes action to protect against the risk.<sup>13</sup> However, under S. 3209, the burden would be imposed on chemical manufacturers and processors to demonstrate that a substance meets safety standards.<sup>14</sup> The result of the change is that US EPA, instead of being an investigator as it is under the current scheme, would now sit in judgment over safety standard data. This is particularly alarming since S. 3209 also provides that US EPA decisions "shall not be subject to judicial review."<sup>15</sup> This places manufacturers and processors at the mercy of agency personnel reviewing the data with no recourse to the courts.

S. 3209 would also require US EPA to establish rules defining the minimum information necessary to support a safety standard determination on a chemical substance or mixture.<sup>16</sup> Yet, the legislation fails to include guidelines or notice to the regulated community on what this might entail leaving it solely to agency discretion. This may have significant repercussions as S. 3209 would also have US EPA develop a priority list<sup>17</sup> of chemical substances that

<sup>10</sup> U.S. Department of Health and Human Services, President's Cancer Panel, 2008-2009 Annual Report at p. 5 (April 2010).

<sup>11</sup> The Toxic Substance Control Act of 1976, 15 U.S.C. § 2601, et seq.

<sup>12</sup> See Safe Chemicals Act of 2010, S. 3209, 111th Cong., § 3(b)(3)-(5).

<sup>13</sup> See, 15 U.S.C. § 2605.

<sup>14</sup> *Id.* § 7(b)(1)(B).

<sup>15</sup> *Id.* at § 7(b)(1)(D).

<sup>16</sup> *Id.* at § 5(a)(1).

<sup>17</sup> S. 3209 would require US EPA to develop and publish a list of 300 chemical substances within 18 months after passage of the Safe Chemicals Act of 2010. See, *id.* at § 7(a)(1).



would need to have the minimum data set submitted within 18 months after placement on the priority list.<sup>18</sup>

While there is a general lack of guidance on what information will be necessary, S. 3209 is clear that US EPA would have broad authority to order tests on a chemical substance "as necessary" to make a safety standard determination.<sup>19</sup> Thus, it could require a chemical manufacturer to perform a battery of tests to evaluate a substance's toxicity or its carcinogenic or bioaccumulation properties prior to making a safety standard determination.<sup>20</sup> This suggests that significant information development will likely be required under this new approach. Further, to keep the public informed, S. 3209 would require US EPA to publish in the *Federal Register* all test data it receives within 15 days of receipt.

In addition, S. 3209 seeks to limit manufacturers' and processors' claims for confidential business information protections under TSCA. Administrator Jackson contends that US EPA is unable to publicly identify 17,000 of the 83,000 substances listed on the TSCA Inventory due to claims of confidentiality.<sup>21</sup> S. 3209 would impose specific limits on the information that can remain confidential. The identity of a chemical substance would no longer be protected nor would safety standard determinations or health and safety studies. Instead, US EPA would be required to develop standards that cannot be more restrictive than the Freedom of Information Act.<sup>22</sup> Further, even if a request for confidentiality is approved, S. 3209 would provide that it can be kept confidential for no more than five years.<sup>23</sup> This is particularly concerning given the amount and type of proprietary information that is generally submitted under TSCA.

Separately, but certainly related, US EPA has made a determination that TSCA does not extend confidential status to health and safety studies that do not disclose

process or chemical make-up information.<sup>24</sup> Thus, US EPA has given notice that it will begin reviewing confidentiality claims this month and issuing determination letters.<sup>25</sup> Parties can seek judicial review of a determination, but the flood gates will be open and disclosure may be permitted if a stay or injunction is not otherwise granted.

Thus, changes are certainly on the horizon - it is simply a question of when. On July 22, 2010 Representatives Rush and Waxman introduced legislation in the House - H. 5280, the Toxic Chemical Safety Act of 2010 - that largely mirrors S. 3209. These two pieces will likely form the benchmarks for the debate concerning TSCA Reform that is sure to proceed and provide a clear indication of where this debate is headed. Obviously, if enacted in its current form, S. 3209 (or H. 5280) would place significant additional burdens on chemical manufacturers and processors and yet decrease proprietary protections at the same time. Chemical manufacturers and processors need to be vigilant as both the Senate and House bills proceed in evaluating how they will be impacted.



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<sup>18</sup> *Id.* at § 5(a)(2).

<sup>19</sup> *Id.* at § 5(b)(1).

<sup>20</sup> *Id.* at § 5(c)(2).

<sup>21</sup> See, US EPA Press Release, EPA Makes Chemical Information More Accessible to Public For the First Time, TSCA Chemical Inventory Free of Charge Online (March 15, 2010).

<sup>22</sup> *Id.* at § 14(5)(2).

<sup>23</sup> *Id.*

<sup>24</sup> See Notice: Claims of Confidentiality of Certain Chemical Identities Contained in Health and Safety Studies and Data from Health and Safety Studies Submitted Under the Toxic Substances Control Act, 75 Federal Register 29754 (May 27, 2010).

<sup>25</sup> *Id.*



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