

July 6, 2020

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U.S. Environmental Protection Agency  
EPA Docket Center  
Air and Radiation Docket  
Docket ID No. EPA-HQ-OAR-2018-0195  
Mail Code 28221T  
1200 Pennsylvania Avenue NW  
Washington, DC 20460

To Whom It May Concern:

The National Association of Clean Air Agencies (NACAA) offers the following comments on the U.S. Environmental Protection Agency's (EPA's) Notice of Proposed Rulemaking (NPRM), "Standards of Performance for New Residential Wood Heaters, New Residential Hydronic Heaters and Forced-Air Furnaces," which was published in the *Federal Register* on May 22, 2020 (85 Fed. Reg. 31,124).<sup>1</sup> NACAA is the national, nonpartisan, non-profit association of air pollution control agencies in 41 states, including 115 local air agencies, the District of Columbia and four territories. The air quality professionals in our member agencies have vast experience dedicated to improving air quality in the U.S. These comments are based upon that experience. The views expressed in these comments do not represent the positions of every state and local air pollution control agency in the country.

NACAA opposes this proposed rule because of the illogical justification; the absence of evidence supporting the need for a sell-through; the lack of analyses quantifying the excess emissions, related adverse public health impacts, cost savings and foregone benefits that would result; the lack legal authority by EPA to violate a New Source Performance Standard (NSPS) and its punishment of manufacturers and retailers who were prepared to comply on May 15, 2020.

In addition, it is deeply disturbing that in the midst of the COVID-19 respiratory pandemic EPA would pursue a rule that would cause excess PM<sub>2.5</sub> emissions, and the attendant deadly respiratory and other health harms, for decades to come.

Background

In this NPRM, EPA proposes to allow retailers of residential wood heaters (RWHs) to sell Step 1 units from the date of *Federal Register* publication of the final rule until November 30, 2020 – an action the agency says is to help make up for "significant losses

<sup>1</sup> 85 Fed. Reg. 31,124 (May 22, 2020) – <https://www.govinfo.gov/content/pkg/FR-2020-05-22/pdf/2020-11096.pdf>

in retail sales” of RWHs due to COVID-19. Between now and the date on which EPA publishes a final action on this proposal the agency will place a low priority on enforcement of the May 15, 2020 deadline for selling Step 1 units. The agency writes in the proposal, “...to ensure retailers will regain the sales opportunities lost as a result of the closures, shut-down orders, and other precautions taken due to the pandemic during the last 60 days leading up to May 15, 2020, the EPA is proposing to allow retailers to sell Step 1 certified wood heating devices from the date of promulgation, if this proposal is promulgated, until November 30, 2020. In addition, in light of the above, during the period between May 15, 2020, and publication of EPA's final action on this proposal, EPA will treat the sale of Step 1 devices as a low enforcement priority.”

On April 2, 2020, EPA published a final rule making amendments to the April 2015 RWH NSPS (85 Fed. Reg. 18, 448).<sup>2</sup> In that final rule, EPA announced its decision to not finalize its November 2018 proposal to provide for a two-year sell-through for Step 1 units. After an intense years'-long lobbying effort by industry to gain more time to manufacture and sell Step 1 units, manufacturers and retailers provided “insufficient” data to justify the need for a sell-through, according to EPA. Under the current proposal, retailers would be given until November 30, 2020 – six and a half additional months – to sell Step 1 units to compensate for two months of claimed lost sales.

### Woodsmoke Emissions Pose Serious Threats to Public Health and the Environment

Residential wood heating in the U.S. produces five times more direct fine particulate matter (PM<sub>2.5</sub>) emissions than all U.S. petroleum refineries, cement manufacturers and pulp and paper plants combined.<sup>3</sup> Woodsmoke contains a mixture of harmful substances that penetrate deep into the lungs. PM<sub>2.5</sub> from woodsmoke not only affects air quality in entire regions, but also significantly impacts air quality and public health at the local level, including in communities and neighborhoods located in valleys where woodsmoke accumulates. In fact, a single wood-burning device can emit enough pollutants to place an entire neighborhood at risk.<sup>4</sup> Each year, residential wood combustion is responsible for hundreds of thousands of tons of PM<sub>2.5</sub> emissions. These emissions can increase the concentration of particle pollution to levels that cause serious health impacts ranging from exacerbation of cardiac and respiratory problems to premature death.<sup>5</sup> Further, PM<sub>2.5</sub> contributes significantly to our nation's regional haze problem. Residential woodsmoke also contains volatile organic compounds and carbon monoxide, as well as toxic air pollutants such as benzene, toluene, aldehyde gases, polycyclic organic matter (POM), black carbon and methane. EPA estimates that residential wood combustion contributes 44 percent of all anthropogenic POM emissions and accounts for 50 percent of all area source cancer risks and 8 percent of all noncancer respiratory effects.<sup>6</sup>

### EPA's Justification for this Proposal Is Illogical

EPA states in its proposal that it is “proposing to provide time for retailers to sell Step 1 devices to ensure they get the full benefit of the 5 year ‘lead time’ on which the Step 2 standards were based by replacing the time period for sales opportunities that [they] lost due to COVID-19.”

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<sup>2</sup> 85 Fed. Reg. 18,448 (April 2, 2020) – <https://www.govinfo.gov/content/pkg/FR-2020-04-02/pdf/2020-05961.pdf>

<sup>3</sup> *Introduction to Hearth Appliances, Nature and Magnitude of Residential Wood Smoke*, Presentation of Larry Brockman, U.S. Environmental Protection Agency (March 6, 2018) – [http://www.4cleanair.org/sites/default/files/Documents/RWH-Intro\\_to\\_Hearth\\_Appliances-Larry\\_Brockman\\_EPA-030618.pdf](http://www.4cleanair.org/sites/default/files/Documents/RWH-Intro_to_Hearth_Appliances-Larry_Brockman_EPA-030618.pdf)

<sup>4</sup> Source: Bay Area Air Quality Management District

<sup>5</sup> *Strategies for Reducing Residential Wood Smoke*, U.S. Environmental Protection Agency (March 2013), p. 4 – <https://www.epa.gov/sites/production/files/documents/strategies.pdf>

<sup>6</sup> *Supra* note 3

EPA offers this justification for its proposal: “The Residential Wood Heater source category is different from most NSPS source categories in that it regulates mass-produced residential consumer appliance products, rather than industrial facilities. Thus, important elements in determining the BSER [Best System of Emission Reduction] include the costs and environmental impacts on consumers of delaying production while wood heating devices are designed, tested, field evaluated, and certified. Section 111(b)(1)(B) of the CAA requires that the standards be effective upon the promulgation of the NSPS. Considering these factors, as discussed more fully in the 2015 Federal Register document, the 2015 NSPS final rule took a two-step compliance approach, in which certain Step 1 standards became effective on May 15, 2015, and more stringent Step 2 standards would become effective 5 years later, on May 15, 2020. In particular, one of the bases for the Step 2 limits and deadline was that 5 years was sufficient time for manufa[c]turers to develop models to meet the more stringent Step 2 standards and for retailers to transition from selling Step 1 units to Step 2 units. Providing this 5-year time period was a key aspect of the 2015 rule because, pursuant to CAA 111(a)(1), the stringency of a standard of performance under CAA 111 must reflect ‘the degree of emission limitation achievable’ through the application of the best system of emission reduction. In turn, what is achievable is dependent on how much ‘lead time’ sources have to meet the standard.”

Numerous aspects of this justification are highly problematic.

First, using BSER as the justification for providing a sell-through for retailers is inappropriate. The purpose of a sell-through is to address inventory management issues not to advance the development of technology. EPA is not claiming that BSER for the Step 2 standards cannot be achieved, nor could the agency make such a claim since hundreds of different models of Step 2-certified devices in all categories (boilers, furnaces and stoves) have been in production for several years.

Second, EPA states that the proposed sell-through would not take effect until and unless a final rule promulgating the action is published in the *Federal Register*. The fact that the agency openly states in the proposed rule that between May 15, 2020 and final promulgation enforcement of the Step 2 compliance deadline will be a low priority clearly signals that EPA will allow the illegal sale of Step 1 units for a full six and a half months. A simple internet search provides many examples of Step 1 appliances still being offered for sale online.<sup>7,8,9</sup>

Third, by turning a blind eye to illegal sales, EPA illogically presupposes the outcome of the rulemaking process. If EPA is truly interested in public comments and intends to give them full consideration, then there is the chance the agency may determine that a sell-through is not warranted and should not be finalized, in which case retailers will, nonetheless, still have had a sell-through of four or more months.

Fourth, it is also illogical to provide a sell-through of more than six-months to make up for two-months of purported (though unsubstantiated) lost sales. The period of “lost sales” in question is from mid-March to May 15, 2020, which is the slowest season for RWH sales. Setting aside EPA’s looking the other way on enforcement from May 15, 2020 until the proposed regulatory start of the sell-through, the proposed two-

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<sup>7</sup>[http://www.4cleanair.org/sites/default/files/Documents/Buck Stove Model 21 Wood Stove with Black Door FP 21 at Tractor Supply Co .pdf](http://www.4cleanair.org/sites/default/files/Documents/Buck%20Stove%20Model%2021%20Wood%20Stove%20with%20Black%20Door%20FP%2021%20at%20Tractor%20Supply%20Co.pdf)

<sup>8</sup>[http://www.4cleanair.org/sites/default/files/Documents/pleasant hearth 1800.pdf](http://www.4cleanair.org/sites/default/files/Documents/pleasant%20hearth%201800.pdf)

<sup>9</sup>[http://www.4cleanair.org/sites/default/files/Documents/Englander 2000 sq ft EPA Certified Wood-Burning-Stove-15-W03-The Home Depot.pdf](http://www.4cleanair.org/sites/default/files/Documents/Englander%202000%20sq%20ft%20EPA%20Certified%20Wood-Burning-Stove-15-W03-The%20Home%20Depot.pdf)

month “official” sell-through period EPA is offering is October 1, 2020 through November 30, 2020 – two months of the peak sales season.

In its final Response to Comments accompanying the April 2, 2020 final rule in which it did not promulgate a two-year sell-through, EPA quoted from the comments of U.S. Stove Company (USSC) provided in support of the proposed two-year sell through. In the quoted comments, USSC emphasized that the showroom floor selling season is, essentially, four months, from September through December: “Stores are typically set with wood heating product displays shortly prior to Labor Day, and after the New Year they begin to transition and replace heating product with spring lawn and garden items. Effectively 4 months on the showroom floor as a selling season. Like many other seasonal products, these retailers take advantage of the time of year consumers will be buying these kinds of products. Weather is a pivotal factor on the success or failure of the selling season. It is common for mass merchant retailers to carryover somewhere between 25-35% of their annual purchases to the next year. This number translates to between [REDACTED] of USSC inventory that is typically carried over by the retailers. These merchants, often publicly traded, won’t afford to be saddled with inventory they cannot sell the following year because of the May 2020 deadline. In order to maintain business relationships, USSC will either have to buy product back or pay for markdowns (payments or credits to retailers to be able to discount products as sale items at retail) of retail prices.”<sup>10</sup>

#### EPA Has Provided No Evidence Supporting the Need for a Sell-Through

Other than the RWH retailers’ claim, as reported by EPA, that they lost two months of sales time “due to substantial temporary closure of stores, stay at home directives, and the overall focus on addressing the challenges posed by the pandemic,” EPA has provided no evidence or data to support its contention that a sell-through is necessary. (It is worth noting that not all states required small businesses, such as RWH retailers, to shut down and that major home center chains were open for business nationwide throughout the two-month period and, as a result, experienced no loss of time for sales before the compliance deadline.)

The agency has failed to document any specific impacts of the COVID-19 pandemic on RWH retailers or of the sell-through on RWH sales – no analysis of how many units would have been sold but for COVID-19, no indication of how many units actually were sold in stores and online, no attempt to ascertain what typical sales are from mid-March to mid-May, no explanation of how the agency knows that Step 1 units were not being stockpiled in anticipation of a two-year sell-through that did not materialize and no estimate of how many units will be sold as a result of a sell-through, including not only from October 1 through November 30, 2020 but also from May 15 through September 30, 2020 due to enforcement being a low priority (nor any assurance that the number of units sold will not be more than would otherwise have occurred but for COVID-19). NACAA does not know the answer to these questions and, more significantly, neither does EPA. Therein lies a tremendous problem – rulemaking without evidence to justify the rule.

#### EPA Has Conducted No Analyses Quantifying the Excess Emissions and Related Adverse Public Health and Welfare Impacts, Nor the “Cost Savings” and “Foregone Benefits” to Result from Its Proposal

EPA has also failed to provide any analysis of the excess emissions to occur as a result of the continued sale of higher-polluting Step 1 units, their impact on public health and the environment or the cost

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<sup>10</sup> Response to Comments on Proposed Sell-Through Amendment and Pellet Fuel Requirements in the “Standards of Performance for New Residential Wood Heaters, New Residential Hydronic Heaters and Forced-Air Furnaces,” U.S. Environmental Protection Agency (March 10, 2020), p. 199 – <https://www.regulations.gov/document?D=EPA-HQ-OAR-2018-0195-0238>

savings and foregone benefits. In its Supplemental Regulatory Impact Analysis for the 2018 NPRM that included the never-finalized two-year sell-through, EPA defines “cost savings” as the “increase in revenues to manufacturers that produce appliances affected by this sell-through and retailers of these appliances” and “foregone benefits” as “the monetized value of the reduction in incidence of morbidity and premature death projected under the 2015 NSPS that might no longer occur if this proposal is finalized as proposed.”<sup>11</sup>

On its webpage, titled “Regulatory Impact Analyses [RIAs] for Air Pollution Regulations,” EPA acknowledges its obligation to develop RIAs, citing several relevant executive orders.<sup>12</sup> Among other things, Executive Order 12866, “Regulatory Planning and Review,” in Section 1(b)(6), requires that “[e]ach agency shall assess both the costs and the benefits of the intended regulation and, recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs.”<sup>13</sup> Further, Executive Order 13563, “Improving Regulation and Regulatory Review,” in Section 1(a), states, “Our regulatory system ... must take into account benefits and costs, both quantitative and qualitative.”<sup>14</sup>

Section IV of this EPA proposed rule is titled “Summary of Cost, Environmental, and Economic Impacts.” Despite its title, however, this section provides no information at all on the cost impacts, environmental impacts or economic impacts of this proposal, not to mention public health impacts, which the agency does not even pretend to address. Instead, this section reads as follows: “The COVID–19 pandemic is causing an unanticipated impact (mandatory store closures, loss of sales, excess stranded inventory) that the proposed rule will help to mitigate. This action roughly replaces the 60 days of sales opportunities that retailers would have otherwise had in the absence of the pandemic. *The EPA understands that there may be impacts from this proposed action, if it is finalized as proposed. We are unable to quantify what, if any, impacts there may be and seek public comments to help inform us of any potential impacts. We are placing the Supplemental Regulatory Impact Analysis (RIA) from the 2018 proposed ‘sell-through’ in the docket as an illustration of what impacts of additional sales time could look like.*” (emphasis added)

This is not only unhelpful it is misleading and demonstrates negligence on the part of EPA to fulfill its responsibility to protect public health and the environment by weighing “cost savings” for retailers against the “foregone benefits” to society.

To say “there may be impacts” from this regulatory action if it is finalized as proposed is a misleading understatement. Every single additional Step 1 unit installed in a home means greater emissions. The dirtier Step 1 units that are purchased during the six-and-a-half-month sell-through period will remain in use and continue to emit substantially higher levels of health-threatening pollutants for 20 to 40 years. This is a fact about which there is no question, as are the disproportionate adverse impacts to be borne by low-income communities – both rural and urban – where residents rely on burning wood for heat.

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<sup>11</sup> Supplemental Regulatory Impact Analysis (RIA) for “Standards of Performance for New Residential Wood Heaters, New Residential Hydronic Heaters and Forced-Air Furnaces,” U.S. Environmental Protection Agency (November 20, 2018) – [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)

<sup>12</sup> Regulatory Impact Analyses for Air Pollution Regulations, Webpage, U.S. Environmental Protection Agency (June 18 2020) – <https://www.epa.gov/economic-and-cost-analysis-air-pollution-regulations/regulatory-impact-analyses-air-pollution>

<sup>13</sup> Executive Order 12866, *Regulatory Planning and Review*, President Bill Clinton (September 30, 1993) – <https://www.regulationwriters.com/downloads/EO12866.pdf>

<sup>14</sup> Executive Order 13563, *Improving Regulation and Regulatory Review*, President Barack Obama (January 18, 2011) – <https://www.regulationwriters.com/downloads/EO13563.pdf>

Likewise, for EPA to claim it is “unable to quantify what, if any, impacts there may be” is also misleading. To be clear, EPA made no effort to quantify the impacts of this proposed regulation. Instead, EPA abdicates its duty by turning to the public for comments to “inform [the agency] of any potential impacts.” This is wholly inappropriate, particularly given the well-documented detrimental impacts of woodsmoke emissions.

### EPA Does Not Have Legal Authority to Violate an NSPS

EPA has never before offered a deliberate pathway to violating an NSPS and NACAA believes that EPA does not have legal authority under this NSPS to provide a sell-through. As EPA acknowledged in its November 30, 2018 proposed “Standards of Performance for New Residential Wood Heaters, New Residential Hydronic Heaters and Forced-Air Furnaces” (83 Fed. Reg. 61,574), Section 111 of the Clean Air Act (CAA) requires the agency to establish standards of performance that reflect “the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any non-air quality health and environmental impact and energy requirement) the Administrator determines has been adequately demonstrated.’ This definition makes clear that the standard of performance must be based on controls that constitute ‘the best system of emission reduction (BSER)’ ... Section 111(b)(1)(B) of the CAA requires that the standards be effective upon promulgation of the NSPS. Given this statutory requirement, as discussed more fully in the *Federal Register* notice for the 2015 NSPS rulemaking (80 FR 13672), the EPA adopted the stepped (phased) approach for residential wood heaters, hydronic heaters and forced-air furnaces to provide sufficient implementation time for manufacturers and retailers to comply with Step 2 limits.”<sup>15</sup>

The NSPS EPA established in 2015 for hydronic heaters, forced-air furnaces and wood heaters required full compliance with Step 2 standards by all devices sold at retail beginning May 15, 2020. A sell-through would allow for compliance with a weaker standard of performance than EPA has concluded reflects BSER even though EPA has not asserted that the BSER upon which the Step 2 standards are based cannot be achieved; in fact, such an assertion cannot be made because it has been demonstrated that the Step 2 standards are achievable for all categories of devices. Further, CAA Section 111 is clear in stating that NSPS must take effect upon their promulgation. EPA has not identified a mechanism that would allow for a sell-through that sanctions violations of the NSPS.

### EPA’s Proposal Punishes Manufacturers and Retailers That Were Prepared to Meet the May 15, 2020 Compliance Deadline

Providing a sell-through would punish manufacturers and retailers that invested heavily and planned carefully to ensure on-time compliance with the May 15, 2020 deadline and reward those who did not. As a result of this proposal, sales of Step 2-certified units, which were to be the only legally available devices as of May 15, 2020, will be impeded by the continued sale of dirtier and cheaper Step 1 units. This, as well as many other aspects of this proposal, sets a terrible precedent and defies the expressed priority of this Administration to provide regulatory certainty.

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<sup>15</sup> 83 Fed. Reg. 61,574 (November 30, 2018) – <https://www.govinfo.gov/content/pkg/FR-2018-11-30/pdf/2018-26083.pdf>

Conclusion

For all of the reasons we have cited, NACAA opposes this proposed rule. EPA should take swift action to announce that it will not be promulgated and turn its attention to significantly improving enforcement of the RWH program which, to date, has been dubious.

On behalf of NACAA, we hope you will consider these comments. If you have questions or would like further information, please contact Nancy Kruger, Deputy Director of NACAA.

Sincerely,



Wayne Natri  
(Los Angeles, California)  
Co-Chair  
NACAA Criteria Pollutants Committee



George S. (Tad) Aburn, Jr.  
(Maryland)  
Co-Chair  
NACAA Criteria Pollutants Committee