

WebMemo



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EPA's Boiler MACT Rules Still a Threat

Diane Katz

The Environmental Protection Agency (EPA) has postponed imposition of unduly onerous regulations governing emissions from hundreds of thousands of commercial, institutional, and industrial boilers. While the action is welcome, it would be premature to conclude that the Obama Administration has undergone a regulatory epiphany. Instead, the postponement reveals the extent of the EPA's blunders in crafting the rules.

Big MACT. Referred to as “Boiler MACT,” the four interrelated rules govern emissions of mercury, dioxin, particulate matter, hydrogen chloride, and carbon monoxide from some 200,000 boilers nationwide. These boilers burn natural gas, fuel oil, coal, biomass (e.g., wood), refinery gas, or other gas to produce steam, which is used to generate electricity or provide heat for factories and other industrial and institutional facilities.

The rules are complex, spanning 276 pages and encompassing controls and monitoring standards for 11 subcategories of boilers and process heaters that vary in design and fuel type. Factories, restaurants, schools, churches, and even farms would be required to conduct emissions testing and comply with standards of control that vary by boiler size, feedstock, and available technologies. For most facilities, compliance would require either switching fuels or installation of multiple emissions-control technologies.¹

Billions of Dollars in New Costs. EPA officials last year pegged the capital cost of the rules at \$9.5 billion. A study by the economic forecasting

firm IHS Global Insight, prepared for the Council of Industrial Boiler Owners,² put the figure at \$20 billion. The U.S. Small Business Administration warned that the rules would cause “significant new regulatory costs” for businesses, institutions, and municipalities across the country.³ And a Commerce Department analysis reportedly concluded that the rules would cause job losses of 40,000 to 60,000—much greater than the agency had claimed.⁴

Whatever the precise cost, the economic consequences of the regulations would be significant—and the more so in light of several other major regulatory schemes unleashed by the agency of late.⁵ Of particular concern is the direct impact on the manufacturing sector. The capital costs to install new emissions controls would come at the expense of investments in productivity and would even be unfeasible for some operations, leading to plant closures and job losses. To the extent the regulatory costs reduce output, suppliers would also be affected. The economic ripples would also extend to consumer spending as layoffs and unemployment increase.

Errors Plague EPA Draft Rules. The stringency and cost of the new regulations provoked an out-

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214 Massachusetts Avenue, NE
Washington, DC 20002-4999
(202) 546-4400 • heritage.org

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pouring of protest and some 5,800 comments citing technical and statutory errors.⁶ Some 21 governors and more than 100 Members of Congress also raised objections. Ultimately, EPA officials were forced to acknowledge their failure to “calculate standards that fully reflected operational reality.”⁷

Consequently, the agency sought court approval to extend the deadline for issuing the rules, from January 16, 2011, to April 13, 2012, citing the need to “formulate the final standards based on careful consideration of all relevant data and upon full consideration of comments.”⁸ In other words, EPA regulators lacked a thorough understanding of boilers and emissions control technology when drafting the Boiler MACT rules. However, the Sierra Club opposed the request for extension, and Judge Paul Friedman of the U.S. District Court for the District of Columbia ordered the agency to release the regulations by February 21, which it did.

When releasing the rules, EPA officials claimed to have made revisions from its previous version that shaved 50 percent off the regulatory cost while maintaining the same level of health benefit. That means the original rules cost twice as much as

necessary. However, the agency’s cost calculations remain in dispute.

Poorly Crafted Rules Require Postponement. On May 18, the EPA published a notice of postponement in the *Federal Register*⁹ stating:

We find that justice requires postponing the effectiveness of these rules.... EPA has identified several issues in the final rules which it intends to reconsider because we believe the public did not have a sufficient opportunity to comment on certain revisions EPA made to the proposed rules.... In addition, EPA received data before finalizing both rules but was unable to incorporate that data into the final rules given the court deadline for issuing the rules, which the Agency was unable to extend.

Under the stay, the public will have until July 15 to submit comments. The delay will extend until judicial reviews of the rules are completed or the agency completes its reconsideration, whichever is earlier.

As currently written, the majority of boilers that run on coal and oil would be required to meet “technology-based” standards, i.e., specific levels of

1. McGuireWoods, “Frankenstein Boiler Still Alive: EPA’s New Boiler MACT and Solid Waste Rules,” March 3, 2011, at <http://www.mcguirewoods.com/news-resources/news/5592.asp?SearchFor=boiler> (May 25, 2011).
2. IHS Global Insight, “The Economic Impact of Proposed EPA Boiler/Process Heater MACT Rule on Industrial, Commercial, and Institutional Boiler and Process Heater Operators,” August 2010, at http://www.cibo.org/pubs/boilermact_jobsstudy.pdf (May 25, 2011).
3. Winslow Sargeant, Chief Counsel for Advocacy, and Kevin Bromberg, Assistant Chief Counsel for Environmental Policy, Small Business Administration Office of Advocacy, letter to Lisa Jackson, Administrator, Environmental Protection Agency, August 23, 2010, at <http://www.sba.gov/advocacy/816/12752> (May 25, 2011).
4. Press release, “NACAA’S Critique of Estimated Job Losses from Boiler MACT Only Highlights the Need for Commerce to Release Its Own Analysis,” American Forest and Paper Association, December 8, 2010, at <http://www.afandpa.org/pressreleases.aspx?id=1712> (May 25, 2011).
5. For example, new limits on emissions of so-called greenhouse gases. See James Gattuso, Diane Katz, and Stephen Keen, “Red Tape Rising: Obama’s Torrent of New Regulation,” Heritage Foundation *Backgrounder* No. 2482, October 26, 2010, at <http://www.heritage.org/Research/Reports/2010/10/Red-Tape-Rising-Obamas-Torrent-of-New-Regulation>.
6. Robert D. Bessette, “Comments of the Council of Industrial Boiler Owners on EPA Proposed Rule National Emission Standards for Hazardous Air Pollutants for Major Sources: Industrial, Commercial, and Institutional Boilers and Process Heaters,” August 20, 2010, at http://www.cibo.org/pubs/boilermact_epacomment3.pdf (May 25, 2011).
7. Lisa Jackson, Administrator, Environmental Protection Agency, letter to Representative J. Gresham Barrett, November 18, 2010, at http://www.epa.gov/ocir/pdf/2010_1222_congressmen_letter_barrett.pdf (May 25, 2011).
8. EPA’s Memorandum in Support of Motion to Amend Order of March 31, 2006, Case 1:01-cv-01537-PLF, Document 136-1, December 7, 2010.
9. *Federal Register*, Vol. 76, No. 96 (May 18, 2011), pp. 28662–28664, at <http://www.gpo.gov/fdsys/pkg/FR-2011-05-18/pdf/2011-12308.pdf> (May 25, 2011).

emissions control performance. Under the Clean Air Act, the MACT standard for existing sources cannot be less stringent than the average emission limitation achieved by the best-performing 12 percent of existing sources in the relevant category or subcategory. The standards for new sources cannot be less stringent than the controls achieved by the best-controlled similar source (as determined by the EPA administrator).

The EPA formulated the MACT standards based on the “best performing” emissions levels for *each* pollutant—not emissions in the aggregate. Therefore, a facility could be “best performing” for one pollutant but not others. In fact, *none* of the best performers evaluated by the agency can meet the new limits for all the regulated emissions.¹⁰ Consequently, the standards represent the performance of a wholly hypothetical boiler—hence the moniker “Frankenstein Boiler.” Moreover, the EPA appears to have cherry-picked the “best performing” sources on which to base the standards, thereby producing overly stringent regulations.

Health-Based Standard Warranted. Also problematic is the fact that the agency applied a “no-threshold” standard to the regulation—i.e., it treated all emissions as causing health effects at any level of exposure. Consequently, the emissions limits are stricter—and more costly to achieve—than they otherwise would be under a “health-based” standard, which recognizes that a threshold exists below which exposure does not pose health risks. Indeed, at least four of the regulated emissions meet the statutory requirements for a health-based standard and were treated as such in previous versions of the boiler MACT rules.

Agency officials claim that they lack the information necessary to set health-based standards. But

that would mean that their calculations of health benefits lack an empirical basis.

By refusing to adopt a health-based standard, the EPA dramatically increased compliance costs for coal-fired boilers in particular. This is not all that surprising given the Obama Administration’s criticism of fossil fuels in general and coal in particular.

Congressional Action Needed. The Boiler MACT rules also feature an array of other regulatory missteps. For example, when evaluating “best performing” facilities for setting the standards, the EPA excluded higher levels of emissions as “outliers”—the result of which is artificially stringent limits. The new regulations also mandate that existing facilities undergo an “energy assessment” to identify conservation targets. But the Clean Air Act does not authorize the agency to compel such an assessment, which bears no relationship to the targeted emissions. The EPA has also skewed the benefits assessment by treating all particulate matter, no matter its actual composition, as equally potent.

Now the agency is taking yet another swipe at the rules. But rather than simply hope that the EPA will actually follow the law and manage to get its facts straight, Congress should take on a more active role in agency oversight. The implementation delay does provide another opportunity for public comment, but it will also add to the seven years of uncertainty that has plagued the many industries subject to the rules. It is long past time for Congress to set the agency straight on the Boiler MACT. This Frankenstein of a regulation is not dead yet.

—*Diane Katz is Research Fellow in Regulatory Policy in the Thomas A. Roe Institute for Economic Policy Studies at The Heritage Foundation.*

10. McGuireWoods, “Frankenstein Boiler Still Alive.”