

Attorneys General of New York, Maryland, Massachusetts, Minnesota, Oregon, Vermont, Washington, and the Puget Sound Air Quality Agency

January 14, 2019

Re: Proposed Amendments to the New Source Performance Standards for Residential Wood Heaters, published at 83 Fed. Reg. 61,574 (Nov. 30, 2018); Agency Docket No. EPA-HQ-OAR-2018-0195

The Attorneys General of New York, Maryland, Massachusetts, Minnesota, Oregon, Vermont, and Washington, and the Puget Sound Air Quality Agency (the States) submit these comments on the Environmental Protection Agency's above-referenced proposed rule concerning emission standards for new residential wood-burning heating devices. The States oppose EPA's proposal to amend the new source performance standards (NSPS) to allow a two-year sell-through period for non-compliant hydronic heaters (wood boilers) and forced-air furnaces, which will allow increased emissions and negative health impacts throughout the roughly twenty-year life span of such noncompliant units—*i.e.*, decades beyond the 2020 compliance deadline. As explained below, EPA's proposed sell-through is unlawful under the Clean Air Act and would harm public health by causing more deadly particulate matter pollution.¹

1. Hazards of Wood Smoke

Wood-burning devices emit multiple pollutants that endanger human health. These pollutants include fine particulate matter (PM_{2.5}), carbon monoxide (CO), polycyclic aromatic hydrocarbons (PAHs), and polycyclic organic matter (POM). The Centers for Disease Control determined that PAHs are reasonably expected to cause cancer.²

Multiple studies show the dangers of PM_{2.5}. For example, a 2018 study published in the Proceedings of the National Academy of Sciences attributed an estimated 4 million deaths worldwide to PM_{2.5} in 2015.³ Another study found that increases in particulate matter were

¹ The Attorney General of New York sent a Freedom of Information Act (FOIA) request to EPA on some of the same topics addressed in the proposed rule. *See* FOIA Request from the New York Attorney General's Office to EPA (May 17, 2018), *available at*: <https://www.foiaonline.gov/foiaonline/action/public/search/quickSearch?query=EPA-HQ-2018-009031>. EPA acknowledged receipt of this request on June 26, 2018. However, EPA has not finished its review of potentially responsive documents. The States therefore reserve the right to submit additional comments and take further action once EPA finishes its review and production of documents.

² Centers for Disease Control, *Toxic Substances Portal: Polycyclic Aromatic Hydrocarbons (PAH)*, *available at*: <http://www.atsdr.cdc.gov/toxfaqs/tf.asp?id=121&tid=25>.

³ Burnett, et al. *Global Estimates of Mortality Associated with Long-Term Exposure to Outdoor fine Particulate Matter*, Proceedings of the National Academy of Sciences, July 23, 2018, at 2.

associated with increases in mortality, and the risks were greatest among certain groups, including African-Americans and people with Medicaid eligibility.⁴ In 2013, acknowledging these dangers, EPA revised its National Ambient Air Quality Standards for PM_{2.5} to provide more protection. 78 Fed. Reg. 3,086, 3,103 (Jan. 15, 2013).

Particulate matter from poorly-controlled wood-burning devices causes public health hazards in the States. For example, these devices pose a particular danger to rural areas in New York.⁵ New York is the nation's second largest consumer of wood for heating, with approximately 150,000 homes using wood for primary heat and 500,000 homes for supplemental heat.⁶ In rural New York counties, residential wood burning causes 90 percent of PM_{2.5} emissions.⁷ To put this in perspective, as shown in Figure 1 below, residential wood heating contributes more PM_{2.5} emissions to New York's air than the electricity generation and the transportation sectors combined.⁸ To reduce PM_{2.5} emissions, while encouraging the sustainable use of our forest resources, New York has become a leader in the research, development, and demonstration of the next generation of wood heaters through the Renewable Heat New York program.

⁴ Di, *et al.*, *Air Pollution and Mortality in the Medicare Population*, 376 *New England Journal of Medicine* 2513, 2520-21 (2017).

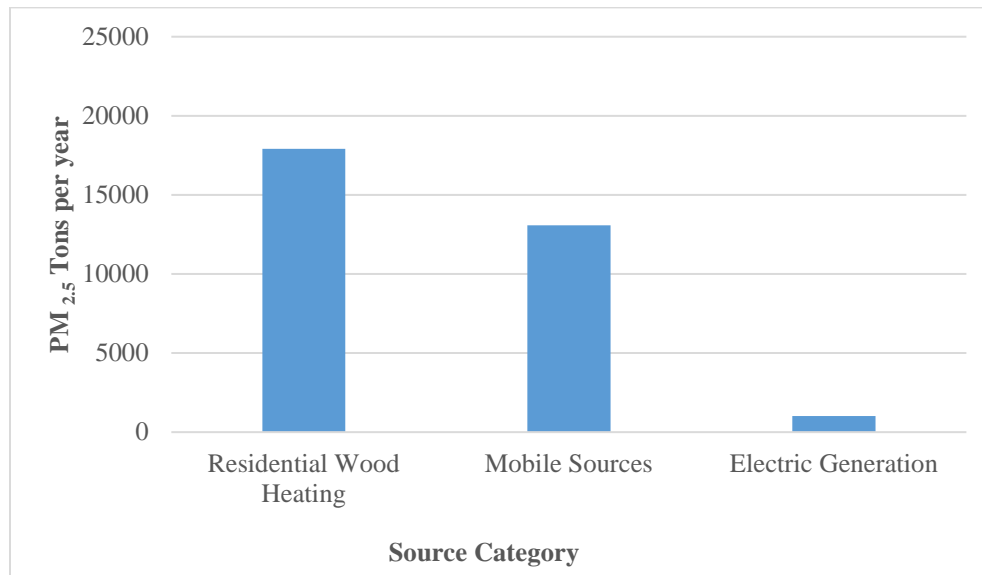
⁵ New York State Energy Research & Development Authority, No. 10-02, *Spatial Modeling and Monitoring of Residential Wood Smoke Across a Non-Urban Upstate New York Region*, xvii-xix, 4-1 (Feb. 2010) (finding that in a seven-county area of upstate New York, "very high spikes in wood smoke concentrations" of over 100 micrograms per cubic meter were observed and that 26% of the monitored population was exposed to elevated residential wood smoke), available at <https://www.nyserda.ny.gov/-/media/Files/Publications/Research/Biomass-Solar-Wind/monitoring-residential-woodsmoke.pdf>.

⁶ New York State Energy Research & Development Authority, No. 15-26, *New York State Wood Heat Report: An Energy, Environmental, and Market Assessment*, S-1 (April 2016), available at: <https://www.nyserda.ny.gov/-/media/Files/Publications/Research/Biomass-Solar-Wind/15-26-NYS-Wood-Heat-Report.pdf>.

⁷ New York State Department of Health, *Fine Particulate Matter Concentrations in Outdoor Air Near Outdoor Wood-Fired Boilers*, 1 (Jan. 2013) available at: https://www.health.ny.gov/environmental/outdoors/air/owb/docs/owb_report.pdf.

⁸ New York State Energy Research & Development Authority, No. 15-26, *New York State Wood Heat Report: An Energy, Environmental, and Market Assessment*, 31.

Figure 1: Comparison of PM_{2.5} Emissions from Residential Wood Heating, Mobile Sources, and Electric Generating Stations in New York.



In Massachusetts, because of the serious health problems and nuisance conditions that result from wood-burning appliances, more than 30 municipalities have enacted regulations, by-laws or ordinances that place restrictions on the use of outdoor wood-fired boilers. *See, e.g.*, Barre, Chapter 310, § 310-1 - § 310-8; Belchertown, Chapter 294, § 294-1 - § 294-9. Many of the regulations have been approved by the Massachusetts Department of Environmental Protection pursuant to M.G.L. c. 111, § 31C. *See generally*, <https://www.mass.gov/guides/heating-your-home-with-a-wood-burning-appliance>.

2. Procedural History of Regulation of Wood-Burning Devices Under the Clean Air Act

Section 111(b)(1)(A) of the Clean Air Act requires EPA to list categories of stationary sources that “cause, or contribute significantly to, air pollution which may reasonably be anticipated to endanger public health and welfare.” 42 U.S.C. § 7411(b)(1)(A). EPA must establish NSPS for listed categories of stationary sources based on the best system of emission reduction the Administrator determines has been adequately demonstrated. *Id.* § 7411(b)(1)(B). A system of emission reduction is adequately demonstrated if the standard of performance is achievable, that is, “if a technology can reasonably be projected to be available to new sources at the time they are constructed that will allow them to meet the standard.” 79 Fed. Reg. 1,430, 1,463 (Jan. 8, 2014). “The standards should be stringent in order to force the development of improved technology.” *Sierra Club v. Costle*, 657 F.2d 298, 325 (D.C. Cir. 1981). EPA must review and, as appropriate, revise, the NSPS for stationary sources at least every eight years. 42 U.S.C. § 7411(b)(1)(B).

The 1988 NSPS

In 1988, in response to a lawsuit filed by New York State and the Natural Resources

Defense Council, EPA determined that PM_{2.5} emitted from residential wood heaters causes or contributes significantly to air pollution that may reasonably be anticipated to endanger public health or welfare and therefore established a NSPS for new and modified wood heaters. *See* 53 Fed. Reg. 5,873 (Feb. 26, 1988); 40 C.F.R. Part 60, Subpart AAA. The 1988 standards required manufacturers to limit PM_{2.5} emissions to 4.1 grams per hour (“g/hr”) from catalytic wood heaters and 7.5 g/hr for non-catalytic heaters. 40 C.F.R. § 60.532(b)(1) & (2). EPA exempted indoor and outdoor residential wood-fired boilers (also known as “hydronic heaters”) from the 1988 standards. *See* 40 C.F.R. §§ 60.530(h)(2) & 60.531 (exempting and defining “boilers”). EPA did not regulate residential boilers in 1988 because it lacked sufficient data to set a standard for boilers. *See* 52 Fed. Reg. 4,994, 4,999 (Feb. 18, 1987).

The States’ 2013 Deadline Lawsuit

After EPA failed to timely update the 1988 NSPS, in August 2013, New York, Connecticut, Maryland, Massachusetts, Oregon, Rhode Island, Vermont, and the Puget Sound Air Quality Agency sent a notice letter to EPA notifying the agency that it was in violation of a nondiscretionary duty under 42 U.S.C. § 7411(b)(1)(A) and (B) to timely review and, as appropriate, revise the NSPS for new wood heaters. In their letter, the States explained that not only were the NSPS for new wood heaters obsolete, but that the agency’s exemption of residential wood-fired boilers from regulation was also outdated in light of the increased prevalence of these devices (and their resulting pollution) since the 1988 rulemaking. The States notified EPA of their intention to commence a lawsuit if the agency did not correct the violations within 60 days.

In October 2013, after EPA failed to correct the violations, the States filed a complaint in federal district court, *New York v. McCarthy* (D.D.C. Civil No. 13-1553). The case was consolidated with a similar lawsuit brought by public health advocacy organizations, *American Lung Assoc. v. McCarthy* (D.D.C. Civil No. 13-1555). Following EPA’s issuance of the proposed rule and negotiations among the parties, EPA lodged a consent decree with the court on April 28, 2014 to resolve the case. The consent decree required EPA to promulgate the final NSPS by February 3, 2015. *See New York v. McCarthy*, Doc. # 27-1 (April 28, 2014).

The 2015 NSPS

On March 16, 2015, EPA promulgated an updated NSPS for new residential wood heaters and established NSPS for particulate matter from new residential hydronic heaters and forced-air furnaces. *See* 80 Fed. Reg. 13,672 (Mar. 16, 2015). The 2015 rule applies to manufacturers, retailers, owners and operators of wood heaters, hydronic heaters, and forced-air furnaces. *Id.* at 13,674, 13,676; *see, e.g.*, 40 C.F.R. § 60.530(a) (wood heaters). Compliance with the rule’s “step one” standards was required shortly after the rule’s promulgation because many of the devices already on the market met these requirements.

EPA gave manufacturers and retailers an additional five years, until May 15, 2020, to comply with the more stringent “step two” standards. The Agency adopted the stepped approach to emissions limits to ease the transition for manufacturers. *Id.* at 13,673. Citing the fact that many manufacturers are small businesses, and evidence in the record that some manufacturers

could take up to five years to develop, test, evaluate, and certify new models, EPA provided for a five-year compliance period. *Id.* at 13,676. At the time of the proposed rule, several of the States objected to the five-year phase-in period as unnecessarily long in light of the presence of some step two compliant devices on the market and the timely need for pollution reductions from wood heaters due to the seriousness of the ongoing public health risks.

As shown in Table 1 below, the step two standards represented a significant tightening of the step one standards for PM_{2.5}:⁹

Table 1: 2015 New Source Performance Standards (80 Fed. Reg. at 13,685)

| | Step One Limit (May 15, 2015) | Step Two Limit (May 15, 2020) |
|---|--|--|
| Wood Boilers (Hydronic Heaters) | 0.32 lbs/mmBTU | 0.10 lbs/mmBTU (or 0.15 if tested with cordwood) |
| Wood Heaters (Wood Stoves and Pellet Stoves) | 4.5 g/hr | 2.0 g/hr (or 2.5 if tested with cordwood) |
| Forced Air Furnaces | 0.93 lbs/mmBTU* <i>*Effective date February 2016 for small units; February 2017 for large units</i> | 0.15 lbs/mmBTU |

The improvements between the step one and step two standards are significant. For wood boilers, the step two units are approximately three times cleaner. For New York, timely implementation of the step two standards is particularly important because the State has had its own step-one equivalent regulations on the books since before 2015. *See* 6 NYCRR Pt. 247. For forced-air furnaces, the difference is even more stark—the step two units are approximately six times cleaner.

Also in the 2015 rule, EPA promulgated a seven-and-a-half month sell-through period for new wood heaters and boilers. 80 Fed. Reg. at 13,685. EPA allowed the sell-through to give

⁹ In the proposed rule for the 2015 NSPS, EPA proposed even stricter step two standards for wood boilers and forced-air furnaces (0.06 lbs/mmBtu). 79 Fed. Reg. 6,330, 6,333 (Feb. 3, 2014). The Attorneys General of New York, Maryland, and Massachusetts supported these restrictions in their May 5, 2014 comments as feasible in light of devices already on the market and in development. EPA’s decision to impose less stringent step two standards further demonstrates the reasonableness of maintaining the standards without an additional two-year sell through period.

retailers a chance to sell existing inventory, and stated that it would affect a small number of units. *Id.* The Attorneys General of New York, Maryland, and Massachusetts objected to this sell-through period in their rulemaking comments, explaining that EPA lacked the authority to set a standard and then allow retailers to sell new wood-burning devices that violated it. EPA nonetheless included the sell-through in the final rule.

EPA analyzed the expected costs and benefits of the 2015 NSPS and found that the benefits of the standards overwhelmingly outweighed the costs of industry compliance. EPA estimated that the rule would save between \$3.1 billion and \$7.6 billion, depending on the estimate and discount rate. *Id.* at 13,694. In contrast, EPA estimated that the rule would cost \$43.7 million—meaning that the benefits would outweigh the costs by approximately one hundred to one. *Id.* at 13,692. Much of the savings occurred from reduced premature mortality attributable to decreased particulate matter emissions. *Id.* at 13,694.

Manufacturers' Challenge to the 2015 NSPS

Shortly after the 2015 rule was promulgated, the Hearth, Patio & Barbecue Association (HPBA) challenged it. *Hearth, Patio & Barbecue Ass'n v. EPA* (D.C. Cir. No. 15-1056). In its initial filings, HPBA alleged that EPA had acted arbitrarily and capriciously and contrary to the Clean Air Act in revising the NSPS for new wood heaters and in establishing NSPS for new wood boilers and forced air furnaces. In November 2015, several of the States filed a notice of intent to participate as amicus curiae in support of EPA's defense of the NSPS.

More than three years later, however, the litigation has not advanced. HPBA, with EPA's consent, filed unopposed motions to extend the briefing schedule in the case on six different occasions, each of which the court granted. In those motions, HPBA cited ongoing negotiations with EPA that could resolve certain issues in the litigation as a basis for the extensions. In 2018, EPA moved for two additional extensions, citing its plan to issue proposed rules to revise aspects of the 2015 NSPS. That latest motion, which the court also granted, pushes the briefing schedule to a July 2019 completion date (assuming no further extensions).

2018 Proposed Amendments to the 2015 NSPS

On November 30, 2018, EPA issued two rulemaking notices relevant to the 2015 NSPS. First, in the instant rulemaking, EPA proposed to amend the 2015 standards to allow a two-year sell-through period for hydronic heaters and forced-air furnaces. 83 Fed. Reg. 61,574 (Nov. 30, 2018). Second, EPA issued an advance notice of proposed rulemaking that seeks comment on ten different aspects of the 2015 NSPS, including whether to rescind the step two standards. 83 Fed. Reg. 61,585 (Nov. 30, 2018).

In the proposed rule to allow a two-year sell-through period for new wood boilers and forced-air furnaces, EPA stated that the sell-through provision would enable retailers to continue to sell new boilers and furnaces that complied with the step one—but not step two—standards until May 2022 (two years past the compliance deadline for step two). EPA cited complaints by some manufacturers that retailers were ending their purchases of step one boilers and furnaces in

2018. 83 Fed. Reg. at 61,574, 61,578. EPA did not propose to change the emission standards themselves or the May 2020 compliance deadline.

Although the Agency noted that it had used its authority under section 111 of the Clean Air Act to establish the standards in 2018, it provided no legal rationale for the separate sell-through provision. *Id.* at 61,577; *see* 42 U.S.C. § 7411. EPA likewise did not state that changes in technology or health effects obviated the need for the 2015 NSPS or would reduce the timeliness of their health benefits. EPA also did not propose to change the scope of the NSPS, indicating that the NSPS would continue to apply to manufacturers, owners, operators, and retailers of wood heaters, hydronic heaters, and forced-air furnaces. 83 Fed. Reg. at 61,574, 61,577.

EPA's cost/benefit analysis in support of the proposed two-year sell-through provision evidenced a change in agency policy, prioritizing industry cost savings over public health benefits. For example, EPA proposed the two-year sell-through provision despite finding that the cost savings for industry (termed "benefits" under the agency's revised approach) would amount to about \$10 million annually, compared to the "costs" (foregone public health benefits) of \$90 million to \$230 million. *Id.* at 61,582-61,583. These costs and benefits were explained in the agency's supplemental regulatory impact analysis for the proposed rule, in which EPA analyzed three different scenarios. Supplemental Regulatory Impact Analysis (RIA) for "Standards of Performance for New Residential Wood Heaters, New Residential Hydronic Heaters and Forced-Air Furnaces" Introduction (Nov. 20, 2018), *available at*: https://www.epa.gov/sites/production/files/2018-11/documents/wood_heaters_proposal_nsps_supp_ria_final.pdf, at 13.

In scenario 1, EPA assumed the proposed rule would have no impact because manufacturers would sell all of the step one units anticipated in the 2015 rule by May 2020, *i.e.*, no additional noncompliant units would be sold after May 2020. In scenario 2, EPA assumed manufacturers would produce the same number of units anticipated in the 2015 rule, but an additional two years would be needed to sell existing inventory. Under this second scenario, consumers would purchase wood boilers and forced air furnaces that did not comply with the step two emission standards during the May 2020-22 period instead of purchasing those that did comply. In scenario 3, EPA assumed that manufacturers would increase production of step one-compliant devices before the May 2020 deadline, knowing that retailers could sell those devices until May 2022. EPA stated that it believed that scenario 2 was the primary, and most likely scenario, without explaining the basis for that reasoning. *See* Supplemental Regulatory Impact Analysis at 13.

3. Comments on the Legality of the Proposed Sell-Through Provision

The States oppose the proposed sell-through provision because it would violate the Clean Air Act and lead to increased particulate matter pollution that harms our residents. The proposed rule, if finalized, would violate the Act on substantive and procedural grounds. EPA lacks authority under section 111(b) of the Act to allow a sell-through period, and section 111(e) of the Act would prohibit installation and operation of step one wood-burning devices after May 15, 2020. Furthermore, EPA failed to explain the legal basis for the proposed sell-through period in the preamble of the proposed rule, in violation of section 307's rulemaking requirements. In

addition, because the proposed sell-through is not justified by the evidence in the record, it would be arbitrary and capricious for EPA to finalize it. Furthermore, the sale of wood-burning devices that consumers cannot lawfully operate may constitute consumer fraud under state law.¹⁰

EPA Lacks Authority under the Clean Air Act to Allow a Sell-Through Period

Nothing in section 111(b) of the Clean Air Act, or any other provision of the Act, allows EPA to issue a NSPS and then permit manufacturers and retailers to continue to sell non-compliant devices after a standard takes effect. *See Michigan v. E.P.A.*, 268 F.3d 1075, 1081 (D.C. Cir. 2001) (“[A]n administrative agency’s power to promulgate legislative regulations is limited to the authority delegated by Congress.”). Tellingly, and as discussed further below, EPA cites no legal basis in the preamble of the proposal for authorizing the sell-through of noncompliant units.

The lack of explicit authority for EPA to grant a sell-through period contrasts with other statutes. For example, in setting standards for formaldehyde emissions from composite wood products, Congress allowed a sell-through period of 180 days for existing inventory. 15 U.S.C. § 2697(d)(3)(A); *see Sierra Club v. Pruitt*, 293 F. Supp. 3d 1050, 1059 (N.D. Cal. 2018) (holding that EPA could not delay implementation past the 180-days for existing inventory authorized by the statute). The absence of such authority in section 111 should be given effect.

The proposed sell-through provision is also inconsistent with the language in section 111(b). Specifically, section 111(b)(1)(B) states that “[s]tandards of performance or revisions thereof shall become *effective upon promulgation*.” *Id.* § 7411(b)(1)(B) (emphasis added). Accordingly, the Act indicates that any NSPS takes effect on its promulgation and applies to all new sources. It does not authorize EPA to allow continued sale of non-compliant devices with an applicable performance standard. EPA’s attempt to create a work around to allow new sources to avoid the May 2020 effective date is inconsistent with the statutory scheme.

To the extent EPA relies on its previous, seven-month, sell-through provision contained in the 2015 rule for its legal authority, it is incorrect. That shorter sell-through provision was not challenged in court, and past agency practice cannot provide a valid legal basis for an agency action that is unauthorized by the governing statute. *See Wilderness Soc. v. Morton*, 479 F.2d 842, 865 (D.C. Cir. 1973) (“An administrative practice which is plainly contrary to the legislative will may be overturned no matter how well settled and how long standing.”).

The Clean Air Act Prohibits Installation and Operation of Non-Compliant Devices

Even if EPA had the authority to allow a sell-through period, section 111(e) of the Act still prohibits owners from installing and operating new non-compliant wood-burning devices. “After the effective date of standards of performance promulgated under this section, it shall be unlawful for any owner or operator of any new source to operate such source in violation of any

¹⁰ For these same reasons, the States oppose expanding the scope of the sell-through provision to apply it to new wood heaters (wood stoves). *See* 83 Fed. Reg. at 61,580.

standard of performance applicable to such source.” 42 U.S.C. § 7411(e). As explained below, the installation of a new wood boiler, furnace, or heater by an owner after May 15, 2020 would make it a new source that would have to comply with any “applicable” standard under section 111, including the step two standards.

Under EPA’s regulations implementing section 111, a wood-burning device sold and installed after May 15, 2020 would be a “new source” subject to the step two standards. A new source is “any stationary source, the construction or modification of which is commenced after the publication of regulations (or, if earlier, proposed regulations) prescribing a standard of performance under this section which will be applicable to such source.” *Id.* § 7411(a)(2). The devices would become new sources at the time of installation by the owner because construction includes installation. *See* 40 C.F.R. § 60.2 (“Construction means fabrication, erection, or installation of an affected facility.”).¹¹

Although manufacturers would have built the wood boiler or furnace before May 2020, the owner or operator who purchased the device after May 2020 would neither have “undertaken a continuous program of construction” nor entered into a contract for construction of the device. *See* 40 C.F.R. § 60.2. The actions of the owner, not the manufacturer, control whether the wood boiler or furnace is a new source. *See* 42 U.S.C. § 7411(a)(2) (defining new source); 40 C.F.R. § 60.2 (defining commenced to include actions by the owner). Section 111(e) prohibits operation of a new source by an owner or operator, which is “any person who owns, leases, operates, controls, or supervises a stationary source.” *Id.* § 7411(a)(5). Here, that definition would therefore apply to a consumer who purchases and installs a wood-burning device, making it unlawful for the owner to operate a noncompliant device purchased after May 15, 2020.

Governing case law under section 111 supports the conclusion that step one-compliant devices sold after May 2020 would be considered new sources, not existing sources. For step one devices bought after May 2020, the owner would not have been involved with constructing the boiler before the NSPS took effect. *See United States v. Painesville*, 644 F.2d 1186, 1187, 1188 n.2 (6th Cir. 1981) (holding that a coal boiler was a new source because it was built after a NSPS went into effect). Similarly, it is unlikely that the owner would have contracted to buy the wood-burning device before it arrives in a retail show room. *See Sierra Pacific Power Co. v. E.P.A.*, 647 F.2d 60, 66 (9th Cir. 1981) (finding a boiler was a new source because there was no contract for construction before the NSPS). Except in the odd circumstance where the owner entered into a purchase contract before May 2020, but bought and installed the step one-compliant devices after May 2020, there would be no contract for sale before the step two NSPS took effect. As in *Painesville* and *Sierra Pacific Power*, the step one devices would therefore qualify as new sources.

Furthermore, in the proposed rule, EPA admits that the 2015 NSPS (including the step two standards) apply to not only manufacturers and retailers but also owners and operators. *See*

¹¹ “Commenced” means where “an owner or operator has undertaken a continuous program of construction or modification or that an owner or operator has entered into a contractual obligation to undertake and complete, within a reasonable time, a continuous program of construction or modification.” 40 C.F.R. § 60.2.

83 Fed. Reg. at 61,574, 61,578. EPA cannot now deny that owners and operators would be subject to the step two NSPS, and therefore could not lawfully install and operate step one-compliant devices after May 2020.

As a newly-installed wood boiler or forced-air furnace would be a new source, the NSPS would be “applicable” to it. Thus, the Act prohibits operation of any wood-burning device bought and installed after May 15, 2020 that does not comply with the step two standards. *See* 42 U.S.C. § 7411(e); *Painesville*, 644 F.2d at 1187, 1188 n.2, 1190 (allowing enforcement under section 111(e) for a new source).

EPA Failed to Explain the Legal Basis for the Proposed Sell-Through Period, as Required Under Section 307(d) of the Act

EPA’s failure to explain its legal rationale or cite any legal authority in support of its proposed sell-through provision also violates section 307(d) of the Act, which sets forth the requirements for agency rulemakings. Section 307(d)(3)(C) states that EPA shall include in the preamble of a proposed rule “the major legal interpretations . . . underlying the proposed rule.” 42 U.S.C. § 7607(d)(3)(C); *see also* 1 C.F.R. § 18.12(a) (federal agencies must include “basis and purpose” for a proposed rule). Yet, the preamble of this proposal contains no explanation of EPA’s legal authority to allow a sell-through period. This constitutes a violation of section 307(d). At a minimum, therefore, EPA must supplement its proposed rule with an explanation of its legal authority and extend the public comment period to allow for an opportunity for public input on the agency’s rationale.

The Proposed Rule is Arbitrary and Capricious

Aside from being unlawful under the Clean Air Act, the proposed rule is also arbitrary and capricious. “A reviewing court shall hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]” 5 U.S.C. § 706; *accord* 42 U.S.C. § 7607(d)(9)(A). “[A] rule is arbitrary and capricious if the agency: (1) has relied on factors which Congress has not intended it to consider, (2) entirely failed to consider an important aspect of the problem, (3) offered an explanation for its decision that runs counter to the evidence before the agency, or (4) offers an explanation that is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Am. Wild Horse Pres. Campaign v. Perdue*, 873 F.3d 914, 923 (D.C. Cir. 2017) (internal alterations omitted); *see also State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (same).

Furthermore, “an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change[.]” *State Farm*, 463 U.S. at 42. The requirement that “[a]n agency [must] provide reasoned explanation for its action would ordinarily demand that it display awareness that it is changing position.” *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). It “must show that there are good reasons for the new policy.” *Id.* Where, as here, a new policy rests on factual or legal determinations that contradict those underlying the agency’s prior policy, the agency must provide a more detailed explanation for its policy. *Id.* “Unexplained inconsistency” in agency policy is “a reason for holding an interpretation to be an

arbitrary and capricious change from agency practice.” *National Cable & Telecommunications Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005).

EPA made several errors in its analysis supporting the proposed rule, and failed to provide a good reason for the change in its rule providing for a five-year phase in period for compliance with step two standards (without a two-year sell through). In promulgating the 2015 NSPS, EPA recognized the dangers of PM_{2.5} emissions. EPA estimated that the 2015 standards would reduce premature deaths by 360 to 810 people, prevent 180 emergency room visits, and avoid 48,000 lost workdays. Those dangers are still present, and EPA does not even try to argue that the proposed rule will have any health benefits. EPA’s lack of justification for the delay in implementation and disregard of the serious public health concerns the statute aims to protect is arbitrary and capricious. *See Air All. Houston v. Env’tl. Prot. Agency*, 906 F.3d 1049, 1066-67 (D.C. Cir. 2018) (finding EPA decision to change the effective date of a rule was arbitrary and capricious); *Clean Air Council v. Pruitt*, 862 F.3d 1, 8 (D.C. Cir. 2017) (finding EPA’s decision to stay a rule was arbitrary and capricious).

Instead, in the proposed rule, EPA admits that the costs in foregone health benefits (\$90 million to \$230 million) of modifying the rule outweigh the benefits in savings to manufacturers (\$10 million) by a factor of between nine and twenty-three to one. 83 Fed. Reg. at 61,583. Although this ratio of benefits to public health compared to industry compliance costs is less than EPA found in promulgating the 2015 NSPS (nearly 100:1), EPA has not offered any reasoned explanation for why it is now prioritizing cost savings to industry that still pale in comparison to the public health benefits that will be lost.

Moreover, EPA’s quantification of the foregone public health benefits is likely underestimated, for two reasons. First, EPA avoided selecting the most likely scenario (scenario 3) that would result in even more foregone public health benefits. EPA selected scenario 2, where manufacturers would sell no more step one-compliant devices than anticipated in the 2015 performance standards, as the primary scenario. EPA provided no justification, however, for its assumption that scenario 2 was more likely than scenario 3, in which manufacturers would increase production of step one devices because retailers would have additional time to sell them. Given the evidence in the record that step two-compliant devices are more expensive to manufacture—and therefore result in relatively less profit for manufacturers compared to step one-compliant devices—EPA’s assumption that manufacturers that support a sell-through will not ramp up production of step one-compliant devices runs counter to common sense. If EPA had selected scenario 3 as the primary scenario, the estimated health impacts would be even greater. *See* Supplemental Regulatory Impact Analysis at 9, 17 (showing that foregone emissions reductions under scenario 3 are greater than under scenario 2).¹²

¹² In the Supplemental Regulatory Impact Analysis, EPA also included analysis of sales, savings, and foregone benefits for these same scenarios for wood stoves. *See* Supplemental Regulatory Impact Analysis at 16-18. EPA’s estimates for wood stoves are also flawed. In EPA’s projections for wood stoves, it fails to account for single burn rate stoves and pellet stoves. For example, for the year 2019, EPA projects shipments of 102,000 stoves, but fails to account for the 29,325 single burn rate stoves and 95,585 pellet stoves that it projected in the Regulatory Impact Analysis for the 2015 NSPS. *Compare* Regulatory Impact Analysis (RIA) for Residential Wood Heaters NSPS Revision (Feb. 2015), available at: <https://www3.epa.gov/ttnecas1/docs/ria/wood->

Second, EPA only estimated the health impacts for four years, but it admits that wood burning devices have life expectancies of *twenty years*. See 80 Fed. Reg. at 13,693. Step one devices sold in 2021 would emit PM_{2.5} for decades. Thus, the negative health impacts of allowing a two year sell-through period are likely far greater than EPA suggests in the proposed rule.

Furthermore, EPA's proposed sell-through would reward manufacturers that did not diligently comply with an already generous five-year phase in period. For example, at the EPA public hearing for the proposed rule on December 17, 2018, a representative for Hearth and Home Technologies stated that her company had engaged in research and development for the past twenty-four months. However, the industry was put on formal notice by the proposed NSPS issued in February 2014 (five years ago) that particulate matter standards would be strengthened. The companies that have developed step two compliant devices would suffer business losses if EPA gives an advantage to dilatory companies.¹³ Moreover, manufacturers had the opportunity to promptly litigate the legality of the 2015 NSPS, but chose instead to delay that litigation for more than three years (presumably to try and convince EPA to weaken the standards). To the extent these companies delayed in moving ahead to develop compliant wood boilers and furnaces, that was a conscious choice that should not be rewarded with an additional two years to sell noncompliant devices.

Potential Consumer Fraud

Finally, in addition to the numerous problems with the proposal under federal law outlined above, EPA's proposed sell-through provision would also create potential consumer fraud issues under state law. As explained above, if EPA allowed sale of new noncompliant wood boilers and forced-air furnaces past May 15, 2020, it would still be illegal under section 111(e) for owners to install and operate them. Failure by retailers to disclose this issue to consumers may constitute consumer fraud under state laws. See, e.g., N.Y. General Business Law § 349; see also *People ex rel. Spitzer v. Applied Card Sys., Inc.*, 894 N.E.2d 1, 6 (N.Y. 2008) (holding that federal law did not preempt the state Attorney General's ability to seek penalties and restitution for consumer frauds). EPA could avoid these consumer fraud issues by not finalizing the proposed sell-through provision.

4. Conclusion

For the reasons stated above, EPA should not finalized its proposed rule to allow a sell-through period for non-compliant wood boilers and furnaces. The 2015 performance standards as promulgated are necessary to protect public health from the dangers of particulate matter pollution. Allowing a sell-through period will mean that the public will not realize the full

[heaters ria final-nsps-revision 2015-02.pdf](#), at 4-13 (Table 4-4), with Supplemental Regulatory Impact Analysis at 16 (Table A-2). Without accounting for single burn rate stoves and pellet stoves, EPA again underestimates the costs of the proposed sell-through period, if it were expanded to include those devices.

¹³ December 5, 2018 letter from Scott Nichols of Tarm Biomass to EPA, available at: <https://www.regulations.gov/document?D=EPA-HQ-OAR-2018-0195-0019>.

benefits of the 2015 standards until well after the 2020 step two compliance deadline. Therefore, the States urge EPA to abandon its misguided proposal.

Sincerely,

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