

**Attorneys General of New York, Delaware, Illinois, Maryland, Massachusetts, Minnesota, New Jersey, Oregon, Rhode Island, Vermont, Washington, and the Puget Sound Clean Air Agency**

July 6, 2020

Re: Proposed Amendments to the Standards of Performance for New Residential Wood Heaters, New Residential Hydronic Heaters and Forced-Air Furnaces, published at 85 Fed. Reg. 31,124 (May 22, 2020); Agency Docket No. EPA-HQ-OAR-2018-0195

The Attorneys General of New York, Delaware, Illinois, Maryland, Massachusetts, Minnesota, New Jersey, Oregon, Rhode Island, Vermont, Washington, and the Puget Sound Clean Air Agency (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 for the sale of non-compliant wood heaters, hydronic heaters (wood boilers) and forced-air furnaces until November 30, 2020, which would allow increased emissions and negative health impacts throughout the roughly twenty-year life span of such noncompliant units—*i.e.*, decades beyond the May 15, 2020 compliance deadline.

EPA's action is particularly egregious, because it aims to facilitate more sales of wood-burning heating devices that will result in more particulate matter emissions that harm the respiratory systems of more people at the precise moment when the Covid-19 pandemic is ravaging respiratory health, and researchers have linked long term exposure to the very pollution at issue here—particulate matter—to increased Covid-19 mortality in our most vulnerable communities, which have been hit hardest by the pandemic.<sup>1</sup> EPA's action conveys that EPA—contrary to its mission and the Congressional intent animating the Clean Air Act—is willing to elevate the interests of wood-burning heating device manufacturers and sellers over the interests of those whose health EPA is charged with protecting. 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 during a respiratory illness pandemic, endangering the residents of our States and of people around the country.

## **1. Hazards of Wood Smoke**

As EPA has recognized, wood-burning devices emit multiple pollutants that endanger human health. These pollutants include fine particulate matter (PM<sub>2.5</sub>), carbon monoxide (CO),

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<sup>1</sup> X. Wu, et al, Exposures to air pollution and COVID-19 mortality in the United States: A nationwide cross-sectional study, at 2 (Apr. 20, 2020), *available at*: <https://projects.iq.harvard.edu/covid-pm/home>; *see also* Office of Massachusetts Attorney General Maura Healey, COVID-19's Unequal Effects in Massachusetts: Remediating the Legacy of Environmental Injustice & Building Climate Resilience (2020), *available at*: <https://www.mass.gov/doc/covid-19s-unequal-effects-in-massachusetts/download>.

polycyclic aromatic hydrocarbons (PAHs), and polycyclic organic matter (POM). The Centers for Disease Control determined that PAHs are reasonably expected to cause cancer.<sup>2</sup>

Multiple studies show the dangers of PM<sub>2.5</sub>. For example, a 2018 study published in the Proceedings of the National Academy of Sciences attributed an estimated 4 million deaths worldwide to PM<sub>2.5</sub> in 2015.<sup>3</sup> Another study found that increases in particulate matter were associated with increases in mortality, and the risks were greatest among certain groups, including African-Americans and people with Medicaid eligibility.<sup>4</sup> In 2013, acknowledging these dangers, EPA revised its National Ambient Air Quality Standards (NAAQS) for PM<sub>2.5</sub> to provide more protection of public health. 78 Fed. Reg. 3,086, 3,103 (Jan. 15, 2013). More recently and unfortunately, EPA is proposing to retain those standards despite mounting unequivocal public health evidence that the current NAAQS for PM<sub>2.5</sub> should be further revised to comply with the Clean Air Act, a proposal that our states are actively opposing.<sup>5</sup> EPA's failure to strengthen the PM<sub>2.5</sub> standards and proposal to allow a sell-through of non-compliant wood heaters will also disproportionately affect environmental justice communities.

## **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).

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<sup>2</sup> 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>.

<sup>3</sup> 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.

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

<sup>5</sup> See Comments of the Attorneys General of New York, California, Illinois, Connecticut, Delaware, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington, and Wisconsin on the EPA Administrator's Review of the National Ambient Air Quality Standards for Particulate Matter, 85 Fed. Reg. 248094 (Apr. 30, 2020), EPA-HQ-OAR-2015-0072-0069 (submitted June 29, 2020).

### *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<sub>2.5</sub> 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<sub>2.5</sub> 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. 4,994-01, 4999 (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 Clean Air 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<sub>2.5</sub>.<sup>6</sup>

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

Source Category	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.

<sup>6</sup> 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 a sell-through period.

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 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, explaining that EPA lacked the authority to set a standard and then allow retailers to sell new wood-burning devices that violated it.

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. *Id.* at 13,694. 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 to defend the 2015 NSPS. After many years of being held in abeyance, briefing of the case has begun this summer.

#### *2018 Proposed Amendments to the 2015 NSPS*

On November 30, 2018, EPA issued two rulemaking notices relevant to the 2015 NSPS. First, 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 sought 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.

The States opposed the proposed two-year sell-through, emphasizing that the sell-through would have negative impacts on their residents. The States also explained that EPA lacked

authority to issue a proposed sell-through, the Clean Air Act would prohibit installation and operation of a non-compliant device, and EPA failed to offer a legal justification for its position.

On April 2, 2020, EPA issued a final rule in which it declined to authorize a sell-through period for step one devices. 85 Fed. Reg. 18,448 (April 2, 2020). EPA found that manufacturers had presented insufficient data to demonstrate that a sell-through was necessary. *Id.* at 18,452. Further, as of March 2018 (two years before the compliance date), many step two models were available on the market, indicating that it was possible for manufacturers to meet EPA’s original deadline. *Id.* No manufacturers provided EPA with data indicating that they had tried but failed to develop models compliant with step two standards. *Id.* Moreover, the forgone public health benefits of a sell-through outweighed the monetary benefits to manufacturers and retailers by a factor of over ten to one. *Id.* at 18,453. Accordingly, EPA determined a sell-through period was not necessary as of April 2, 2020. *See id.* at 18,448, 18,452-18,453.

### *2020 Proposed Sell-Through Period*

On May 22, 2020, 50 days after rejecting a proposed sell-through, EPA issued a rulemaking proposing yet another sell-through, this time from the publication of a final rule until November 30, 2020. 85 Fed. Reg. at 31,124. EPA stated it was proposing this action because of the impact of “the ongoing COVID–19 pandemic on retailers who have lost valuable sales opportunities during the closures, stay-at-home orders, and other precautions taken to address the pandemic.” *Id.* at 31,127. EPA also stated that allowing a sell-through until November 30, 2020 “roughly replaces the 60 days of sales opportunities that retailers would have otherwise had in the absence of the pandemic.” *Id.* at 31,128. EPA did not quantify the additional emissions of particulate matter associated with the newly-proposed sell-through or present a cost-benefit analysis or a regulatory impact statement with its notice of proposed rulemaking. EPA has attempted to make this sell-through a six-month sell through because it has indicated that it will not take enforcement action against retailers while the rule is pending.<sup>7</sup>

A cost-benefit analysis would show that the cost of foregone health benefits greatly outweighs the savings to industry. Although not presented by EPA, the cost-benefit analysis for this sell-through would likely be proportional to the proposed sell-through in 2018. EPA’s own analysis, which understated costs, found the costs would exceed the benefits by over ten to one. *See* 83 Fed. Reg. at 61,582.

### **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, harmful health effects, and morbidity of 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 prohibits installation and operation of step one wood-

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<sup>7</sup> *See* Memo from Susan Parker Bodine to All Governmental and Private Sector Partners (March 26, 2020), available at: <https://www.epa.gov/newsreleases/epa-announces-enforcement-discretion-policy-covid-19-pandemic>.

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.

#### *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 that authorizes the agency to provide for the sale of noncompliant units during a sell-through period.

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 also conflicts 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 that fail to meet the 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 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 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, wood-burning devices sold and installed after May 15, 2020 are “new sources” 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.”).<sup>8</sup>

Although manufacturers would have built the wood-burning devices 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 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 device 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. EPA*, 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 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.

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

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<sup>8</sup> “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.

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.

*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 Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (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." *FCC 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." *Nat'l Cable & Telecommunic'ns Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005).

The justification presented by EPA does not comport with the facts. EPA attempts to justify the proposed sell-through period based on the unanticipated costs of the Covid-19 pandemic. 85 Fed. Reg. at 31,128. Yet, EPA declined to allow a sell through on April 2, 2020—during the initial peak of the very same pandemic EPA now claims is a justification for the sell-through and while already in possession of the main evidence on which it now relies to support its abrupt about-face due to a "recent turn of events." *Id.* at 31,128 & n.2-3 (citing a letter from

Jack Goldman, Hearth, Patio & Barbecue Association to Administrator Wheeler, dated March 24, 2020). Further, EPA has not indicated that manufacturers produced the data that EPA lacked when it rejected the sell-through period in April 2020 as unfounded. Letters written by HPBA, including statements by members, do not explain the amount of stranded inventory as proportional to the sales that would ordinarily have occurred in the spring, but for the Covid-19 restrictions. These anecdotes do not justify EPA reversing its position. Indeed, EPA’s proposal is wholly unsupported by any record evidence that casts even a hint of a shadow on its April 2020 determination that a sell-through is unwarranted, making an extension unnecessary. *See Nat’l Cable & Telecommunications*, 545 U.S. at 981.

The length of the proposed sell-through is also inappropriate. Although EPA states that manufacturers lost approximately 60 days of sales due to the pandemic, it is allowing a sell-through period of effectively six months by not enforcing the step two standards while this proposal is pending. EPA acknowledged that the summer is typically a slow selling season. 85 Fed. Reg. at 31,128. Retailers also stated that the spring is a slow season, but the late-summer and fall is the peak selling season.<sup>9</sup> EPA has not explained why such a lengthy sell-through period is necessary where retailers lost part of a slow selling period and are being given a much longer period that includes their peak selling period. Of course, EPA permitting retailers to sell step one devices for another peak season will have greater pollution and health impacts than if retailers had sold for two additional months during their slow season.

EPA also failed to account for the additional pollution that will occur through allowing an additional sell-through period. Without support, EPA stated that the proposed “amendments will not have a significant effect on emissions.” *Id.* at 31,129. And, EPA did not even attempt to quantify this bare bones allegation.

Along the same lines, EPA did not account for costs and benefits in its current proposed sell-through period. When rejecting the sell-through in April 2020, EPA noted that the cost in foregone health benefits from the sell-through would outweigh the benefits to industry by a factor of between ten and twenty to one. *Id.* at 18,453. Here, EPA did not even attempt to perform a cost benefit analysis. Yet, using EPA’s previous analyses of a similar sell-through, the costs of a new sell-through would also outweigh the benefits to industry by at least ten to one. *See* 83 Fed. Reg. at 61,582. 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. EPA*, 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).

Allowing the continued sale of step one devices until November 30, 2020 will significantly increase particulate matter emissions for decades—*i.e.*, over the entire life span of the units—and cause the premature deaths of hundreds to thousands of Americans. Based on the

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<sup>9</sup> March 20, 2020 letter from HPBA to Hon. Nancy Pelosi, Hon. Mitch McConnell, Hon. Kevin McCarthy, and Hon. Chuck Schumer at 3 (“The vast majority of our sells takes place in 4 months: Aug, Sept, Oct, Nov.”).

length of the extension and the increase in emissions of step one units compared to step two units, the sell through could well allow an increase of between approximately 7,700 tons and 24,000 tons of particulate matter emissions over the next twenty years.<sup>10</sup> Based on these ranges of emissions, these additional emissions will cause a projected 340 to 2,360 premature deaths.

These numbers have real impacts on the residents of the States. For example, according to the U.S. Census Bureau, approximately 120,159 households in New York rely on wood for heating, which corresponds to approximately 5.8% of the total number of households that rely on wood in the United States.<sup>11</sup> As a northeastern state with cold winters and large rural areas, New York likely consumes a disproportionate amount of wood for each household that relies on wood heat. Even assuming that New York consumption tracks with average national usage, the sell-through will cost the lives of an estimated 20 to 137 New Yorkers over the next 20 years.

What is more, EPA's proposed sell-through would reward manufacturers that did not diligently comply with an already generous five-year phase in period. As EPA noted in April 2020, step two models have been available for years. 85 Fed. Reg at 18,452. And, manufacturers successfully transitioned to the 1988 standards with a two-year phase in period. *See* 53 Fed. Reg. at 5,860. The companies that have developed step two compliant devices would suffer business

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<sup>10</sup> Depending on type of appliance, the weighted average of tons of additional emissions from step one units, as opposed to step two units, ranges from 0.0026 to 0.0523. *See* Memo from ECR Estimated Emissions from Wood Heaters (Jan. 30, 2015), *available at*:

<https://beta.regulations.gov/document/EPA-HQ-OAR-2018-0195-0012>.

Assuming 10% of a year of inventory is stranded and can be sold during the proposed sell-through, that equates to about 27,746 units. *See* Environmental Protection Agency, *Supplemental Regulatory Impact Analysis (RIA) for "Standards of Performance for New Residential Wood Heaters, New Residential Hydronic Heaters and Forced-Air Furnaces"* at 5, *available at*:

[https://www.epa.gov/sites/production/files/2018-11/documents/wood\\_heaters\\_proposal\\_nsps\\_supp\\_ria\\_final.pdf](https://www.epa.gov/sites/production/files/2018-11/documents/wood_heaters_proposal_nsps_supp_ria_final.pdf)

(assuming 10% stranded inventory); Environmental Protection Agency, *Regulatory Impact Analysis (RIA) for Residential Wood Heaters NSPS Revision* (Feb. 2015), *available at*:

[https://www3.epa.gov/ttnecas1/docs/ria/wood-heaters\\_ria\\_final-nsps-revision\\_2015-02.pdf](https://www3.epa.gov/ttnecas1/docs/ria/wood-heaters_ria_final-nsps-revision_2015-02.pdf), at 4-

13 (estimating annual sales of wood-burning devices), On the higher end, assuming 50% of a year of sales occurs from a 6 month sell-through period, 138,730 units will be sold. *See*

Environmental Protection Agency, *Regulatory Impact Analysis (RIA) for Residential Wood Heaters NSPS Revision* (Feb. 2015); *see also* NESCAUM, *Estimating Annual Excess PM<sub>2.5</sub>*

*Emissions and Associated Health Costs from a 3-year Delay of Step 2 New Source Performance Standards (NSPS) for Residential Wood Burning Devices* (Oct. 10, 2018), *available at*:

<https://www.nescaum.org/documents/nescaum-method-pm2-5-health-cost-estimates-3-yr-step2-rwh-nsps-delay-20181010-all.pdf/>.

<sup>11</sup> United States Census Bureau, *House Heating Fuel*, *available at*:

<https://data.census.gov/cedsci/table?q=House%20Heating%20Fuel&d=ACS%201-Year%20Estimates%20Detailed%20Tables&tid=ACSDT1Y2018.B25040>

(last visited: July 2, 2020).

losses if EPA gives an advantage to dilatory companies.<sup>12</sup> Moreover, manufacturers had the opportunity to promptly litigate the legality of the 2015 NSPS, but chose instead to delay that litigation for five 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 additional time to sell noncompliant devices.

*EPA Failed to Comply with Its Obligations under Executive Order 12898 to Address Environmental Justice in Minority Populations and Low-Income Populations*

Pursuant to Executive Order 12898, 59 Fed. Reg. 7,629 (Feb. 16, 1994), federal agencies must identify and address disproportionately high and adverse human health or environmental effects of their policies on minority populations and low-income populations in the United States. EPA must also give the reasoning for its decision making. *See State Farm*, 463 U.S. at 42. The Proposed Rule does not meaningfully address its environmental justice impacts caused by extending the sell-through period. Instead, it relies on an unsupported conclusion that “this action does not have disproportionately high and adverse human health or environmental effects on minority populations, low-income populations” and “[t]he amendments will not have a significant effect on emissions.” 85 Fed. Reg. at 31,129. The agency failed to provide analysis to substantiate its conclusion that the proposed action will not harm minority and low-income populations.

As the 2015 Rule acknowledged, “[r]esidential wood smoke can contribute to unhealthy levels of PM<sub>2.5</sub> in many neighborhoods nationwide, including in minority and low-income neighborhoods,” and the 2015 Rule significantly reduces these pollutants that adversely affect human health by phasing out the sale of more polluting devices. 80 Fed. Reg. at 13,673. The Proposed Rule seeks to undo these benefits offered by the 2015 Rule to allow continued sale of Step 1 devices. Communities of color already are exposed to significantly higher levels of air pollution compared to white individuals.<sup>13</sup> These same communities cannot afford additional particulate matter pollution from step one devices. By continuing to sell more-polluting step one devices past the deadline, particulate matter that could have been avoided through the sale of step two devices will burden these communities for decades to come.

Although the Proposed Rule relies on COVID-19 to justify extending the sell-through period, the global pandemic serves as an even stronger reason to enforce the original deadline. Researchers have linked small increases in long-term exposure to PM<sub>2.5</sub> to a large increase in the COVID-19 death rate.<sup>14</sup> Much like the impacts of air pollution, the impacts of COVID-19 are

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<sup>12</sup> Letter from Daryl Lamppa of Lamppa Manufacturing, Inc. to EPA (May 28, 2020), *available at*: <https://www.regulations.gov/document?D=EPA-HQ-OAR-2018-0195-0261>

<sup>13</sup> Bongki Woo, et al., Residential Segregation and Racial/Ethnic Disparities in Ambient Air Pollution, 11 RACE & SOCIAL PROBLEMS 60 (2019), *available at*: <https://pubmed.ncbi.nlm.nih.gov/31440306/>.

<sup>14</sup> *See* Wu, Exposure to air pollution and COVID-19 mortality in the United States (reviewing

disproportionately experienced by communities of color.<sup>15</sup> Increasing particulate matter during the pandemic may have fatal health impacts, which will fall disproportionately on populations of color. For EPA to prioritize marginal and unsupported economic considerations above serious and long-term health consequences and increased morbidity defies the purpose of the Clean Air Act and the Agency's duty to protect the environment and public health and welfare.

The Proposed Rule fails to identify and address its impacts on low-income and minority populations in accordance with Executive Order 12898. The failure to provide a reasonable and adequate explanation in the Proposed Rule would render EPA's proposed extension of the sell-through period arbitrary and capricious if finalized.

#### *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.*, Mass. Gen. L. ch. 93A, § 2; 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 setting up retailers to implicate these consumer fraud issues by not finalizing the proposed sell-through provision.

#### **4. Conclusion**

For the reasons stated above, EPA should not finalize its proposed rule—that would reverse its decision of just two months ago—to allow a sell-through period for non-compliant wood boilers and furnaces. As EPA determined in April of this year, the 2015 performance standards as promulgated are necessary to protect public health from the dangers of particulate matter pollution and provided ample accommodation to retailers and manufacturers. Allowing a sell-through period will mean that the public will not realize the full benefits of the 2015 standards until well after the 2020 step two compliance deadline. EPA lacks authority to allow such a sell-through and its proposed sell-through is arbitrary and capricious, would harm

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studies to find a positive and significant association between COVID-19 notification rates and particulate matter).

<sup>15</sup> *See* Monica Webb Hooper, et al., COVID-19 and racial/ethnic disparities, JAMA (2020), available at: <https://jamanetwork.com/journals/jama/fullarticle/2766098> (writing that African Americans and Latinos bear a disproportionate burden of COVID-19–related outcomes); Joshua Robert Goldstein & Serge Atherwood, Improved measurement of racial/ethnic disparities in COVID-19 mortality in the United States, MEDRXIV (2020), available at: <https://www.medrxiv.org/content/10.1101/2020.05.21.20109116v1> (finding that COVID-19 death rates are 80% higher for African Americans and over 50% higher for Latinos, relative to Whites, on a national level).

environmental justice communities, and encourage consumer fraud. Therefore, the States urge EPA to abandon its misguided proposal.

Sincerely,

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