NOT YET SCHEDULED FOR ORAL ARGUMENT

No. 15-1056

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

HEARTH, PATIO & BARBECUE ASSOCIATION, ET AL.,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

On Petition For Review of Final Agency Action of The
United States Environmental Protection Agency

PAGE PROOF BRIEF FOR RESPONDENT

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

Pursuant to D.C. Circuit Rule 28(a)(1), all parties, intervenors, and amici in this Court are listed in the Brief for Petitioner Hearth, Patio, and Barbecue Association, except that Pellet Fuels Institute is no longer a party.

B. Rulings Under Review

References to the agency action at issue appears in Petitioners' Brief.

C. Related Cases

This Court granted Pellet Fuels Institute's motion to dismiss voluntarily in Case No. 15-1140 and terminated the consolidation of that case with this one. Order Dated June 26, 2020, Doc. No. 1849126.

/s/*Simi Bhat*
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INTRODUCTION

The Clean Air Act requires the U.S. Environmental Protection Agency ("EPA") to establish emissions standards for new sources of air pollution that cause or contribute significantly to air pollution that endangers public health or welfare, and to periodically review and revise those standards as appropriate. 42 U.S.C. § 7411. EPA first established new source performance standards for residential wood heaters in 1988. Standards of Performance for New Stationary Source; New Residential Wood Heaters, 53 Fed. Reg. 5860 (Feb. 26, 1988) ("1988 Rule"). Recognizing that manufacturers have since developed cleaner-burning wood heaters, EPA revised the standards in 2015. Standards of Performance for New Residential Wood Heaters, New Residential Hydronic Heaters and Forced-Air Furnaces, 80 Fed. Reg. 13,672 (Mar. 16, 2015) ("2015 Rule").

STATEMENT OF JURISDICTION

(A) EPA had jurisdiction to issue the 2015 Rule under the Clean Air Act, 42 U.S.C. §§ 7401-7671q.

(B) This Court has jurisdiction under 42 U.S.C. § 7607(b)(1) because EPA took final action under the Clean Air Act, 42 U.S.C. §§ 7401-7671q.

(C) The 2015 Rule was issued on March 16, 2015. Petitioners timely filed their petition for review that same day.

(D) The petition is from agency action reviewable under § 7607(b)(1).

STATEMENT OF THE ISSUE

Petitioners Hearth, Patio and Barbecue Association et al. ("HPBA") do not challenge the new standards in the 2015 Rule. Instead, HPBA argues that emissions test results for wood heaters are so variable that EPA could not reasonably expect a wood heater to pass the same emissions test in an audit as the wood heater passed to demonstrate compliance with the standards originally. EPA investigated variability and found that it was not as high as HPBA presents. Still, EPA adjusted the standards to accommodate variability.

Under the 2015 Rule, like under the 1988 Rule, if a wood heater passes the original certification test, but fails an audit test, a manufacturer has the opportunity to request an audit hearing and prove continued compliance with any relevant evidence, including on variability.

This case presents one narrow issue:

1. Did EPA reasonably include a compliance audit process in the 2015 Rule that begins with an emissions test and allows a manufacturer to request a hearing to rebut a failed audit test with any relevant evidence?

PERTINENT STATUTES AND REGULATIONS

All pertinent statutes and regulations are set forth in the Addendum following this brief.

STATEMENT OF THE CASE

Residential wood heaters generate small particles of pollution that can cause difficulty breathing, heart problems, and even premature death. 79 Fed. Reg. 6330, 6337 (Feb. 3, 2014). These emissions are so pervasive that EPA estimates that residential wood heaters account for nearly twenty-five percent of cancer risks from toxic air pollution and fifteen percent of noncancer respiratory risks. 80 Fed. Reg. 13,672, 13,673 (Mar. 16, 2015).

EPA first issued new source performance standards for residential wood heaters in 1988. 53 Fed. Reg. 5860 (Feb. 26, 1988). Recognizing the impracticality of testing every device, EPA allowed manufacturers to test a single device of a model line to receive certification to sell that model line, but retained authority to conduct compliance audits to ensure that devices of that model line continued to comply with the standards. *Id*. at 5861, 5870.

Manufacturers designed wood heaters to achieve even lower emissions than required under the 1988 standards. These improvements in performance prompted EPA to propose tighter standards in 2014. 79 Fed. Reg. 6330. HPBA commented that test results under the 1988 Rule were highly variable and urged EPA not to set low emissions limits that heaters could not consistently achieve. EPA Response to Comments on the 2015 Rule ("RTC") at 236, JA__. After conducting its own analysis on variability and considering other data on newer heaters, EPA

concluded that variability was not as high as HPBA supposed, but still present. 80 Fed. Reg. at 13,686. In 2015, EPA finalized standards that were not as stringent as originally proposed to accommodate a margin of variability. *Id*. The annual net benefits of the 2015 Rule are between $3.1 billion to $7.6 billion. *Id*. at 13,674.

HPBA now recycles the same argument about variability, but applies it only to the compliance audit process. Oddly, HPBA ignores its own success—the final standards reflect variability. EPA did not need to adjust the audit provisions because EPA adjusted the standards themselves, both by allowing a margin for variability in the emissions limits and by improving precision in testing.

The audit provisions allow a further opportunity for manufacturers to present evidence on variability. Contrary to HPBA's depiction, the audit provisions are not new or draconian. Under the 2015 Rule, like under the 1988 Rule, if a device fails an audit test, a manufacturer may request a hearing. EPA will consider any relevant evidence presented at that hearing, including on variability, before deciding whether to revoke certification of compliance for that model line.

While HPBA may be concerned that EPA may not administer the audit provisions fairly, this concern is unripe. EPA has not yet conducted an audit under the 2015 Rule. A hypothetical failed audit test by unknown margins with unknown context does not lend itself to judicial review at this time. If EPA revokes certification, that decision can be challenged. This petition should be dismissed.

A. Statutory background

The Clean Air Act, 42 U.S.C. §§ 7401-7671q, establishes a comprehensive program to protect and enhance the Nation's air quality. *Id*. § 7401(b)(1). Part of this program focuses on reducing emissions from new sources of air pollution. Under Section 111(b)(1)(A) of the Act, EPA first identifies categories of sources that "cause[], or contribute[] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." *Id*. § 7411(b)(1)(A). EPA then issues mandatory standards of performance for new sources in each category for certain pollutants. *Id*. § 7411(a)(1), (b)(1)(B), (e).

A new source performance standard must "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 nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated." *Id*. § 7411(a)(1). EPA may distinguish among classes, types and sizes of sources within the category when issuing new source performance standards. *Id*. § 7411(b)(2).

Every eight years, EPA considers whether to review and possibly revise a new source performance standard. *Id*. § 7411(b)(1)(B). If sources are achieving emissions reductions below the existing standards, EPA must "consider the

emission limitations and percent reductions achieved in practice" when revising new source performance standards. *Id*.

B. Factual background

EPA first listed residential wood heaters under Section 111(b)(1)(A) in 1987. Listing of Residential Wood Heaters for Development of New Source Performance Standards, 52 Fed. Reg. 5065 (Feb. 18, 1987). Emissions from wood heaters contain small particles known as particulate matter, as well as carcinogens and carbon monoxide. At the time of listing, EPA knew that particulate matter from these devices could penetrate the lung, thereby increasing respiratory symptoms such as coughing and chest pain, aggravating cardiovascular diseases, and potentially exacerbating the adverse health effects of air pollution as a whole. *Id*. at 5066.

In the decades since the listing, EPA has learned more about the health effects of residential wood heater emissions. Particulate matter pollution has been associated with changes in basic lung function and even premature death. 80 Fed. Reg. at 13,675. Carbon monoxide pollution can impair thinking and reflexes by interfering with the transmission of oxygen to the brain. Standards of Performance for New Residential [] Heaters (Proposed Rule), 79 Fed. Reg. 6330, 6337 (Feb. 3, 2014). Formaldehyde, polycyclic aromatic hydrocarbons, benzene, and dioxin are known toxic air pollutants that are present in residential wood heater emissions. *Id*.

Wood heaters also emit nitrogen oxides that can irritate the eyes and respiratory system and damage the immune system. *Id*. at 6337. Older adults, children, and individuals with pre-existing heart or lung disease are particularly at risk for health effects from wood heater emissions. *Id*.

Residential wood heaters collectively emit hundreds of thousands of tons of particulate matter throughout the country every year. *Id*. At times and places of high use, wood heaters can contribute over fifty percent of daily particulate matter pollution. *Id*. Because residential wood heaters are located in residential areas and emit pollution at low heights, even a small amount of pollution from these devices can cause disproportionately high exposure. 52 Fed. Reg. at 5066. This exposure is not fleeting because residential wood heaters are often used around the clock. 79 Fed. Reg. at 6337. Emissions from wood heaters account for nearly twenty-five percent of cancer risks from toxic air pollution and fifteen percent of noncancer respiratory effects. *Id*.

1. 1988 Standards

In 1988, EPA issued the first new source performance standards for residential wood heaters. 53 Fed. Reg. 5860. Residential wood heaters are different from most categories of sources for which EPA issues new source performance standards. These heaters are not large pieces of industrial equipment, but small, mass-produced devices used by consumers in their homes. Under the 1988 Rule,

EPA allowed manufacturers to obtain a certificate of compliance for an entire model line by testing one device of that model. *Id*. at 5861.

The 1988 standards took effect in two phases and distinguished between catalytic and noncatalytic wood heaters.[1] By the effective date of the second phase of standards, the emissions limit for catalytic wood heaters was 4.1 grams of particulate matter per hour, and the limit for noncatalytic wood heaters was 7.5 grams of particulate matter per hour, as demonstrated in a laboratory test conducted according to one of four emissions sampling methods. *Id*. at 5860.

EPA also established a program of random compliance audit testing in the 1988 Rule. *Id*. at 5861. In an audit, EPA obtained one device of a model line and directed a laboratory to test that device. *Id*. at 5878 (40 C.F.R. § 60.533(p)(5)(ii)). If that device failed to meet the standards, EPA would notify the manufacturer that EPA proposed to revoke the certification for that model line, but the manufacturer would be allowed to rebut the audit test results in a hearing. *Id*. (40 C.F.R. § 60.533(p)(5)(ii)). If the audit test results exceeded the standards by more than 50 percent, EPA would suspend the certification for up to 30 days while EPA went through the same process of proposing revocation and allowing a hearing. *Id*. (40 C.F.R. § 60.533 (p)(5)(i)).

[1] A catalytic wood heater contains a catalytic combustor, while a noncatalytic wood heater uses other technology to reduce emissions. *See* 40 C.F.R. §§ 60.531, 60.5473.

2. 2014 Proposed Rule

Two and a half decades after the 1988 standards were issued, many wood heaters sold in the United States and Europe were outperforming the 1988 standards. 79 Fed. Reg. at 6335. EPA and the New York State Energy Research and Development Authority conducted research showing that wood heaters had achieved significant emissions reductions. *Id*. In 1995, Washington State set statewide emissions standards for wood heaters at almost half the rate of EPA's 1988 standards. Kenworthy, Craig T., Exec. Dir. Puget Sound Clean Air Agency, Comment (Dec. 5, 2012) at 2, JA_ . States and other countries had begun regulating larger wood heaters that were not governed by the 1988 Rule. RTC at 13, JA___; 80 Fed. Reg. at 13,684, 87.

In 2014, EPA proposed new standards for wood heaters that reflected improvements in emissions control. 79 Fed. Reg. 6330. EPA also proposed expanding the definition of wood heater to include larger heaters not covered by the 1988 Rule. *Id*. at 6343. The 1988 Rule regulated only those wood heaters that were designed to heat the space in which they were located, like a room, which are sometimes known as "room heaters." In 2014, EPA also proposed standards for "central heaters," which can heat areas other than the space where they are located. *Id*. There are two types of central heaters: hydronic heaters and forced-air furnaces. A hydronic heater heats water, which is distributed through pipes to warm other

areas of the house. *Id*. at 6336. A forced-air furnace heats air, which is distributed to other areas of the house through ducts. *Id*. at 6384.

EPA also proposed changing the type of wood burned in emissions tests. Under the 1988 Rule, emissions tests were conducted with "crib wood," which is lumber of specific dimensions arranged into a precise configuration and burned during testing. *Id*. at 6637. "Crib wood" is unlike the firewood that homeowners normally burn, which is referred to as "cord wood." *Id*. By 2014, cord wood test methods had been developed, and EPA proposed using cord wood for emissions tests for the new standards. *Id*. at 6340.

EPA also proposed phasing in the new standards. *Id*. at 6339, 6343. The first set of new standards would take effect shortly after proposal, while the second set of standards would be more stringent and would take effect five years later. *Id*. HPBA refers to this second set of standards as "Step 2" standards. This brief uses the term "2020 standards."

3. Variability Analyses

Petitioner HPBA commented that EPA's proposed 2020 standards were too stringent because EPA had not adequately "account[ed] for test method imprecision," and, therefore, the 2020 standards did not "incorporat[e] appropriate compliance margins." Comments of HPBA on EPA's Proposed Standards of Performance for New Residential Wood Heaters, New Residential Hydronic

Heaters and Forced-Air Furnaces, and New Residential Masonry Heaters (May 2, 2014) at 8, JA___. In support of this comment, HPBA cited a 2010 analysis that it had funded. *Id*. at 1. HPBA's analysis was based primarily on test results of three wood heaters tested in different laboratories under the 1988 standards. Curkeet, Rick, Ferguson, Robert W., EPA Wood Heater Test Method Variability Study (Oct. 6, 2010) [EPA-HQ-OAR-2009-0734-0202] (hereinafter "Curkeet") at 8. HPBA calculated that the average results for these three heaters were 3.91, 14.01, and 6.35 gram/hour, and the overall variability in test results was ± 4.9 to 9.8 gram/hour. *Id*. at 8. As a percentage, overall variability was ± 112%. *Id*. HPBA also concluded that variability depended in part on test method. The 1988 Rule allowed manufacturers to use any of four emissions sampling methods. HPBA calculated that the variability of one of the old methods used in the 1988 Rule, Method 5G-3, was approximately ten times less than the variability of another method, Method 5H. *Id*. at 14-15.

The manufacturer Woodstock Soapstone submitted comments comparing HPBA's data to Woodstock Soapstone's more recent data for three room heaters. Morrisey, Thomas, Woodstock Soapstone Company, Comment EPA-HQ-OAR-2009-0734 (Aug. 14, 2014) (hereinafter "Morrisey") at 1, JA__. The average emissions performance of the Woodstock Soapstone heaters was lower than the heaters HPBA analyzed and the variability was lower as well. All three room

heaters consistently tested below 2 gram/hour, with differences in test results that varied by less than .7 gram/hour. *Id*. at 6, JA__.

Woodstock Soapstone attributed the difference between the variability it observed in test results of its heaters and the variability HPBA described to the "deep[] flaw[s]" in HPBA's dataset. *Id*. at 1, JA__. Woodstock Soapstone observed that in HPBA's dataset, the distribution of data did not seem to reflect random chance. Rather, the initial certification test of a heater yielded results that was almost always lower (better) than subsequent tests. *Id*. at 3, JA__. Woodstock Soapstone calculated only a 0.52% chance that the variability HPBA identified could be attributed to random chance. *Id*. at 1, JA__. Woodstock Soapstone concluded that the most reasonable interpretation of HPBA's dataset was that the initial certification tests were conducted in a different manner than the subsequent tests. *Id*.

The Puget Sound Clean Air Agency ("Puget Sound") also submitted comments on HPBA's analysis. Kenworthy, Craig T., Exec. Dir., Puget Sound, Comment (Dec. 5, 2012) (hereinafter "Kenworthy") at 2, JA_. Puget Sound concluded that HPBA "disregarded basic questions of data quality and representativeness." *Id*. For example, HPBA relied on results from the highest emitting wood heaters, which can have large differences in test results, instead of analyzing the entire dataset. *Id*. at 8, JA__. But the variability of the "worst

performing" device does not represent the variability across the board. *Id*. Puget Sound further observed that HPBA's data reflected "different sampling methods, locations, testing protocols, testing locations, span many years, and do not include data from a balanced or representative cross spectrum of the stoves and independent variables." *Id*. at 10, JA__. Even if HPBA's dataset were representative and reliable, which Puget Sound did not believe, the real variability was far less than HPBA calculated. *Id*. at 9-10, JA__-__. Puget Sound discovered that HPBA simply used the wrong statistical measurement to express variability as ± 4.5 to 9 gram/hour. *Id*. The correct value for the (problematic) dataset of old heaters would be approximately ± 1.5-2 gram/hour. *Id*.

EPA contracted with the Brookhaven National Laboratory to investigate, among other things, the repeatability of results from hydronic heater tests. 79 Fed. Reg. 37,259, 37,261 (July 1, 2014). Brookhaven tested the heaters by burning wood at three different rates, as specified in the test method for hydronic heaters. At the highest burn rate, results for three replicate tests were within 15% of each other. *Id*. At the two other burn rates tested, the results were within 3% and 10% of each other. Butcher, T. et al., Brookhaven Nat'l Lab. (June 30, 2014) (hereinafter "Brookhaven") at 8, 17, JA__, ___. EPA concluded from this study that the "repeatability of cord wood test method" for hydronic heaters can be "very good." 79 Fed. Reg. at 37,261. Before seeing the results of the Brookhaven study, HPBA

had postulated that precision in hydronic heater testing would likely be similar in precision to other wood heater testing. HPBA, Hydronic Heater NSPS-Industry Perspective (Oct. 27, 2012), p. 4, slide 7, JA__.

4. 2015 Rule

EPA promulgated new standards for room heaters and central heaters in 2015. 80 Fed. Reg. 13,672. Like the proposed rule, the final rule phased in the standards over five years. *Id*. at 13,680. The second set of standards took effect on May 15, 2020, *id*., so this brief does not detail the first set of expired standards. As under the 1988 Rule, under the 2015 Rule, EPA allowed manufacturers to obtain a certificate of compliance for an entire model line by testing one device of that model. *Id*.

The final 2020 standards are less stringent than initially proposed because EPA incorporated a margin of variability in the standards. *Id*. at 13,687. The final rule also differs from the proposed rule in allowing the use of crib wood in emissions tests of room heaters and hydronic heaters. *Id*. at 13,677. Because these different methods result in different emissions when tested under laboratory conditions, EPA set different emissions limits for crib wood and cord wood tests. *Id*. at 13,682-83.

The annual net benefits of the 2015 Rule are estimated at between $3.1 billion to $7.6 billion. 80 Fed. Reg. at 13674. The net benefits of this rule outweigh

the costs by more than 100 times. *Id*. at 13,674. EPA estimates the rule will avoid 360 to 810 premature deaths per year. *Id*. The 2015 Rule is also expected to reduce carbon monoxide emissions by 46,000 tons, volatile organic compound emissions by 9,300 tons, and reduce exposure to hazardous pollutants such as formaldehyde, benzene, and polycyclic organic matter, reduce greenhouse gas emissions, and increase visibility. *Id*.

a. 2020 Room Heater Standards

As noted above, the 2020 standards were promulgated in the 2015 Rule as the "Step 2" limits that were to take effect after a five-year period, which would allow time for manufacturers to develop lower-emitting wood heaters. The 2020 emissions limit for room heaters tested with crib wood is 2 grams particulate matter per hour, and for room heaters tested with cord wood is 2.5 grams particulate matter per hour. 80 Fed. Reg. at 13,677-78.

EPA originally proposed that all room heaters test with cord wood and achieve a limit of 1.3 gram/hour, which EPA believed to reflect the best system of emissions reduction achievable. 79 Fed. Reg. at 6355. But in the final rule, EPA considered that the same heater tested multiple times would not yield the same results every time because of imprecision in testing. 80 Fed. Reg. at 13,677-78. EPA disagreed with HPBA's speculation that "lower emission standards cannot be measured accurately," but acknowledged that there was some variability. RTC at

236, JA__. EPA ultimately decided that the "reproducibility and repeatability of test results" were sufficiently precise to set standards lower than the 1988 Rule, but not as low as EPA had proposed. *Id*.

EPA concluded that if "precision" in testing "is no better than 1.0 [gram/hour]," the final emissions limit of 2.0 [gram/hour]" for room heaters tested with crib wood would adequately reflect the emissions reductions achieved by stoves that tested at 1.0 gram/hour, "i.e., 1.0 [gram/hour] plus 1.0 [gram/hour] equal 2.0 [gram/hour." *Id*. By the time EPA issued the final rule in 2015, 90% of catalytic room heaters and 18% of non-catalytic room heaters already tested at or lower than 2 gram/hour. *Id*. at 13,686.

EPA further concluded that the cord wood limit of 2.5 gram/hour was achievable even assuming "test precision is no better than 1 gram/hour." *Id*. at 13,677-78, 86. By 2015, three room heaters had already tested at or under 1.3 gram/hour with cord wood, but the Agency finalized a less stringent limit to accommodate variability.

b. 2020 Hydronic Heaters Standards

The 2020 emissions limit for hydronic heaters tested with crib wood is 0.10 lb/mmBtu heat output, and for hydronic heaters tested with cord wood is 0.15 lb/mmBtu heat output. *Id*. at 13,681.

EPA considered the hydronic heater test results analyzed by the Brookhaven National Laboratory, as well as the other variability analyses of room heaters, and concluded that "expected precision" in testing was 35 percent. *Id*. at 13,687. EPA determined that, "even if there were to be method uncertainty on the order of approximately four times the expected precision of 35 percent," the 2020 hydronic heater limits would still adequately account for variability. *Id*. In cord wood tests, over fifty European hydronic heaters achieved 0.06 lb/mmBtu or better. *Id*.; 79 Fed. Reg. at 6359. In crib wood tests, nine of the fifty hydronic heaters tested through EPA's voluntary program already achieved the 2020 crib wood emissions limit. 80 Fed. Reg. at 13,687. An additional twenty models that tested through a New York program achieved the limit as well. *Id*.

c. 2020 Forced-Air Furnace Standards

The 2020 emissions limit for forced-air furnaces is 0.15 lb/mmBtu heat output. *Id*. at 13,681. All forced-air furnaces must be tested with cord wood, as they have been since 2010 in Canada. *Id*. at 13,684. The forced-air furnace standard is the same as the hydronic heater cord wood standard. EPA did not have test results showing the achievement of this standard by forced-air furnaces in 2015, but forced-air furnace manufacturers reported that some designs in development at that time were able to meet this standard. *Id*. at 13,693. Forced-air furnace manufacturers had looked to technology from hydronic heaters and/or

room heaters to incorporate into their designs for new forced-air furnaces. *Id*. at 13,687. EPA expected other forced-air furnace manufacturers would be able to do the same in the five years before the 2020 limits took effect. *Id*.

d. Audit Provisions

Just like the 1988 Rule, the 2015 Rule contains provisions for compliance audits. *Id*. at 13,680. The 2015 Rule contains two separate, but substantively identical, compliance audit test provisions, one for room heaters, and another for central heaters. These provisions closely track the 1988 audit test provisions.

Like the 1988 Rule, the 2015 audit provisions establish an auditing process that begins with an emissions test of one device. *Compare* 40 C.F.R. §§ 60.533 (n)(2)(i); 60.5475(n)(2)(i) *with* 53 Fed. Reg. at 5879 (40 C.F.R. § 60.533(p)(3)). Under both the 1988 Rule and the 2015 Rule, if that device does not meet the emissions limit, EPA will propose revoking the certificate of compliance for that model line and allow for a hearing. *Compare* 40 C.F.R. §§ 60.533 (n)(3)(ii)(A); 60.5475(n)(3)(ii)(A) *with* 53 Fed. Reg. at 5878 (40 C.F.R. § 60.533(p)(5)(ii)(A)). At the hearing, the manufacturer can rebut the results of the audit test with "any relevant information." *Compare* 40 C.F.R. §§ 60.533(n)(3)(viii); 60.5475(n)(3)(viii) *with* 53 Fed. Reg. at 5879 (40 C.F.R. § 60.533(p)(5)(vii)). The results of the audit test are automatically rebutted if four additional heaters are tested and meet applicable emissions limits or if two additional heaters are tested

and both meet applicable emissions limits and the average of those two heaters and the audited heater also meet the emissions limits. *Compare* 40 C.F.R. §§ 60.533 (n)(3)(vi); 60.5475(n)(3)(vi) *with* 53 Fed. Reg. at 5878 (40 C.F.R. § 60.533 (p)(5)(vi)).

Under both the 1988 and 2015 Rules, if the audit test result exceeds the emissions limit by more than 50 percent, EPA will give 72 hours' notice before suspending the certification of compliance for the model line. *Compare* 40 C.F.R. §§ 60.533 (n)(3)(i); 60.5475(n)(3)(i) *with* 53 Fed. Reg. at 5878 (40 C.F.R. § 60.533 (p)(5)(i)). The suspension is automatically withdrawn either (1) after 30 days if a revocation notice is not issued by EPA, or (2) on the date of EPA's final action on revocation, whichever occurs earliest. *Id*. EPA retains discretion to withdraw the suspension at any time. 40 C.F.R. §§ 60.533 (n)(3)(i); 60.5475(n)(3)(i).

The differences between the 1988 and 2015 audit provisions are slight. In the 1988 Rule, EPA required that the audit test be performed at the same laboratory that performed the certification test, until EPA could determine overall test method precision. *Id*. (40 C.F.R. § 60.533 (p)(3)). Test method precision can be broken into two components. There is variability in test results when the same device is tested in the same laboratory multiple times (intralaboratory precision), and there is variability in test results when the same device is tested in different laboratories (interlaboratory precision). Under the 1988 Rule, once EPA determined test

method precision, EPA would allow an additional margin equal to only interlaboratory precision when determining whether a device failed the audit test. *Id*.

For the 2015 Rule, EPA analyzed variability before issuing the standards, incorporated variability into the standards, and concluded that it was not necessary to include an additional allowance for interlaboratory imprecision in the audit provisions. 80 Fed. Reg. at 13,686. EPA also no longer requires the laboratory that conducted the original certification test to conduct the audit test. EPA can choose any laboratory to conduct the audit test. 40 C.F.R. §§ 60.533 (n); 60.5475(n). For the first time in the 2015 Rule, EPA imposed conflict of interest requirements on laboratories, requiring them to agree not to receive any financial benefit from the outcome of tests. *Id.* § 60.535(a)(2)(v).

C. Procedural background

EPA issued the new standards on March 16, 2015. 80 Fed. Reg. 13,672. HBPA and four other sets of petitioners filed for review. After a series of extensions to the briefing schedule to discuss potential resolutions to these disputes, EPA published an advanced notice of proposed rulemaking concerning the standards, taking comment on many issues, including whether EPA should more specifically address variability in the audit provisions. 83 Fed. Reg. 61,585, 61,592 (Nov. 30, 2018). HPBA did not submit any new variability analysis, and

EPA has not taken further action on the audit provisions. EPA issued a notice responding to comments on the advanced notice of proposed rulemaking. Standards of Performance for New Residential Wood Heaters (Final Rule), 85 Fed. Reg. 18,448, 18,453 (Apr. 2, 2020). EPA noted that there were at least 78 room heaters, 9 hydronic heaters and 1 forced-air furnace certified as meeting the 2020 standards. *Id.* at 18,452; *see also* EPA-Certified Wood Stove Database, https://cfpub.epa.gov/oarweb/woodstove/index.cfm?fuseaction=app.about (last visited Sept. 11, 2020) (reporting that 237 room heaters, 28 hydronic heaters, and 2 forced-air furnaces are certified as meeting the 2020 standards). All four petitioners other than HPBA voluntarily dismissed their cases.

SUMMARY OF ARGUMENT

1. EPA did not need to make special allowance for variability in the audit provisions because EPA had already accounted for variability when setting the standards. Even the outdated analysis championed by HPBA does not support the need for any further buffer in the audit provisions.

2. Manufacturers will have a further opportunity to submit evidence on variability should any of their devices fail an audit test. EPA will consider any relevant evidence manufacturers present during an audit hearing, including evidence on variability. No other mechanism is necessary to address variability in audits.

3. EPA left the audit process in the 2015 Rule largely unchanged from the original 1988 Rule. Variability has never before been an issue in the implementation of the audit provisions, and HPBA offers no good reason to think it will now.

4. If EPA revokes certification following a failed audit test, a manufacturer can challenge that decision at that time. HPBA's challenge to the possibility that EPA might revoke certification based on an unknown test result in the face of unknown rebuttal evidence in a future audit is unripe.

STANDARD OF REVIEW

The Court may reverse EPA's action only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 42 U.S.C. § 7607(d)(9)(A). This standard "is narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Manufacturers' Association v. State Farm Mutual Auto. Insurance Co.*, 463 U.S. 29, 43 (1983). An agency acts arbitrarily if it "entirely failed to consider an important aspect of the problem" or "offered an explanation for its decision that runs counter to the evidence before the agency." *American Petroleum Inst. v. EPA*, 684 F.3d 1342, 1350 (D.C. Cir. 2012) (citations and quotations omitted). Where EPA has considered the relevant factors and articulated a rational connection between the facts found and the choices made, its decisions should be upheld. *State Farm*, 463 U.S. at 43. There is no "higher hurdle" required to justify a new agency position. *Federal Communications Commission v. Fox Television Stations, Inc.*, 556 U.S. 502, 219. When EPA interprets scientific evidence within its expertise, the Court gives the Agency extreme deference. *Center for Biological Diversity v. EPA*, 749 F.3d 1079, 1087-88 (D.C. Cir. 2014) (sampling circuit law).

When deciding whether an agency action is ripe for review, this Court considers "both the fitness of the issues for judicial decision and the hardship to the

parties of withholding court consideration." *Abbot Laboratories v. Gardner*, 387 U.S. 136, 149 (1967).

ARGUMENT

I. The 2020 standards accommodate variability.

HPBA no longer claims, as it did in its comments, that variability renders the standards unachievable. Instead, HPBA argues that manufacturers should not be required to meet the same standards in an audit as they did for certification because test results are variable. HPBA Br. at 20-21. This argument assumes that the standards do not already accommodate variability.

In fact, EPA accommodated variability when setting both components of the standards: emissions limits and test methods. The 2020 emissions limits are at least twice as high as the lowest emissions test results on record in 2014. These margins accommodate the variability observed in recent studies. And HPBA's own analysis supports EPA's conclusions that the test methods that EPA set in the 2015 Rule reduce variability. Having reviewed the available studies and data, EPA is entitled to deference for its reasonable, technical determinations that variability is low and that the standards adequately reflect and accommodate true variability. *Ethyl Corp. v. EPA*, 541 F.2d 1, 36 (D.C. Cir. 1976) (where the agency decision turns on issues requiring the exercise of technical or scientific judgment, the court "must look at the decision not as the chemist, biologist or statistician that we are qualified neither

by training nor experience to be, but as a reviewing court exercising our narrowly defined duty of holding agencies to certain minimal standards of rationality.").

A. EPA incorporated margins of variability of approximately 100 to 140% in the 2020 standards.

As EPA explained in the preamble to the final rule, the emissions limits are high enough to accommodate variation in "test precision" and "method uncertainty." 80 Fed. Reg. at 13,687, 13,690. At the time EPA proposed the new standards in 2014, room heaters and central heaters had achieved very low emissions test results. But EPA did not set emissions limits as low as the lowest results. True to its statutory mandate to set new source performance standards to reflect the degree of emissions reduction achievable by the best system of emissions reduction, EPA promulgated higher limits that adequately account for variability in test results. 42 U.S.C. § 7411(a)(1).

In both the 2020 crib wood and cord wood limits for room heaters, EPA included a margin of 1 g/hour to reflect imprecision in testing. By 2014, 38 room heaters already achieved crib wood test results at least as good as 1 g/hour. List of EPA Certified Wood Heaters September 2014, EPA-HQ-OAR-2009-0734-1790, JA__. But EPA finalized a crib wood limit of 2 g/hour, reasoning that this limit was sufficient to account for variability, even if test method "precision is no better than 1.0 g/hr" because "1.0 g/hr plus 1.0 g/hr equals 2.0 g/hour." 80 Fed. Reg. at 13,686. Similarly, though three heaters had achieved cord wood test results of 1.3

g/hour or better, EPA finalized a cord wood limit of 2.5 g/hour. *Id*. EPA again explained that this limit would more than account for "test precision." *Id*. The margin of variability in both of the 2020 room heater standards is approximately 100% higher than some of the lowest demonstrated emissions results.

For central heaters, EPA also accommodated "method uncertainty" by setting 2020 limits that were 140% higher than some of the lowest demonstrated emissions results. At the time of the proposed rule in 2014, over 50 European hydronic heaters achieved results of 0.06 lb/mmBtu or better when tested with cord wood. 79 Fed. Reg. at 6359. But EPA set the 2020 cord wood limit for central heaters at 0.15 lb/mmBtu. EPA explained that "even if there were to be method uncertainty on the order of approximately four times the expected precision of 35 percent," the 2020 cord wood limit of 0.15 lb/mmBtu would still adequately account for variability. 80 Fed. Reg. at 13,687. EPA also set a separate crib wood limit for hydronic heaters of 0.10 lb/mmBtu. *Id*. By 2015, four U.S. models tested with crib wood achieved results of 0.06 lb/mmBtu or better. *Id*. Twenty-nine U.S. models achieved the 2020 crib wood limit already by 2015.

B. The margins of variability in the 2020 standards are supported by recent analyses of variability.

EPA reasonably decided that the 100 to 140% allowances incorporated into the standards adequately accommodate variability. EPA's conclusions on variability are supported by the Brookhaven National Laboratory study on

hydronic heaters, a comment by the manufacturer Woodstock Soapstone regarding tests of its own room heaters at different laboratories, an analysis by the Puget Sound Clean Air Agency of the same dataset relied on by HPBA, and even a fair reading of HPBA's own analysis. RTC 236, JA__.

EPA tasked the Brookhaven National Laboratory with studying variability. 79 Fed. Reg. at 37,261. Brookhaven ran three tests of the same hydronic heater at three different rates of burning wood. At the highest burn rate, results for three tests were within 15% of each other. *Id*. At the two other burn rates tested, the results were within 3% and 10% of each other. Brookhaven at 8, 17, JA__, ___. EPA concluded from the Brookhaven study that the "repeatability of cord wood test method" can be "very good." 79 Fed. Reg. at 37,261. Though Brookhaven studied only hydronic heaters in only one laboratory, HPBA has acknowledged that studies of variability on one type of wood heater are also applicable to variability in other types of wood heaters. HPBA, Hydronic Heater NSPS-Industry Perspective (Oct. 27, 2012), p. 4, slide 7, JA__. And per HPBA's own analysis, variability in test results in one laboratory (intralaboratory variability) is similar to variability in test results in different laboratories (interlaboratory variability). Curkeet at 14, JA__. The 100% to 140% margins of variability that EPA incorporated into the 2020 standards are much higher than the variability calculated by Brookhaven.

EPA also looked to an analysis of interlaboratory variability for room heaters submitted by the manufacturer Woodstock Soapstone. Morrisey at 1, JA_. This manufacturer presented test results of two of its room heater models from two laboratories. *Id*. These results varied by approximately 10% for one room heater (1.35 g/hour compared to 1.52 g/hour) and approximately 30% for the other (1.9 g/hour compared to 1.29 g/hour). *Id*. at 6, JA__. The margins of variability in the 2020 standards are much higher than Woodstock Soapstone calculated as well. EPA found this manufacturer's assessment of variability to be more credible than HPBA's analysis for reasons discussed further below. RTC at 236, JA__.

C. HPBA's analysis is flawed, but even a fair reading of that analysis supports the margins of variability in the 2020 standards.

HPBA's statistical analysis is flawed and the database that it used is not applicable to determining variability of newer, better performing heaters tested under more precise methods.

Puget Sound Clean Air Agency provided its own analysis of the same dataset studied by HPBA, as well as a critique of HPBA's analysis. Puget Sound estimated that, based on the data used by HPBA, variability around the average emissions performance is about ±1.5 to 2 g/hour. Kenworthy at 10, JA__. One of the reasons that Puget Sound's estimate differs so drastically from HPBA's claimed variability is that HPBA incorrectly presented the statistics. While HPBA calculated the "d2s," which represent the absolute difference between the highest

and lowest expected test results, HPBA expressed the results as a ± range around a mean. *Id*. at 9, JA__. For example, instead of saying that the lowest expected test result was 4.9 grams/hour lower than the highest expected test result, HPBA said that variability was ± 4.9 grams/hour. HPBA's presentation makes variability seem twice as large. HPBA did not rebut Puget Sound's critique that the d2 statistics HPBA calculated could not be used to express ± variability. EPA agreed that Puget Sound's "rigorous" statistical analysis showed that variability was far less than HPBA claims. RTC at 236, JA__.

Another flaw in HPBA's analysis is inherent to the data it used. As Woodstock Soapstone explained, HPBA's data is unlikely to reflect true variability. Morrisey at 3, JA__. If test results varied due to random chance, there would be no reason to think that the first test result of a heater would necessarily be any lower or higher than subsequent test results. *Id*. But in the dataset relied upon by HPBA, the initial certification test result was almost always lower than the subsequent test results. *Id*. Woodstock Soapstone concluded that the most reasonable interpretation of HPBA's dataset is that the initial certification tests were conducted in a different manner than the subsequent tests. *Id*. at 1, JA__. For all of these reasons, EPA concluded that HPBA's presentation of "variability" based on its dataset was incorrect. RTC at 236, JA__.

HPBA's database is also not clearly applicable to variability expected under the 2020 standards because emissions technology in heaters has improved. The old wood heaters studied by HPBA "had essentially no emissions controls" or had only "basic emissions mitigation." RTC at 364. These wood heaters would not be expected to test consistently. *Id*. Newer heaters are better designed and have more consistent results. *Id*. Puget Sound recognized that variability could be even less than ±1.5 to 2 g/hour for new heaters, possibly 1 g/hour. Kenworthy at 10, JA__. This low variability was confirmed by the data of low-emitting heaters from Woodstock Soapstone, in which test results varied by only .17 to .61 g/hour. Morrisey at 3, 5-6, JA__, __-__.

The test results in HPBA's database are also more variable than would be expected under the 2020 Rule because most of the results were obtained through less precise test methods that are no longer used under the 2015 Rule. The 1988 test methods were not designed to be precise because it would have been "unnecessary and wasteful" to invest in precision when the 1988 standards were so high. RTC at 364. As HPBA itself recognizes, variability decreases as test methods improve. While the 1988 Rule allowed testing with any of four methods, the 2015 rule prescribes a single method for sampling emissions. This method is based on one of the four methods permitted under the 1988 standards, Method 5G-3. 79 Fed. Reg. at 6342. HPBA calculated that the variability for Method 5G-3 was ±2.5%,

which is ten times lower than the variability of other methods. Curkeet at 14-15, JA__.

HPBA primarily argues that EPA needed to allow for very high variability in audits, even for the new heaters certified to meet the new standards, because HPBA calculated total variability to be as high as ±6.4 grams/hour for the old heaters. HPBA Br. at 16. But it does not make sense that new wood heaters certified to meet standards of 2 g/hour would exhibit variability of ±6.4 grams/hour. The beginning of their range of test results would be -4.4 grams/hour. HPBA avoids presenting variability in terms of the percentage of emissions. But with new heaters achieving results like 1 gram/hour, the variability of their results in terms of gram/hour would be lower as well.

Expressing variability as a percentage is more useful to understanding how the variability of old heaters might apply to variability of new heaters. HPBA calculated variability as a percentage to be ±112%. Curkeet at 8, JA__. Setting aside Puget Sound's argument that variability is in fact much lower, *see* Kenworthy at 9-10, JA__, the percentage of variability that HPBA calculated largely aligns with the margins of variability that EPA incorporated into the standards. EPA's 140% margin of variability for central heaters *exceeds* the percentage of variability calculated by HPBA. And given EPA's improvements to the test method in the 2015 Rule, EPA's 100% margin of variability for the room

heater standards should be sufficient to accommodate variability even according to HPBA.

II. The audit provisions allow EPA to further consider variability.

EPA reasonably expected that wood heaters would be able to meet the same standards in an audit as they did for initial certification. But even if a device fails the audit test, EPA must still consider any relevant evidence that a manufacturer presents in a subsequent hearing, including evidence on variability, before deciding whether to revoke certification. HPBA does not once mention in its brief that the audit process includes the opportunity for manufacturers to present additional evidence. Given that variability is already incorporated into the standards, as discussed above, and that EPA will consider any relevant evidence presented in an audit hearing, EPA did not need to make yet another allowance for variability in the audit provisions.

An emissions test is only the first step of the audit process. If a wood heater fails the audit test, EPA will send a notice of proposed revocation, and a manufacturer may request a hearing to provide evidence to rebut the results of that audit test. 40 C.F.R. §§ 60.533(n)(3)(viii); 60.5475(n)(3)(viii). A manufacturer has 60 days after receiving the notice to make its request for a hearing or for an extension to request the hearing. 40 C.F.R. §§ 60.533(n)(3)(ii); 60.5475(n)(3)(ii). Before deciding whether to finalize the proposed revocation or withdraw the

revocation, EPA must consider "any other relevant information." *Id.* §§ 60.533(n)(3)(viii); 60.5475(n)(3)(viii). If a manufacturer presents evidence on variability during the audit hearing, EPA will consider that evidence. If the additional information presented in the hearing is sufficient to rebut the failed audit test, EPA will withdraw the proposed revocation. *Id*.

The only circumstance in which consequences are automatically triggered without a hearing is if a wood heater fails the audit test by 50% or more of the standards. If a device fails so egregiously, then EPA will suspend the certification after giving the manufacturer 72 hours' notice of the suspension. *Id.* §§ 60.533(n)(3)(i); 60.5475(n)(3)(i). This suspension may be withdrawn by EPA, and the manufacturer will still have the same opportunity to present any relevant evidence at a subsequent hearing to avoid final revocation. *Id*.

The 50% exceedance trigger for suspension allows for even greater variability than HPBA itself calculated based on its old and flawed dataset. HPBA estimated that variability was ±112%. Curkeet at 8, JA__. The margin of variability for the 2020 crib wood and cord wood room heater standards is approximately 100%, as discussed above. Given the additional 50% margin of variability in the suspension provision, even HPBA's analysis does not indicate that the suspension of a room heater is likely to be triggered by chance alone. For central heaters, there is even more buffer. EPA incorporated a 140% margin of

variability for central heaters, which *by itself* is higher than HPBA's calculation of variability. The 50% exceedance for suspension adds an even greater margin. HPBA's argument that the suspension trigger is too strict to accommodate variability is thus belied by HPBA's own variability calculations.

III. The audit provisions in the 2015 Rule are almost identical to the audit provisions in the 1988 Rule and are otherwise reasonable

HPBA claims that the audit provisions in the 2015 Rule are an unjustified change from the 1988 Rule. But the new audit provisions are almost the same as the old ones. The sole difference that HPBA identifies between the two is that while the 1988 Rule initially required the certifying laboratory to conduct the compliance audit test, the 2015 Rule permits any qualified laboratory to conduct the compliance audit test. Otherwise, under both rules, when a device fails the audit test, EPA will propose revocation and allow for a hearing. And under both rules, manufacturers can request an audit hearing, during which they can present any relevant evidence of continued compliance. EPA will consider that evidence before deciding whether to revoke certification.

Thus, the only question concerning the difference between the old and new rules is whether EPA had "good reasons" to permit laboratories other than the certifying laboratory to conduct audit tests. *Federal Communications Commission v. Fox*, 556 U.S. at 515. EPA had new data from Woodstock Soapstone and the

Brookhaven National Laboratory, as well as analyses of data from old heaters from Puget Sound and HPBA. HPBA's own analysis shows that variability between laboratories is not very different from variability within the same laboratory. Curkeet at 14, JA__. EPA also improved test methods, which according to HPBA's analysis would further reduce variability. The other studies also support EPA's conclusion that it sufficiently accounted for variability, both interlaboratory and intralaboratory, in setting the standards, as discussed above in Argument Section I, pp. 24-32.

One potential reason that different laboratories may produce different results when testing the same heater (interlaboratory variability) relates to financial incentives that existed under the 1988 Rule. As Woodstock Soapstone observed, in HPBA's dataset of results under the 1988 Rule, the results from the initial certifying laboratory were almost always lower than subsequent results from other laboratories. Morrisey at 1, JA__. These lower emissions rates were better for manufacturers. Woodstock Soapstone calculated only a 0.52% chance that the data could fall in this pattern unless the initial certifying laboratories were not testing in the same manner as other laboratories. *Id*. Considering this improbability, Woodstock Soapstone explicitly "question[ed] the legitimacy" of the initial certification testing. *Id*. Under the 1988 Rule, there were no limitations on the financial incentives that manufacturers could offer to certifying laboratories. In the

2015 Rule, EPA added a new conflict-of-interest provision that specifically prohibits laboratories from receiving financial benefits from passing test results. 40 C.F.R. § 60.535(a)(2)(v). This provision addresses the problem of different financial incentives driving different results in different laboratories.

IV. HPBA's challenge to EPA's discretionary application of the audit provisions is unripe

HPBA ignored EPA's ability to consider any relevant evidence during an audit hearing. HPBA may argue that it did not mention the audit hearing because HPBA cannot be sure what evidence EPA will consider sufficient to withdraw a proposed revocation in an audit hearing. EPA agrees that there are many unknowns, including whether a device will be audited, what the results of the audit test might be, and what other evidence a manufacturer might present to rebut the results of a failed test. These unknowns demonstrate that HPBA's dispute is unripe for resolution at this time. Both prongs of the *Abbot Laboratories* ripeness test weigh against hearing HPBA's challenge to the audit provisions. The issues are not fit for judicial review at this time and manufacturers will not suffer undue hardship in the interim. *Abbot Labs.*, 387 U.S. at 149.

When an agency "has discretion in the application of the challenged regulations," this Court has held that a "purely facial challenge" to the regulations is not ripe for review. *Media Access Project v. Federal Communications Commission*, 883 F.2d 1063, 1070 (D.C. Cir. 1989). Here, if a wood heater fails an

audit test, EPA may still decide not to revoke certification. EPA's decision may depend on many technical facts not yet developed, including the margin by which the device failed the test and the other evidence that the manufacturer presents in rebuttal, potentially including other test results and statistics on variability. At this time, "there are too many imponderables" concerning the evidence manufacturers may present in rebuttal and how EPA will weigh that evidence. *Clean Air Implementation Project v. EPA*, 150 F.3d 1200 (D.C. Cir. 1998). HPBA's hypothetical concerns of revocation following a failed audit test may never come to pass. And if EPA decides to revoke certification, the court's appraisal of EPA's decision is "likely to stand on a much surer footing in the context of a specific application of [the] regulation than could be the case in the framework of the generalized challenge made here." *Toilet Goods Association, Inc. v. Gardner*, 387 U.S. 158, 164 (1967).

HPBA's members would not suffer "any significant hardship from withholding of review" at this time. *Media Access*, 883 F.2d at 1071. EPA has not yet audited a single device under the 2015 Rule. The Agency stated its intent to audit only in rare circumstances, such as when notified of potential fraud or changes in model design. RTC at 149, JA__. It is possible that no device will fail an audit test, and it is possible that EPA will not revoke any certifications.

If a wood heater does fail an audit test, a manufacturer seeking to rebut the audit test results must request a hearing. But the burden of rebuttal at that hearing is mitigated by the availability of evidence that manufacturers may present at that hearing. For example, manufacturers will have information from their initial development of the model, and the raw data from the audit test. Because manufacturers must participate in a quality control program, they will have results from biennial independent third-party audits. 40 C.F.R. §§ 60.533(f)(i); 60.5475(f)(i). Additionally, EPA requires laboratories to participate in proficiency testing, and manufacturers can obtain this information from EPA to present evidence on variability under the 2015 Rule. *Id*. § 60.535(b). Presenting information to EPA in an audit hearing is not costless, but it is not a significant burden, particularly when so much information is already available to manufacturers. The information marshalled for the audit hearing would likely be the same as manufacturers would wish to present to a court during judicial review. And the burden of filing a new suit is itself "hardly the type of hardship which warrants immediate consideration" of this case. *Webb v. Department of Health & Human Services*, 696 F.2d 101, 107 (D.C. Cir. 1982).

To be sure, when a device fails an audit test by sufficiently high margins to trigger suspension of certification, that suspension would impose a greater hardship on a manufacturer than where there is no suspension. But suspension only occurs

where the device fails the audit test by more than 50% of the emissions limit. 40 C.F.R. §§ 60.533(n)(3)(i); 60.5475(n)(3)(i); RTC at 221. As explained above in Argument Section II, pp. 32-34, test results would have to vary by far more than the margin of variability that HPBA calculated to trigger a suspension. Even if a suspension is triggered, manufacturers have 72 hours before suspension takes effect. 40 C.F.R. §§ 60.533(n)(3)(i), 60.5475(n)(3)(i). During this time, they can seek withdrawal of the suspension from EPA and/or file for an injunction.

HPBA may argue that it would be burdensome to rebut the audit test by subsequently testing four or two devices and achieving passing results, after which, EPA "will" withdraw the proposed revocation. 40 C.F.R. §§ 60.533(n)(3)(vi); 60.5475(n)(3)(vi). However, the two- and four- test result options discussed by HPBA are just that – options which may be chosen at the discretion of the manufacturer. Favorable results under either of those options guarantee that the proposed revocation will be withdrawn. 40 C.F.R. §§ 60.533(n)(3)(vi); 60.5475(n)(3)(vi). But a manufacturer still has the ability to rebut the failed audit test and avoid revocation with any other relevant information. To the extent that HPBA would prefer EPA to accept lesser proof of rebuttal than two or four subsequent passing tests, the rule does not prevent EPA from accepting such a lesser degree of proof. A manufacturer may present *whatever* evidence it believes to be sufficient to EPA, EPA can decide whether such evidence is sufficient to

rebut the audit test result, and if needed, judicial review can be sought at that time. In that concrete context, with developed facts, a court would be able to determine if EPA erred. But in this facial challenge, hypothetical, fact-intensive arguments are not permissible or appropriate.

CONCLUSION

For the foregoing reasons, the Court should deny the petition for review and uphold the audit provisions in the 2015 Rule.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f) this document contains 8,979 words.

2. This document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Garamond font.

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CERTIFICATE OF SERVICE

I hereby certify that on September 11, 2020, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

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STATUTORY AND REGULATORY ADDENDUM

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42 USCS § 7401

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§ 7401. Congressional findings and declaration of purpose

(a) Findings. The Congress finds—

(1)that the predominant part of the Nation's population is located in its rapidly expanding metropolitan and other urban areas, which generally cross the boundary lines of local jurisdictions and often extend into two or more States;

(2)that the growth in the amount and complexity of air pollution brought about by urbanization, industrial development, and the increasing use of motor vehicles, has resulted in mounting dangers to the public health and welfare, including injury to agricultural crops and livestock, damage to and the deterioration of property, and hazards to air and ground transportation;

(3)that air pollution prevention (that is, the reduction or elimination, through any measures, of the amount of pollutants produced or created at the source) and air pollution control at its source is the primary responsibility of States and local governments; and

(4)that Federal financial assistance and leadership is essential for the development of cooperative Federal, State, regional, and local programs to prevent and control air pollution.

(b) Declaration. The purposes of this title are—

(1)to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population;

(2)to initiate and accelerate a national research and development program to achieve the prevention and control of air pollution;

(3)to provide technical and financial assistance to State and local governments in connection with the development and execution of their air pollution prevention and control programs; and

(4)to encourage and assist the development and operation of regional air pollution prevention and control programs.

(c) Pollution prevention. A primary goal of this Act is to encourage or otherwise promote reasonable Federal, State, and local governmental actions, consistent with the provisions of this Act, for pollution prevention.

History

HISTORY:

42 USCS § 7411

Current through Public Law 116-158, approved August 14, 2020.

United States Code Service > TITLE 42. THE PUBLIC HEALTH AND WELFARE (Chs. 1 — 161) > CHAPTER 85. AIR POLLUTION PREVENTION AND CONTROL (§§ 7401 — 7671q) > PROGRAMS AND ACTIVITIES (§§ 7401 — 7515) > AIR QUALITY AND EMISSION LIMITATIONS (§§ 7401 — 7431)

§ 7411. Standards for performance for new stationary sources

(a) Definitions. For purposes of this section:

(1) The term "standard of performance" means a standard for emissions of air pollutants which reflects 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 nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated.

(2) The term "new source" means 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.

(3) The term "stationary source" means any building, structure, facility, or installation which emits or may emit any air pollutant. Nothing in title II of this Act [42 USCS §§ 7621 et seq.] relating to nonroad engines shall be construed to apply to stationary internal combustion engines.

(4) The term "modification" means any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted.

(5) The term "owner or operator" means any person who owns, leases, operates, controls, or supervises a stationary source.

(6) The term "existing source" means any stationary source other than a new source.

(7) The term "technological system of continuous emission reduction" means—

(A)a technological process for production or operation by any source which is inherently low-polluting or nonpolluting, or

(B)a technological system for continuous reduction of the pollution generated by a source before such pollution is emitted into the ambient air, including precombustion cleaning or treatment of fuels.

(8)A conversion to coal (A) by reason of an order under section 2(a) of the Energy Supply and Environmental Coordination Act of 1974 [15 USCS § 792(a)] or any amendment thereto, or any subsequent enactment which supersedes such Act, or (B) which qualifies under section 113(d)(5)(A)(ii) of this Act shall not be deemed to be a modification for purposes of paragraphs (2) and (4) of this subsection.

(b) List of categories of stationary sources; standards of performance; information on pollution control techniques; sources owned or operated by United States; particular systems; revised standards.

(1)

(A) The Administrator shall, within 90 days after the date of enactment of the Clean Air Amendments of 1970 [enacted Dec. 31, 1970], publish (and from time to time thereafter shall revise) a list of categories of stationary sources. He shall include a category of sources in such list if in his judgment in causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare.

(B) Within one year after the inclusion of a category of stationary sources in a list under subparagraph (A), the Administrator shall publish proposed regulations, establishing Federal standards of performance for new sources within such category. The Administrator shall afford interested persons an opportunity for written comment on such proposed regulations. After considering such comments, he shall promulgate, within one year after such publication, such standards with such modifications as he deems appropriate. The Administrator shall, at least every 8 years, review and, if appropriate, revise such standards following the procedure required by this subsection for promulgation of such standards. Notwithstanding the requirements of the previous sentence, the Administrator need not review any such standard if the Administrator determines that such review is not appropriate in light of readily available information on the efficacy of such standard. Standards of performance or revisions thereof shall become effective upon promulgation. When implementation and enforcement of any requirement of this Act indicate that emission limitations and percent reductions beyond those required by the standards promulgated under this section are achieved in practice, the Administrator shall, when revising standards promulgated under this section, consider the emission limitations and percent reductions achieved in practice.

(2) The Administrator may distinguish among classes, types, and sizes within categories of new sources for the purpose of establishing such standards.

(3) The Administrator shall, from time to time, issue information on pollution control techniques for categories of new sources and air pollutants subject to the provisions of this section.

(4) The provisions of this section shall apply to any new source owned or operated by the United States.

(5) Except as otherwise authorized under subsection (h), nothing in this section shall be construed to require, or to authorize the Administrator to require, any new or modified source to install and operate any particular technological system of continuous emission reduction to comply with any new source standard of performance.

(6) The revised standards of performance required by enactment of subsection (a)(1)(A)(i) and (ii) shall be promulgated not later than one year after enactment of this paragraph [enacted Aug. 7, 1977]. Any new or modified fossil fuel fired stationary source which commences construction prior to the date of publication of the proposed revised standards shall not be required to comply with such revised standards.

(c) State implementation and enforcement of standards of performance.

(1) Each State may develop and submit to the Administrator a procedure for implementing and enforcing standards of performance for new sources located in such State. If the Administrator

finds the State procedure is adequate, he shall delegate to such State any authority he has under this Act to implement and enforce such standards.

(2) Nothing in this subsection shall prohibit the Administrator from enforcing any applicable standard of performance under this section.

(d) Standards of performance for existing sources; remaining useful life of source.

(1) The Administrator shall prescribe regulations which shall establish a procedure similar to that provided by section 110 [42 USCS § 7410] under which each State shall submit to the Administrator a plan which (A) establishes standards of performance for any existing source for any air pollutant (i) for which air quality criteria have not been issued or which is not included on a list published under section 108(a) [42 USCS § 7408(a)] or emitted from a source category which is regulated under section 112 [42 USCS § 7412] but (ii) to which a standard of performance under this section would apply if such existing source were a new source, and (B) provides for the implementation and enforcement of such standards of performance. Regulations of the Administrator under this paragraph shall permit the State in applying a standard of performance to any particular source under a plan submitted under this paragraph to take into consideration, among other factors, the remaining useful life of the existing source to which such standard applies.

(2) The Administrator shall have the same authority—

(A)to prescribe a plan for a State in cases where the State fails to submit a satisfactory plan as he would have under section 110(c) [42 USCS § 7410(c)] in the case of failure to submit an implementation plan, and

(B)to enforce the provisions of such plan in cases where the State fails to enforce them as he would have under sections 113 and 114 [42 USCS §§ 7413 and 7414] with respect to an implementation plan.

In promulgating a standard of performance under a plan prescribed under this paragraph, the Administrator shall take into consideration, among other factors, remaining useful lives of the sources in the category of sources to which such standard applies.

(e) Prohibited acts. 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.

(f) New source standards of performance.

(1) For those categories of major stationary sources that the Administrator listed under subsection (b)(1)(A) before the date of the enactment of the Clean Air Act Amendments of 1990 [enacted Nov. 15, 1990] and for which regulations had not been proposed by the Administrator by such date, the Administrator shall—

(A)propose regulations establishing standards of performance for at least 25 percent of such categories of sources within 2 years after the date of the enactment of the Clean Air Act Amendments of 1990 [enacted Nov. 15, 1990];

(B)propose regulations establishing standards of performance for at least 50 percent of such categories of sources within 4 years after the date of the enactment of the Clean Air Act Amendments of 1990 [enacted Nov. 15, 1990]; and

(C)propose regulations for the remaining categories of sources within 6 years after the date of the enactment of the Clean Air Act Amendments of 1990 [enacted Nov. 15, 1990].

42 USCS § 7607

Current through Public Law 116-158, approved August 14, 2020.

United States Code Service > TITLE 42. THE PUBLIC HEALTH AND WELFARE (Chs. 1 — 161) > CHAPTER 85. AIR POLLUTION PREVENTION AND CONTROL (§§ 7401 — 7671q) > GENERAL PROVISIONS (§§ 7601 — 7628)

§ 7607. Administrative proceedings and judicial review

(a) Administrative subpenas; confidentiality; witnesses. In connection with any determination under section 110(f) [42 USCS § 7410(f)], or for purposes of obtaining information under section 202(b)(4) or 211(c)(3) [42 USCS § 7521(b)(4) or 7545(c)(3)], any investigation, monitoring, reporting requirement, entry, compliance inspection, or administrative enforcement proceeding under the [this] Act (including but not limited to section 113, section 114, section 120, section 129, section 167, section 205, section 206, section 208, section 303, or section 306 [42 USCS § 7413, 7414, 7420, 7429, 7477, 7524, 7525, 7542, 7603, or 7606][,], the Administrator may issue subpenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents, and he may administer oaths. Except for emission data, upon a showing satisfactory to the Administrator by such owner or operator that such papers, books, documents, or information or particular part thereof, if made public, would divulge trade secrets or secret processes of such owner or operator, the Administrator shall consider such record, report, or information or particular portion thereof confidential in accordance with the purposes of section 1905 of title 18 of the United States Code, except that such paper, book, document, or information may be disclosed to other officers, employees, or authorized representatives of the United States concerned with carrying out this Act, to persons carrying out the National Academy of Sciences' study and investigation provided for in section 202(c) [42 USCS § 7521(c)], or when relevant in any proceeding under this Act. Witnesses summoned shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. In case of contumacy or refusal to obey a subpena served upon any person under this subparagraph, the district court of the United States for any district in which such person is found or resides or transacts business, upon application by the United States and after notice to such person, shall have jurisdiction to issue an order requiring such person to appear and give testimony before the Administrator to appear and produce papers, books, and documents before the Administrator, or both, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

(b) Judicial review.

(1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard or requirement under section 112 [42 USCS § 7412], any standard of performance or requirement under section 111 [42 USCS § 7411][,], any standard under section 202 [42 USCS § 7521] (other than a standard required to be prescribed under section 202(b)(1) [42 USCS § 7521(b)(1)]), any determination under section 202(b)(5) [42 USCS § 7521(b)(5)], any control or prohibition under section 211 [42 USCS § 7545], any standard under section 231 [42 USCS § 7571] any rule issued under section 113, 119, or under section 120 [42 USCS § 7413, 7419, or 7420], or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under

this Act may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 110 or section 111(d) [42 USCS § 7410 or 7411(d)], any order under section 111(j) [42 USCS § 7411(j)], under section 112 [42 USCS § 7412],[,] under section 119 [42 USCS § 7419], or under section 120 [42 USCS § 7420], or his action under section 119(c)(2)(A), (B), or (C) (as in effect before the date of enactment of the Clean Air Act Amendments of 1977) or under regulations thereunder, or revising regulations for enhanced monitoring and compliance certification programs under section 114(a)(3) of this Act, or any other final action of the Administrator under this Act (including any denial or disapproval by the Administrator under title I [42 USCS §§ 7401 et seq.]) which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit. Notwithstanding the preceding sentence a petition for review of any action referred to in such sentence may be filed only in the United States Court of Appeals for the District of Columbia if such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination. Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise. The filing of a petition for reconsideration by the Administrator of any otherwise final rule or action shall not affect the finality of such rule or action for purposes of judicial review nor extend the time within which a petition for judicial review of such rule or action under this section may be filed, and shall not postpone the effectiveness of such rule or action.

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement. Where a final decision by the Administrator defers performance of any nondiscretionary statutory action to a later time, any person may challenge the deferral pursuant to paragraph (1).

(c) Additional evidence. In any judicial proceeding in which review is sought of a determination under this Act required to be made on the record after notice and opportunity for hearing, if any party applies to the court for leave to adduce additional evidence, and shows to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Administrator, the court may order such additional evidence (and evidence in rebuttal thereof) to be taken before the Administrator, in such manner and upon such terms and conditions as [to] the court may deem proper. The Administrator may modify his findings as to the facts, or make new findings, by reason of the additional evidence so taken and he shall file such modified or new findings, and his recommendation, if any, for the modification or setting aside of his original determination, with the return of such additional evidence.

(d) Rulemaking.

(1) This subsection applies to—

(A)the promulgation or revision of any national ambient air quality standard under section 109 [42 USCS § 7409],

(B)the promulgation or revision of an implementation plan by the Administrator under section 110(c) [42 USCS § 7410(c)],

appeals for the appropriate circuit (as provided in subsection (b)). Such reconsideration shall not postpone the effectiveness of the rule. The effectiveness of the rule may be stayed during such reconsideration, however, by the Administrator or the court for a period not to exceed three months.

(8) The sole forum for challenging procedural determinations made by the Administrator under this subsection shall be in the United States court of appeals for the appropriate circuit (as provided in subsection (b)) at the time of the substantive review of the rule. No interlocutory appeals shall be permitted with respect to such procedural determinations. In reviewing alleged procedural errors, the court may invalidate the rule only if the errors were so serious and related to matters of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made.

(9) In the case of review of any action of the Administrator to which this subsection applies, the court may reverse any such action found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; or

(D) without observance of procedure required by law, if (i) such failure to observe such procedure is arbitrary or capricious, (ii) the requirement of paragraph (7)(B) has been met, and (iii) the condition of the last sentence of paragraph (8) is met.

(10) Each statutory deadline for promulgation of rules to which this subsection applies which requires promulgation less than six months after date of proposal may be extended to not more than six months after date of proposal by the Administrator upon a determination that such extension is necessary to afford the public, and the agency, adequate opportunity to carry out the purposes of this subsection.

(11) The requirements of this subsection shall take effect with respect to any rule the proposal of which occurs after ninety days after the date of enactment of the Clean Air Act Amendments of 1977 [enacted Aug. 7, 1977].

(e) Other methods of judicial review not authorized. Nothing in this Act shall be construed to authorize judicial review of regulations or orders of the Administrator under this Act, except as provided in this section.

(f) Costs. In any judicial proceeding under this section, the court may award costs of litigation (including reasonable attorney and expert witness fees) whenever it determines that such award is appropriate.

(g) Stay, injunction, or similar relief in proceedings relating to noncompliance penalties. In any action respecting the promulgation of regulations under section 120 [42 USCS § 7420] or the administration or enforcement of section 120 [42 USCS § 7420] no court shall grant any stay, injunctive, or similar relief before final judgment by such court in such action.

(h) Public Participation. It is the intent of Congress that, consistent with the policy of the Administrative Procedures Act [5 USCS §§ 551 et seq.], the Administrator in promulgating any regulation under this Act, including a regulation subject to a deadline, shall ensure a reasonable period for public participation of at least 30 days, except as otherwise expressly provided in section [sections] 107(d), 172(a), 181(a) and (b), and 186(a) and (b) [42 USCS §§ 7407(d), 7502(a), 7511(a) and (b), 7512(a) and (b)].

40 CFR 60.531

This document is current through the September 9, 2020 issue of the Federal Register.

Code of Federal Regulations > TITLE 40 -- PROTECTION OF ENVIRONMENT > CHAPTER I -- ENVIRONMENTAL PROTECTION AGENCY > SUBCHAPTER C -- AIR PROGRAMS > PART 60 -- STANDARDS OF PERFORMANCE FOR NEW STATIONARY SOURCES > SUBPART AAA-- STANDARDS OF PERFORMANCE FOR NEW RESIDENTIAL WOOD HEATERS

§ 60.531 What definitions must I know?

As used in this subpart, all terms not defined herein have the meaning given them in the Clean Air Act and subpart A of this part.

Adjustable burn rate wood heater means a wood heater that is equipped with or installed with a damper or other mechanism to allow the operator to vary burn rate conditions, regardless of whether it is internal or external to the appliance. This definition does not distinguish between heaters that are free standing, built-in or fireplace inserts.

Approved test laboratory means a test laboratory that is approved for wood heater certification testing under § 60.535 or is an independent third-party test laboratory that is accredited under ISO-IEC Standard 17025 to perform testing using the test methods specified in § 60.534 by an accreditation body that is a full member signatory to the International Laboratory Accreditation Cooperation Mutual Recognition Arrangement and approved by the EPA for conducting testing under this subpart.

Camp stove (sometimes also called cylinder stove or wall tent stove) means a portable stove equipped with a pipe or chimney exhaust capable of burning wood or coal intended for use in a tent or other temporary structure used for hunting, camping, fishing or other outdoor recreation. The primary purpose of the stove is to provide space heating, although cooking and heating water may be additional functions.

Catalytic combustor means a device coated with a noble metal used in a wood heater to lower the temperature required for combustion.

Chip wood fuel means wood chipped into small pieces that are uniform in size, shape, moisture, density and energy content.

Coal-only heater means an enclosed, coal-burning appliance capable of space heating or space heating and domestic water heating, which is marketed and warranted solely as a coal-only heater and has all of the following characteristics:

(1) An opening for emptying ash that is located near the bottom or the side of the appliance;

(2) A system that admits air primarily up and through the fuel bed;

(3) A grate or other similar device for shaking or disturbing the fuel bed or a power-driven or mechanical stoker;

(4) Installation instructions, owner's manual and marketing information that state that the use of wood in the stove, except for coal ignition purposes, is prohibited by law; and

(5)A safety listing as a coal-only heater, except for coal ignition purposes, under accepted American or Canadian safety codes, as documented by a permanent label from a nationally recognized certification body.

Commercial owner means any person who owns or controls a wood heater in the course of the business of the manufacture, importation, distribution (including shipping and storage), or sale of the wood heater.

Cook stove means a wood-fired appliance that is designed, marketed and warranted primarily for cooking food and that has the following characteristics:

(1) An oven, with volume of 0.028 cubic meters (1 cubic foot) or greater, and an oven rack;

(2)A device for measuring oven temperatures;

(3)A flame path that is routed around the oven;

(4) An ash pan;

(5) An ash clean-out door below the oven;

(6) The absence of a fan or heat channels to dissipate heat from the appliance;

(7)A cooking surface with an area measured in square inches or square feet that is at least 1.5 times greater than the volume of firebox measured in cubic inches or cubic feet. Example: A cook stove with a firebox of 2 cubic feet must have a cooking surface of at least 3 square feet;

(8)A portion of at least four sides of the oven (which may include the bottom and/or top) is exposed to the flame path during the heating cycle of the oven. A flue gas bypass may exist for temperature control.

Fireplace means a wood-burning appliance intended to be used primarily for aesthetic enjoyment and not as a space heater. An appliance is a fireplace if it is in a model line that satisfies the requirements in paragraphs (1), (2) or (3) of this definition.

(1) The model line includes a safety listing under recognized American or Canadian safety standards, as documented by a permanent label from a nationally recognized certification body affixed on each unit sold, and that said safety listing only allows operation of the fireplace with doors fully open. Operation with any required safety screen satisfies this requirement.

(2) The model line has a safety listing that allows operation with doors closed, has no user-operated controls other than flue or outside air dampers that can only be adjusted to either a fully closed or fully opened position, and the requirements in either paragraph (2)(i) or (2)(ii) of this definition are satisfied.

(i) Appliances are sold with tempered glass panel doors only (either as standard or optional equipment), or

(ii) The fire viewing area is equal to or greater than 500 square inches.

(3)

(i)A model line that is clearly positioned in the marketplace as intended to be used primarily for aesthetic enjoyment and not as a room heater, as demonstrated by product literature (including owner's manuals), advertising targeted at the trade or public (including web-based promotional materials) or training materials is presumptively a fireplace model line.

(ii) The presumption in paragraph (3)(i) of this definition can be rebutted by test data from an EPA-approved test laboratory reviewed by an EPA-approved third-party certifier that were generated when operating the appliance with the door(s) closed, and that demonstrate an

average stack gas carbon dioxide (CO[2]) concentration over the duration of the test run equal to or less than 5.00 percent and a ratio of the average stack gas CO[2] to the average stack gas carbon monoxide (CO) equal to or greater than 15:1. The stack gas average CO[2] and CO concentrations for the test run shall be determined in accordance with the requirements in CSA B415.1-10 (IBR, see § 60.17), clause 6.3, using a sampling interval no greater than 1 minute. The average stack gas CO[2] and CO concentrations for purposes of this determination shall be the average of the stack gas concentrations from all sampling intervals over the full test run.

Manufactured means completed and ready for shipment (whether or not assembled or packaged) for purposes of determining the date of manufacture.

Manufacturer means any entity that constructs or imports into the United States a wood heater.

Model line means all wood heaters offered for sale by a single manufacturer that are similar in all material respects that would affect emissions as defined in this section.

Particulate matter (PM) means total particulate matter including coarse particulate (PM[10]) and fine particulate (PM[2.5]).

Pellet fuel means refined and densified fuel shaped into small pellets or briquettes that are uniform in size, shape, moisture, density and energy content.

Pellet stove (sometimes called pellet heater or pellet space heater) means an enclosed, pellet or chip fuel-burning device capable of and intended for residential space heating or space heating and domestic water heating. Pellet stoves include a fuel storage hopper or bin and a fuel feed system. Pellet stoves include, but are not limited to:

(1) Free-standing pellet stoves--pellet stoves that are installed on legs or on a pedestal or other supporting base. These stoves generally are safety listed under ASTM E1509, UL-1482, ULC S627 or ULC-ORD C1482.

(2) Pellet stove fireplace inserts--pellet stoves intended to be installed in masonry fireplace cavities or in other enclosures. These stoves generally are safety listed under ASTM E1509, UL-1482, ULC-S628 or ULC-ORD C1482.

(3) Built-in pellet stoves--pellet stoves intended to be recessed into the wall. These stoves generally are safety listed under ASTM E1509, UL-127, ULC-S610 or ULC-ORD C1482.

Representative affected wood heater means an individual wood heater that is similar in all material respects that would affect emissions to other wood heaters within the model line it represents.

Residential masonry heater means a factory-built or site-built wood-burning device in which the heat from intermittent fires burned rapidly in the firebox is stored in the refractory mass for slow release to building spaces. Masonry heaters are site-built (using local materials or a combination of local materials and manufactured components) or site-assembled (using factory-built components), solid fuel-burning heating appliances constructed mainly of refractory materials (e.g., masonry materials or soapstone. They typically have an interior construction consisting of a firebox and heat exchange channels built from refractory components, through which flue gases are routed. ASTM E-1602 "Standard Guide for Construction of Solid Fuel Burning Masonry Heaters" provides design and construction information for the range of masonry heaters most commonly built in the United States. The site-assembled models are generally listed to UL-1482.

Sale means the transfer of ownership or control, except that a transfer of control of an affected wood heater for research and development purposes within the scope of § 60.530(b)(2) is not a sale.

Similar in all material respects that would affect emissions means that the construction materials, exhaust and inlet air systems and other design features are within the allowed tolerances for components identified in § 60.533(k)(2), (3) and (4).

Single burn rate wood heater means a wood heater that is not equipped with or installed with a burn control device to allow the operator to vary burn rate conditions. Burn rate control devices include stack dampers that control the outflow of flue gases from the heater to the chimney, whether built into the appliance, sold with it, or recommended for use with the heater by the manufacturer, retailer or installer; and air control slides, gates or any other type of mechanisms that control combustion air flow into the heater.

Sold at retail means the sale by a commercial owner of a wood heater to the ultimate purchaser/user or noncommercial purchaser.

Third-party certifier (sometimes called third-party certifying body or product certifying body) means an independent third party that is accredited under ISO-IEC Standards 17025 and 17065 to perform certifications, inspections and audits by an accreditation body that is a full member signatory to the International Laboratory Accreditation Cooperation Mutual Recognition Arrangement and approved by the EPA for conducting certifications, inspections and audits under this subpart.

Traditional Native American bake oven means a wood or other solid fuel burning appliance that is designed primarily for use by Native Americans for food preparation, cooking, warming or for instructional, recreational, cultural or ceremonial purposes.

Unseasoned wood means wood with an average moisture content of 20 percent or more.

Valid certification test means a test that meets the following criteria:

(1) The Administrator was notified about the test in accordance with § 60.534(g);

(2) The test was conducted by an approved test laboratory as defined in this section;

(3) The test was conducted on a wood heater similar in all material respects that would affect emissions to other wood heaters of the model line that is to be certified; and

(4) The test was conducted in accordance with the test methods and procedures specified in § 60.534.

Wood heater means an enclosed, wood burning-appliance capable of and intended for residential space heating or space heating and domestic water heating. These devices include, but are not limited to, adjustable burn rate wood heaters, single burn rate wood heaters and pellet stoves. Wood heaters may or may not include air ducts to deliver some portion of the heat produced to areas other than the space where the wood heater is located. Wood heaters include, but are not limited to:

(1) Free-standing wood heaters--Wood heaters that are installed on legs, on a pedestal or suspended from the ceiling. These products generally are safety listed under UL-1482, UL-737 or ULC-S627.

(2) Fireplace insert wood heaters--Wood heaters intended to be installed in masonry fireplace cavities or in other enclosures. These appliances generally are safety listed under UL-1482, UL-737 or ULC-S628.

(3) Built-in wood heaters--Wood heaters that are intended to be recessed into the wall. These appliances generally are safety listed under UL-1482, UL-737, UL-127 or ULC-S610.

Statutory Authority

40 CFR 60.533

This document is current through the September 9, 2020 issue of the Federal Register.

Code of Federal Regulations > TITLE 40 -- PROTECTION OF ENVIRONMENT > CHAPTER I -- ENVIRONMENTAL PROTECTION AGENCY > SUBCHAPTER C -- AIR PROGRAMS > PART 60 -- STANDARDS OF PERFORMANCE FOR NEW STATIONARY SOURCES > SUBPART AAA-- STANDARDS OF PERFORMANCE FOR NEW RESIDENTIAL WOOD HEATERS

§ 60.533 What compliance and certification requirements must I meet and by when?

(a) Certification requirement. Each affected wood heater must be certified to be in compliance with the applicable emission standards and other requirements of this subpart. For each model line manufactured or sold by a single entity (e.g., company or manufacturer), compliance with applicable emission standards of § 60.532 must be determined based on testing of representative affected wood heaters within the model line. If one entity licenses a model line to another entity, each entity's model line must be certified. If an entity intends to change the name of the entity or the name of the model, the manufacturer must apply for a new certification 60 days before the intended name change.

(1) Except for model lines meeting the requirements of paragraph (h)(1) of this section, on or after May 15, 2015, the manufacturer must submit to the Administrator the information required in paragraph (b) of this section and follow either the certification process in paragraphs (c) through (e) of this section or the third-party certifier-based application process specified in paragraph (f) of this section.

(2) On or after May 16, 2016, the manufacturer must submit the information required in paragraph (b) of this section and follow the third-party certifier-based application process specified in paragraph (f) of this section.

(b) Application for a certificate of compliance. Any manufacturer of an affected wood heater must apply to the Administrator for a certificate of compliance for each model line. The application must be submitted to:

WoodHeaterReports@epa.gov

. The application must be signed by a responsible representative of the manufacturer or an authorized representative and must contain the following:

(1) The model name and design number. The model name and design number must clearly distinguish one model from another. The name and design number cannot include the EPA symbol or logo or name or derivatives such as "EPA."

(2) Engineering drawings and specifications of components that may affect emissions (including specifications for each component listed in paragraph (k)(2), (3) and (4) of this section). Manufacturers may use assembly or design drawings that have been prepared for other purposes, but must designate on the drawings the dimensions of each component listed in paragraph (k) of this section. Manufacturers must identify tolerances of components listed in paragraph (k)(2) of this section that are different from those specified in that paragraph, and show that such tolerances cannot reasonably be anticipated to cause wood heaters in the

(11)A statement that the approved laboratory and approved third-party certifier are allowed to submit information on behalf of the manufacturer, including any claimed to be CBI.

(12)A statement that the manufacturer will place a copy of the certification test report and summary on the manufacturer's Web site available to the public within 30 days after the Administrator issues a certificate of compliance.

(13)A statement of acknowledgment that the certificate of compliance cannot be transferred to another manufacturer or model line without written approval by the Administrator.

(14)A statement acknowledging that it is unlawful to sell, distribute or offer to sell or distribute an affected wood heater without a valid certificate of compliance.

(15) Contact information for the responsible representative of the manufacturer and all authorized representatives, including name, affiliation, physical address, telephone number and email address.

(c) Administrator approval process. (1) The Administrator may issue a certificate of compliance for a model line if the Administrator determines, based on all information submitted by the applicant and any other relevant information available, that:

(i)A valid certification test demonstrates that the representative affected wood heater complies with the applicable emission standards in § 60.532;

(ii) Any tolerances or materials for components listed in paragraph (k)(2) or (3) of this section that are different from those specified in those paragraphs may not reasonably be anticipated to cause wood heaters in the model line to exceed the applicable emission limits; and

(iii) The requirements of paragraph (b) of this section have been met.

(2) The Administrator will deny certification if the Administrator determines that the criteria in paragraph (c)(1) of this section have not been satisfied. Upon denying certification under this paragraph, the Administrator will give written notice to the manufacturer setting forth the basis for this determination.

(d) Level of compliance certification. The Administrator will issue the certificate of compliance for the most stringent particulate matter emission standard that the tested representative wood heater meets under § 60.532.

(e) Conditional, temporary certificate of compliance. A conditional, temporary certificate of compliance may be granted by the Administrator until May 16, 2016 based on the manufacturer's submittal of a complete certification application meeting all the requirements in § 60.533(b). The application must include the full test report by an EPA-approved laboratory and all required compliance statements by the manufacturer with the exception of a certificate of conformity by an EPA-approved third-party certifier. The conditional, temporary certificate of compliance would allow manufacture and sales of the affected wood heater model line until May 16, 2016 or until the Administrator completes the review of the application, whichever is earlier. By May 16, 2016, the manufacturer must submit a certificate of conformity by an EPA-approved third-party certifier.

(f) Third-party c ertifier-based application process. (1) Any manufacturer of an affected wood heater must apply to the Administrator for a certificate of compliance for each model line. The manufacturer must meet the following requirements:

(i) The manufacturer must contract with a third-party certifier for certification services. The contract must include regular (at least annual) unannounced audits under ISO-IEC Standard 17065 to ensure that the manufacturer's quality assurance plan is being implemented. The

contract must also include a report for each audit under ISO-IEC Standard 17065 that fully documents the results of the audit. The contract must include authorization and requirement for the third-party certifier to submit all such reports to the Administrator and the manufacturer within 30 days of the audit. The audit report must identify deviations from the manufacturer's quality assurance plan and specify the corrective actions that need to be taken to address each identified deficiency.

(ii) The manufacturer must submit the materials specified in paragraph (b) of this section and a quality assurance plan that meets the requirements of paragraph (m) of this section to the third-party certifier. The quality assurance plan must ensure that units within a model line will be similar in all material respects that would affect emissions to the wood heater submitted for certification testing, and it must include design drawings for the model line.

(iii) The manufacturer must apply to the third-party certifier for a certification of conformity with the applicable requirements of this subpart for the model line.

(A) After testing by an approved test laboratory is complete, certification of conformity with the emission standards in § 60.532 must be performed by the manufacturer's contracted third-party certifier.

(B) The third-party certifier may certify conformity if the emission tests have been conducted per the appropriate guidelines; the test report is complete and accurate; the instrumentation used for the test was properly calibrated; the test report shows that the representative affected wood heater meets the applicable emission limits specified in § 60.532; the quality assurance plan is adequate to ensure that units within the model line will be similar in all material respects that would affect emissions to the wood heater submitted for certification testing; and that the affected heaters would meet all applicable requirements of this subpart.

(iv) The manufacturer must then submit to the Administrator an application for a certificate of compliance that includes the certification of conformity, quality assurance plan, test report and all supporting documentation specified in paragraph (b) of this section.

(v) The submission also must include a statement signed by a responsible official of the manufacturer or authorized representative that the manufacturer has complied with and will continue to comply with all requirements of this subpart for certificate of compliance and that the manufacturer remains responsible for compliance regardless of any error by the test laboratory or third-party certifier.

(2) The Administrator will issue to the manufacturer a certificate of compliance for a model line if it is determined, based on all of the information submitted in the application for certification and any other relevant information, that:

(i)A valid certification of conformity has demonstrated that the representative affected wood heater complies with the applicable emission standards in § 60.532;

(ii) Any tolerances or materials for components listed in paragraph (k)(2) or (3) of this section that are different from those specified in those paragraphs may not be reasonably anticipated to cause wood heaters in the model line to exceed the applicable emission limits;

(iii) The requirements of paragraph (b) of this section have been met; and

(iv)A valid certificate of conformity for the model line has been prepared and submitted.

the wood heater submitted for certification testing and meet the emissions standards in § 60.532.

(2) The quality assurance plan must be approved by the third-party certifier as part of the certification of conformity process specified in paragraph (f) of this section.

(3) The quality assurance plan must include regular (at least annual) unannounced audits by the third-party certifier under ISO-IEC Standard 17065 to ensure that the manufacturer's quality assurance plan is being implemented.

(4) The quality assurance plan must include a report for each audit under ISO-IEC Standard 17065 that fully documents the results of the audit. The third-party certifier must be authorized and required to submit all such reports to the Administrator and the manufacturer within 30 days of the audit. The audit report must identify deviations from the manufacturer's quality assurance plan and specify the corrective actions that need to be taken to address each identified deficiency.

(5) Within 30 days after receiving each audit report, the manufacturer must report to the third-party certifier and to the Administrator its corrective actions and responses to any deficiencies identified in the audit report. No such report is required if an audit report did not identify any deficiencies.

(n)EPA compliance audit testing. (1)(i) The Administrator may select by written notice wood heaters or model lines for compliance audit testing to determine compliance with the emission standards in § 60.532.

(ii) The Administrator will transmit a written notification of the selected wood heaters or model line(s) to the manufacturer, which will include the name and address of the laboratory selected to perform the audit test and the model name and serial number of the wood heater(s) or model line(s) selected to undergo audit testing.

(2)

(i) The Administrator may test, or direct the manufacturer to have tested, a wood heater or a wood heater from the model line(s) selected under paragraph (n)(1)(i) of this section in a laboratory approved under § 60.535. The Administrator may select any approved test laboratory or federal laboratory for this audit testing.

(ii) The expense of the compliance audit test is the responsibility of the wood heater manufacturer.

(iii) The test must be conducted using the same test method used to obtain certification. If the certification test consisted of more than one particulate matter sampling test method, the Administrator may direct the manufacturer and test laboratory as to which of these methods to use for the purpose of audit testing. The Administrator will notify the manufacturer at least 30 days prior to any test under this paragraph, and allow the manufacturer and/or his authorized representatives to observe the test.

(3) Revocation of certification.

(i) If emissions from a wood heater tested under paragraph (n)(2) of this section exceed the applicable emission standard by more than 50 percent using the same test method used to obtain certification, the Administrator will notify the manufacturer that certification for that model line is suspended effective 72 hours from the receipt of the notice, unless the suspension notice is withdrawn by the Administrator. The suspension will remain in effect until withdrawn by the Administrator, or the date 30 days from its effective date if a

revocation notice under paragraph (n)(3)(ii) of this section is not issued within that period, or the date of final agency action on revocation, whichever occurs earliest.

(ii)

(A) If emissions from a wood heater tested under paragraph (n)(2) of this section exceed the applicable emission limit, the Administrator will notify the manufacturer that certification is revoked for that model line.

(B)A revocation notice under paragraph (n)(3)(ii)(A) of this section will become final and effective 60 days after the date of written notification to the manufacturer, unless it is withdrawn, a hearing is requested under § 60.539(a)(2), or the deadline for requesting a hearing is extended.

(C) The Administrator may extend the deadline for requesting a hearing for up to 60 days for good cause.

(D)A manufacturer may extend the deadline for requesting a hearing for up to 6 months, by agreeing to a voluntary suspension of certification.

(iii) Any notification under paragraph (n)(3)(i) or (n)(3)(ii) of this section will include a copy of a preliminary test report from the approved test laboratory or federal test laboratory. The test laboratory must provide a preliminary test report to the Administrator within 14 days of the completion of testing, if a wood heater exceeds the applicable emission limit in § 60.532. The test laboratory must provide the Administrator and the manufacturer, within 30 days of the completion of testing, all documentation pertaining to the test, including the complete test report and raw data sheets, laboratory technician notes, and test results for all test runs.

(iv) Upon receiving notification of a test failure under paragraph (n)(3)(ii) of this section, the manufacturer may request that up to four additional wood heaters from the same model line be tested at the manufacturer's expense, at the test laboratory that performed the emissions test for the Administrator.

(v) Whether or not the manufacturer proceeds under paragraph (n)(3)(iv) of this section, the manufacturer may submit any relevant information to the Administrator, including any other test data generated pursuant to this subpart. The manufacturer must bear the expense of any additional testing.

(vi) The Administrator will withdraw any notice issued under paragraph (n)(3)(ii) of this section if tests under paragraph (n)(3)(iv) of this section show either--

(A) That exactly four additional wood heaters were tested for the manufacturer and all four met the applicable emission limits; or

(B) That exactly two additional wood heaters were tested for the manufacturer and each of them met the applicable emission limits and the average emissions of all three tested heaters (the original audit heater and the two additional heaters) met the applicable emission limits.

(vii) If the Administrator withdraws a notice pursuant to paragraph (n)(3)(vi) of this section, the Administrator will revise the certification values for the model line based on the test data and other relevant information. The manufacturer must then revise the model line's labels and marketing information accordingly.

(viii) The Administrator may withdraw any proposed revocation, if the Administrator finds that an audit test failure has been rebutted by information submitted by the manufacturer under paragraph (n)(3)(iv) of this section and/or (n)(3)(v) of this section or by any other relevant information available to the Administrator.

Statutory Authority

AUTHORITY NOTE APPLICABLE TO ENTIRE PART:

42 U.S.C. 7401 et seq.

History

[53 FR 5874, Feb. 26, 1988; 53 FR 14889, Apr. 26, 1988; 60 FR 33925, June 29, 1995; 63 FR 64869, 64874, Nov. 24, 1998; 65 FR 61744, 61764, Oct. 17, 2000; 80 FR 13672, 13701, Mar. 16, 2015]

Annotations

Notes

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Research References & Practice Aids

NOTES APPLICABLE TO ENTIRE CHAPTER:

[PUBLISHER'S NOTE: Nomenclature changes to Chapter I appear at 65 FR 47323, 47324, 47325, Aug. 2, 2000.]

[PUBLISHER'S NOTE: For Federal Register citations concerning Chapter 1 Notice of implementation policy, see: 71 FR 25504, May 1, 2006.]

[PUBLISHER'S NOTE: For Federal Register citations concerning Chapter 1 Findings, see: 74 FR 66496, Dec. 15, 2009.]

[PUBLISHER'S NOTE: For Federal Register citations concerning Chapter I Denials, see: 75 FR 49556, Aug. 13, 2010; 77 FR 42181, July 18, 2012.]

40 CFR 60.535

This document is current through the September 9, 2020 issue of the Federal Register.

Code of Federal Regulations > TITLE 40 -- PROTECTION OF ENVIRONMENT > CHAPTER I -- ENVIRONMENTAL PROTECTION AGENCY > SUBCHAPTER C -- AIR PROGRAMS > PART 60 -- STANDARDS OF PERFORMANCE FOR NEW STATIONARY SOURCES > SUBPART AAA-- STANDARDS OF PERFORMANCE FOR NEW RESIDENTIAL WOOD HEATERS

§ 60.535 What procedures must I use for EPA approval of a test laboratory or EPA approval of a third-party certifier?

(a) Test laboratory approval.

(1)A laboratory must apply to the Administrator for approval to test under this rule by submitting documentation that the laboratory is accredited by a nationally recognized accrediting entity under ISO-IEC Standard 17025 to perform testing using the test methods specified under § 60.534. Laboratories accredited by EPA prior to May 15, 2015 may have until March 16, 2018 to submit documentation that they have accreditation under ISO-IEC Standard 17025 to perform testing using the test methods specified under § 60.534. ISO accreditation is required for all other laboratories performing testing beginning on November 16, 2015.

(2) As part of the application, the test laboratory must:

(i) Agree to participate biennially in an independently operated proficiency testing program with no direct ties to the participating laboratories;

(ii) Agree to allow the Administrator, regulatory agencies and third-party certifiers access to observe certification testing;

(iii) Agree to comply with calibration, reporting and recordkeeping requirements that affect testing laboratories; and

(iv) Agree to perform a compliance audit test at the manufacturer's expense at the testing cost normally charged to such manufacturer if the laboratory is selected by the Administrator to conduct the compliance audit test of the manufacturer's model line. The test laboratory must provide a preliminary audit test report to the Administrator within 14 days of the completion of testing, if the tested wood heater exceeds the applicable emission limit in § 60.532. The test laboratory must provide the Administrator and the manufacturer, within 30 days of the completion of audit testing, all documentation pertaining to the test, including the complete test report and raw data sheets, laboratory technician notes, and test results for all test runs.

(v) Have no conflict of interest and receive no financial benefit from the outcome of certification testing conducted pursuant to § 60.533.

(vi) Agree to not perform initial certification tests on any models manufactured by a manufacturer for which the laboratory has conducted research and development design services within the last 5 years.

(vii) Agree to seal any wood heater on which it performed certification tests, immediately upon completion or suspension of certification testing, by using a laboratory-specific seal.

(viii) Agree to immediately notify the Administrator of any suspended tests through email and in writing, giving the date suspended, the reason(s) why, and the projected date for restarting. The laboratory must submit the operation and test data obtained, even if the test is not completed.

(3) If the EPA approves the laboratory, the Administrator will provide the test laboratory with a certificate of approval for testing under this rule. If the EPA does not approve the laboratory, the Administrator will give written notice to the laboratory setting forth the basis for the determination.

(b) Revocation of test laboratory approval. (1) The Administrator may revoke the EPA laboratory approval if it is determined that the laboratory:

(i) Is no longer accredited by the accreditation body;

(ii) Does not follow required procedures or practices;

(iii) Has falsified data or otherwise misrepresented emission data;

(iv) Has failed to participate in a proficiency testing program, in accordance with its commitment under paragraph (a)(2)(i) of this section; or

(v) Has failed to seal a wood heater in accordance with paragraph (a)(2)(vii) of this section.

(2) Revocation of approval under this paragraph (b) will not take effect until the laboratory concerned has been given written notice by the Administrator setting forth the basis for the proposed determination and an opportunity for a hearing under § 60.539. However, if revocation is ultimately upheld, all tests conducted by the laboratory after written notice was given will, at the discretion of the Administrator, be declared invalid.

(c) Period of test laboratory approval (1) With the exception of laboratories meeting the provisions of paragraph (c)(2) of this section, and unless revoked sooner, a certificate of approval for testing under this rule is valid for 5 years from the date of issuance.

(2) Laboratories accredited by the EPA by May 15, 2015, under the provisions of § 60.535 as in effect prior to that date may continue to be EPA accredited and deemed EPA approved for testing under this subpart until May 15, 2018, at which time the EPA accreditation and approval ends unless the laboratory has obtained accreditation under § 60.535 as in effect on that date.

(d) Third-party certifier approval.

(1)A third-party certifier may apply to the Administrator for approval to be an EPA-approved third-party certifier by submitting credentials demonstrating that it has been accredited by a nationally recognized accrediting entity to perform certifications and inspections under ISO-IEC Standard 17025, ISO-IEC Standard 17065 and ISO-IEC Standard 17020.

(2) As part of the application, the third-party certifier must:

(i) Agree to offer to contract with wood heater manufacturers to perform third-party certification activities according to the requirements of this subpart;

(ii) Agree to periodically conduct audits as described in § 60.533(m) and the manufacturer's quality assurance program;

40 CFR 60.5473

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Code of Federal Regulations > TITLE 40 -- PROTECTION OF ENVIRONMENT > CHAPTER I -- ENVIRONMENTAL PROTECTION AGENCY > SUBCHAPTER C -- AIR PROGRAMS > PART 60 -- STANDARDS OF PERFORMANCE FOR NEW STATIONARY SOURCES > SUBPART QQQQ-- STANDARDS OF PERFORMANCE FOR NEW RESIDENTIAL HYDRONIC HEATERS AND FORCED-AIR FURNACES

§ 60.5473 What definitions must I know?

As used in this subpart, all terms not defined herein have the same meaning given them in the Clean Air Act and subpart A of this part.

Approved test laboratory means a test laboratory that is approved for central heater certification testing under § 60.5477 or is an independent third-party test laboratory that is accredited under ISO-IEC Standard 17025 to perform testing using the test methods specified in § 60.5476 by an accreditation body that is a full member signatory to the International Laboratory Accreditation Cooperation Mutual Recognition Arrangement and approved by the EPA for conducting testing under this subpart.

Catalytic combustor means a device coated with a noble metal used in a wood heater to lower the temperature required for combustion.

Central heater means a fuel-burning device designed to burn wood or wood pellet fuel that warms spaces other than the space where the device is located, by the distribution of air heated by the furnace through ducts or liquid heated in the device and distributed typically through pipes. Unless otherwise specified, these devices include, but are not limited to, residential forced-air furnaces (small and large) and residential hydronic heaters.

Chip wood fuel means wood chipped into small pieces that are uniform in size, shape, moisture, density and energy content.

Coal-only hydronic heater or forced-air furnace means an enclosed, coal- burning appliance capable of space heating or domestic water heating that has all of the following characteristics:

(1) Installation instructions, owner's manual and marketing information that state that the use of wood in the appliance, except for coal ignition purposes, is prohibited by law; and

(2) The model is listed by a nationally recognized safety-testing laboratory for coal use only, except for coal ignition purposes.

Commercial owner means any person who owns or controls a residential hydronic heater, forced-air furnace or other affected central heater in the course of the business of the manufacture, importation, distribution, or sale of the unit.

Large residential forced-air furnace means a residential forced-air furnace that is capable of a heat output of 65,000 BTU per hour or greater.

Manufactured means completed and ready for shipment (whether or not assembled or packaged) for purposes of determining the date of manufacture.

Manufacturer means any entity that constructs or imports into the United States a central heater.

Model line means all central heaters offered for sale by a single manufacturer that are similar in all material respects that would affect emissions as defined in this section.

Particulate matter (PM) means total particulate matter including coarse particulate (PM[10]) and fine particulate (PM[2.5]).

Pellet fuel means refined and densified solid wood shaped into small pellets or briquettes that are uniform in size, shape, moisture, density and energy content.

Representative affected wood or central heater means an individual heater that is similar in all material respects that would affect emissions as defined in this section to other heaters within the model line it represents.

Residential forced-air furnace means a fuel burning device designed to burn wood or wood pellet fuel that warms spaces other than the space where the furnace is located, by the distribution of air heated by the furnace through ducts.

Residential hydronic heater means a fuel burning device designed to burn wood or wood pellet fuel for the purpose of heating building space and/or water through the distribution, typically through pipes, of a fluid heated in the device, typically water or a water and antifreeze mixture.

Residential masonry heater means a factory-built or site-built wood-burning device in which the heat from intermittent fires burned rapidly in the firebox is stored in the refractory mass for slow release to building spaces. Masonry heaters are site-built (using local materials or a combination of local materials and manufactured components) or site-assembled (using factory-built components), solid fuel-burning heating appliances constructed mainly of refractory materials (e.g., masonry materials or soapstone. They typically have an interior construction consisting of a firebox and heat exchange channels built from refractory components, through which flue gases are routed. ASTM E1602 "Standard Guide for Construction of Solid Fuel Burning Masonry Heaters" provides design and construction information for the range of masonry heaters most commonly built in the United States. The site-assembled models are generally listed to UL-1482.

Sale means the transfer of ownership or control, except that a transfer of control of an affected central heater for research and development purposes within the scope of § 60.5472(b)(2) is not a sale.

Similar in all material respects that would affect emissions means that the construction materials, exhaust and inlet air system, and other design features are within the allowed tolerances for components identified in § 60.5475(k).

Small residential forced-air furnace means a residential forced-air furnace that is only capable of a maximum heat output of less than 65,000 BTU per hour.

Sold at retail means the sale by a commercial owner of a central heater to the ultimate purchaser/user or noncommercial purchaser.

Third-party certifier (sometimes called third-party certifying body or product certifying body) means an independent third party that is accredited under ISO-IEC Standards 17025 and 17065 to perform certifications, inspections and audits by an accreditation body that is a full member signatory to the International Laboratory Accreditation Cooperation Mutual Recognition Arrangement and approved by the EPA for conducting certifications, inspections and audits under this subpart.

Unseasoned wood means wood with an average moisture content of 20 percent or more.

Valid certification test means a test that meets the following criteria:

(1) The Administrator was notified about the test in accordance with § 60.5476(h);

(2) The test was conducted by an approved test laboratory as defined in this section;

(3) The test was conducted on a central heater similar in all material respects that would affect emissions as defined in this section to other central heaters of the model line that is to be certified; and

(4) The test was conducted in accordance with the test methods and procedures specified in § 60.5476.

Wood heater under this subpart means an enclosed, wood burning-appliance capable of and intended for residential central heating or central heating and domestic water heating. Unless otherwise specified, these devices include, but are not limited to, hydronic heaters and forced-air furnaces.

Statutory Authority

AUTHORITY NOTE APPLICABLE TO ENTIRE PART:

42 U.S.C. 7401 et seq.

History

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Annotations

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[PUBLISHER'S NOTE: Nomenclature changes to Chapter I appear at 65 FR 47323, 47324, 47325, Aug. 2, 2000.]

[PUBLISHER'S NOTE: For Federal Register citations concerning Chapter 1 Notice of implementation policy, see: 71 FR 25504, May 1, 2006.]

[PUBLISHER'S NOTE: For Federal Register citations concerning Chapter 1 Findings, see: 74 FR 66496, Dec. 15, 2009.]

40 CFR 60.5475

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§ 60.5475 What compliance and certification requirements must I meet and by when?

(a) Certification requirement.

(1) Each affected residential hydronic heater, forced-air furnace and other central heater must be certified to be in compliance with the applicable emission standards and other requirements of this subpart. For each model line manufactured or sold by a single entity, e.g., company or manufacturer, compliance with applicable emission standards of § 60.5474 must be determined based on testing of representative affected central heaters within the model line. If one entity licenses a model line to another entity, each entity's model line must be certified. If an entity intends to change the name of the entity or the name of the model, the manufacturer must apply for a new certification 60 days before making the change.

(2) The manufacturer of each model line must submit the information required in paragraph (b) of this section and follow either the certification process in paragraphs (c) through (e) of this section (for forced-air furnaces) or the certification procedure specified in paragraph (f) of this section.

(3) Models qualified as meeting the Phase 2 emission levels under the 2011 EPA hydronic heater partnership agreement are automatically deemed to have a certificate of compliance for the 2015 particulate matter emission standards and be valid until the effective date for the 2020 particulate matter emission standards.

(4) Models certified by the New York State Department of Environment and Conservation to meet the emission levels in § 60.5474(b) are automatically deemed to have a certificate of compliance for the 2015 particulate matter emission standards and be valid until the effective date for the 2020 particulate matter emission standards.

(5) Models approved by the New York State Energy Research and Development Authority under the Renewable Heat New York (RHNY) Biomass Boiler Program are automatically deemed to have a certificate of compliance for the 2015 particulate matter emission standards and be valid until the effective date for the 2020 particulate matter emission standards provided that they comply with the thermal storage requirements in the RHNY program.

(6) Small forced-air furnace models that are certified under CSA B415.1-10 (IBR, see § 60.17), by an EPA approved third-party certifier, to meet the 2016 particulate matter emission level will be automatically deemed to have a certificate of compliance for the 2016 particulate matter emission standards and be valid until the effective date for the 2020 particulate matter emission standards.

(2) The Administrator will deny certification if the Administrator determines that the criteria in paragraph (c)(1) of this section have not been satisfied. Upon denying certification under this paragraph, the Administrator will give written notice to the manufacturer setting forth the basis for this determination.

(d) Level of compliance certification. The Administrator will issue the certificate of compliance for the most stringent particulate matter emission standard that the tested representative central heater meets under § 60.5474.

(e) Conditional, temporary certificate of compliance. A conditional, temporary certificate of compliance with the Step 1 p.m. emission standards may be granted by the Administrator until May 16, 2016 for small or large forced-air furnaces based on the manufacturer's submittal of a complete certification application meeting all requirements in § 60.5475(b). The application must include the full test report by an EPA-approved laboratory and all required compliance statements by the manufacturer with the exception of a certificate of conformity by an EPA approved third-party certifier. The conditional, temporary approval would allow early marketing of forced-air furnaces as having a conditional, temporary certificate of compliance with the Step 1 p.m. emission standards until May 16, 2016 or until the Administrator completes the review of the application, whichever is earlier.

(f) Third-party certifier-based application process. (1) Any manufacturer of an affected central heater must apply to the Administrator for a certificate of compliance for each model line. The manufacturer must meet the following requirements:

(i) The manufacturer must contract with a third-party certifier for certification services. The contract must include regular (at least annual) unannounced audits under ISO-IEC Standard 17065 to ensure that the manufacturer's quality assurance plan is being implemented. The contract must also include a report for each audit under ISO-IEC Standard 17065 that fully documents the results of the audit. The contract must include authorization and requirement for the third-party certifier to submit all such reports to the Administrator and the manufacturer within 30 days of the audit. The audit report must identify deviations from the manufacturer's quality assurance plan and specify the corrective actions that need to be taken to address each identified deficiency.

(ii) The manufacturer must submit the materials specified in paragraph (b) of this section and a quality assurance plan that meets the requirements of paragraph (m) of this section to the third-party certifier. The quality assurance plan must ensure that units within a model line will be similar in all material respects that would affect emissions to the wood heater submitted for certification testing, and it must include design drawings for the model line.

(iii) The manufacturer must apply to the third-party certifier for a certification of conformity with the applicable requirements of this subpart for the model line.

(A) After testing by an approved test laboratory is complete, certification of conformity with the emission standards in § 60.5474 must be performed by the manufacturer's contracted third-party certifier.

(B) The third-party certifier may certify conformity if the emission tests have been conducted per the appropriate guidelines: The test report is complete and accurate; the instrumentation used for the test was properly calibrated; the test report shows that the representative affected central heater meets the applicable emission limits specified in § 60.5474; and the quality assurance plan is adequate to ensure that units within the model line will be similar in all material respects that would affect emissions to the central heater

(vi) Failure of the manufacturer to conduct a quality assurance program in conformity with paragraph (m).

(vii) Failure of the approved laboratory to test the central heater using the methods specified in § 60.5476.

(2) Revocation of certification under this paragraph (l) of this section will not take effect until the manufacturer concerned has been given written notice by the Administrator setting forth the basis for the proposed determination and an opportunity to request a hearing under § 60.5481.

(m) Quality assurance program. On or after May 16, 2016, for each certified model line, the manufacturer must conduct a quality assurance program that satisfies the requirements of paragraphs (m)(1) through (5) of this section.

(1) The manufacturer must prepare and operate according to a quality assurance plan for each certified model line that includes specific inspection and testing requirements for ensuring that all units within a model line are similar in all material respects that would affect emissions to the central heater submitted for certification testing and meet the emissions standards in § 60.5474.

(2) The quality assurance plan must be approved by the third-party certifier as part of the certification of conformity process specified in paragraph (f) of this section.

(3) The quality assurance plan must include regular (at least annual) unannounced audits by the third-party certifier under ISO-IEC Standard 17065 to ensure that the manufacturer's quality assurance plan is being implemented.

(4) The quality assurance plan must include a report for each audit under ISO-IEC Standard 17065 that fully documents the results of the audit. The third-party certifier must be authorized and required to submit all such reports to the Administrator within 30 days of the audit. The audit report must identify deviations from the manufacturer's quality assurance plan and specify the corrective actions that need to be taken to address each identified deficiency.

(5) Within 30 days after receiving each audit report, the manufacturer must report to the third-party certifier and to the Administrator its corrective actions and responses to any deficiencies identified in the audit report. No such report is required if an audit report did not identify any deficiencies.

(n)EPA compliance audit testing. (1)(i) The Administrator may select by written notice central heaters or model lines for compliance audit testing to determine compliance with the emission standards in § 60.5474.

(ii) The Administrator will transmit a written notification of the selected central heaters or model line(s) to the manufacturer, which will include the name and address of the laboratory selected to perform the audit test and the model name and serial number of the central heater(s) or central heater model line(s) selected to undergo audit testing.

(2)

(i) The Administrator may test, or direct the manufacturer to have tested, the central heater(s) from the model line(s) selected under paragraph (n)(1)(i) of this section in a laboratory approved under § 60.5477. The Administrator may select any approved test laboratory or federal laboratory for this audit testing.

(ii) The expense of the compliance audit test is the responsibility of the central heater manufacturer.

(iii) The test must be conducted using the same test method used to obtain certification. If the certification test consisted of more than one particulate matter sampling test method, the Administrator may direct the manufacturer and test laboratory as to which of these methods to use for the purpose of audit testing. The Administrator will notify the manufacturer at least 30 days prior to any test under this paragraph, and allow the manufacturer and/or his authorized representatives to observe the test.

(3) Revocation of certification.

(i) If emissions from a central heater tested under paragraph (n)(2) of this section exceed the applicable emission standard by more than 50 percent using the same test method used to obtain certification, the Administrator will notify the manufacturer that certification for that model line is suspended effective 72 hours from the receipt of the notice, unless the suspension notice is withdrawn by the Administrator. The suspension will remain in effect until withdrawn by the Administrator, or the date 30 days from its effective date if a revocation notice under paragraph (n)(3)(ii) of this section is not issued within that period, or the date of final agency action on revocation, whichever occurs earliest.

(ii)

(A) If emissions from a central heater tested under paragraph (n)(2) of this section exceed the applicable emission limit, the Administrator will notify the manufacturer that certification is revoked for that model line.

(B)A notice under paragraph (n)(3)(ii)(A) of this section will become final and effective 60 days after the date of written notification to the manufacturer, unless it is withdrawn, a hearing is requested under § 60.5481(a)(2), or the deadline for requesting a hearing is extended.

(C) The Administrator may extend the deadline for requesting a hearing for up to 60 days for good cause.

(D)A manufacturer may extend the deadline for requesting a hearing for up to 6 months, by agreeing to a voluntary suspension of certification.

(iii) Any notification under paragraph (n)(3)(i) or (ii) of this section will include a copy of a preliminary test report from the approved test laboratory or federal test laboratory. The test laboratory must provide a preliminary test report to the Administrator within 14 days of the completion of testing, if a central heater exceeds the applicable emission limit in § 60.5474. The test laboratory must provide the Administrator and the manufacturer, within 30 days of the completion of testing, all documentation pertaining to the test, including the complete test report and raw data sheets, laboratory technician notes, and test results for all test runs.

(iv) Upon receiving notification of a test failure under paragraph (n)(3)(ii) of this section, the manufacturer may request that up to four additional central heaters from the same model line be tested at the manufacturer's expense, at the test laboratory that performed the emissions test for the Administrator.

(v) Whether or not the manufacturer proceeds under paragraph (n)(3)(iv) of this section, the manufacturer may submit any relevant information to the Administrator, including any

other test data generated pursuant to this subpart. The manufacturer must bear the expense of any additional testing.

(vi) The Administrator will withdraw any notice issued under paragraph (n)(3)(ii) of this section if tests under paragraph (n)(3)(iv) of this section show either--

(A) That exactly four additional central heaters were tested for the manufacturer and all four met the applicable emission limits; or

(B) That exactly two additional central heaters were tested for the manufacturer and each of them met the applicable emission limits and the average emissions of all three tested heaters (the original audit heater and the two additional heaters) met the applicable emission limits.

(vii) If the Administrator withdraws a notice pursuant to paragraph (n)(3)(vi) of this section, the Administrator will revise the certification values for the model line based on the test data and other relevant information. The manufacturer must then revise the labels and marketing information accordingly.

(viii) The Administrator may withdraw any proposed revocation, if the Administrator finds that an audit test failure has been rebutted by information submitted by the manufacturer under paragraph (n)(3)(iv) of this section and/or (n)(3)(v) of this section or by any other relevant information available to the Administrator.

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Research References & Practice Aids

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1988 Code of Federal Regulations Archive

Title 40--Protection of Environment; > CHAPTER I--ENVIRONMENTAL PROTECTION AGENCY > SUBCHAPTER C--AIR PROGRAMS > PART 60--STANDARDS OF PERFORMANCE FOR NEW STATIONARY SOURCES > Subpart AAA--Standards of Performance for New Residential Wood Heaters

§ 60.531 Definitions.

As used in this subpart, all terms not defined herein shall have the meaning given them in the Act and Subpart A of this part.

"At retail" means the sale by a commercial owner of a wood heater to the ultimate purchaser.

"Boiler" means a solid fuel burning appliance used primarily for heating spaces, other than the space where the appliance is located, by the distribution through pipes of a gas or fluid heated in the appliance. The appliance must be tested and listed as a boiler under accepted American or Canadian safety testing codes. A manufacturer may request an exemption in writing from the Administrator by stating why the testing and listing requirement is not practicable and by demonstrating that his appliance is otherwise a boiler.

"Coal-only heater" means an enclosed, coal-burning appliance capable of space heating, or domestic water heating, which has all of the following characteristics:

(a) An opening for emptying ash that is located near the bottom or the side of the appliance,

(b) A system that admits air primarily up and through the fuel bed,

(c) A grate or other similar device for shaking or disturbing the fuel bed or power-driven mechanical stoker,

(d) Installation instructions that state that the use of wood in the stove, except for coal ignition purposes, is prohibited by law, and

(e) The model is listed by a nationally recognized safety-testing laboratory for use of coal only, except for coal ignition purposes.

"Commercial owner" means any person who owns or controls a wood heater in the course of the manufacture, importation, distribution, or sale of the wood heater.

"Cookstove" means a wood-fired appliance that is designed primarily for cooking food and that has the following characteristics:

(a) An oven, with a volume of 0.028 cubic meters (1 cubic foot) or greater, and an oven rack,

(b) A device for measuring oven temperatures,

(c) A flame path that is routed around the oven,

(d) A shaker grate,

(e) An ash pan,

(f) An ash clean-out door below the oven, and

(g) The absence of a fan or heat channels to dissipate heat from the appliance.

"Furnace" means a solid fuel burning appliance that is designed to be located outside of ordinary living areas and that warms spaces other than the space where the appliance is located, by the distribution of air heated in the appliance through ducts. The appliance must be tested and listed as a furnace under accepted American or Canadian safety testing codes unless exempted from this provision by the Administrator. A manufacturer may request an exemption in writing from the Administrator by stating why the testing and listing requirement is not practicable and by demonstrating that his appliance is otherwise a furnace.

"Manufactured" means completed and ready for shipment (whether or not packaged).

"Manufacturer" means any person who constructs or imports a wood heater.

"Model line" means all wood heaters offered for sale by a single manufacturer that are similar in all material respects.

"Representative affected facility" means an individual wood heater that is similar in all material respects to other wood heaters within the model line it represents.

"Sale" means the transfer of ownership or control, except that transfer of control shall not constitute a sale for purposes of § 60.530(f).

"Similar in all material respects" means that the construction materials, exhaust and inlet air system, and other design features are within the allowed tolerances for components identified in § 60.533(k).

"Wood heater" means an enclosed, woodburning appliance capable of and intended for space heating and domestic water heating that meets all of the following criteria:

(a) An air-to-fuel ratio in the combustion chamber averaging less than 35-to-1 as determined by the test procedure prescribed in § 60.534 performed at an accredited laboratory,

(b) A usable firebox volume of less than 20 cubic feet,

(c) A minimum burn rate less than 5 kg/hr as determined by the test procedure prescribed in § 60.534 performed at an accredited laboratory, and

(d) A maximum weight of 800 kg. In determining the weight of an appliance for these purposes, fixtures and devices that are normally sold separately, such as flue pipe, chimney, and masonry components that are not an integral part of the appliance or heat distribution ducting, shall not be included.

Statutory Authority

AUTHORITY:

42 U.S.C. 7401, 7411, 7414, 7416, and 7601

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Title 40--Protection of environment; > CHAPTER I--ENVIRONMENTAL PROTECTION AGENCY > SUBCHAPTER C--AIR PROGRAMS > PART 60--STANDARDS OF PERFORMANCE FOR NEW STATIONARY SOURCES > Subpart AAA--Standards of Performance for New Residential Wood Heaters

§ 60.533 Compliance and certification.

(a) For each model line, compliance with applicable emission limits may be determined based on testing of representative affected facilities within the model line.

(b) Any manufacturer of an affected facility may apply to the Administrator for a certificate of compliance for a model line. The application shall be in writing to: Stationary Source Compliance Division (EN-341), U.S. EPA, 401 M Street, SW., Washington, DC, 20460, Attention: Wood Heater Program. The manufacturer must submit two complete copies of the application and attachments. The application must be signed by the manufacturer, or an authorized representative, and shall contain the following:

(1) The model name and/or design number,

(2) Two color photographs of the tested unit (or, for models being certified under § 60.530(c), photographs of a representative unit), one showing a front view and the other, a side view,

(3)(i) Engineering drawings and specifications of components that may affect emissions (including specifications for each component listed in paragraph (k) of this section). Manufacturers may use complete assembly or design drawings that have been prepared for other purposes, but should designate on the drawings the dimensions of each component listed in paragraph (k) of this section. Manufacturers shall identify tolerances of components of the tested unit listed in paragraph (k)(2) of this section that are different from those specified in that paragraph, and show that such tolerances may not reasonably be anticipated to cause wood heaters in the model line to exceed the applicable emission limits.

(ii) A statement whether the firebox or any firebox component (other than one listed in paragraph (k)(3) of this section) will be composed of different material from the material used for the firebox or firebox component in the wood heater on which certification testing was performed and a description of any such differences.

(iii) For applications to certify a model line of catalytic wood heaters to meet the emission limits in § 60.532(b), a statement describing the manufacturer's program to ensure consistency in the size of any gap in the catalyst bypass mechanism. The statement shall describe, in narrative form, the components of the system that affect the size of the gap, any specifications for critical dimensions of any such components, and the procedure the manufacturer will use to ensure consistency in the size of the catalyst bypass gap.

(4) All documentation pertaining to a valid certification test, including the complete test report and, for all test runs: Raw data sheets, laboratory technician notes, calculations, and test results. Documentation

(1) 2 years from the date the consumer purchased the heater for any defects in workmanship or materials that prevent the combustor from functioning when installed and operated properly in the wood heater, and

(2) 3 years from the date the consumer purchased the heater for thermal crumbling or disintegration of the substrate material for heaters manufactured after July 1, 1990.

(d) The manufacturer of an affected facility equipped with a catalytic combustor shall provide for a means to allow the owner to gain access readily to the catalyst for inspection or replacement purposes and shall document in his application for certification how the catalyst is replaced.

(e)(1) The Administrator shall issue a certificate of compliance for a model line if he determines, based on all information submitted by the applicant and any other relevant information available to him, that:

(i) A valid certification test has demonstrated that the wood heater representative of the model line complies with the applicable particulate emission limits in .S 60.532,

(ii) Any tolerances or materials for components listed in paragraph (k) (2) or (3) of this section that are different from those specified in those paragraphs may not reasonably be anticipated to cause wood heaters in the model line to exceed the applicable emission limits, and

(iii) The requirements of paragraphs (b), (c), (d), and (m) of this section have been met. The program described under paragraph (b)(3)(iii) of this section shall be deemed a tolerance specified in the certified design.

(2) For the period between proposal of this subpart through June 30, 1988, an applicant may elect to have his application determined under the requirements of Subpart AAA proposed on February 18, 1987 (52 FR 4994).

(3) Upon denying certification under this paragraph, the Administrator shall give written notice to the manufacturer setting forth the basis for his determination.

(f) To be valid, a certification test must be:

(1) Announced to the Administrator in accordance with § 60.534(e),

(2) Conducted by a testing laboratory accredited by the Administrator pursuant to § 60.535,

(3) Conducted on a wood heater similar in all material respects to other wood heaters of the model line that is to be certified, and

(4) Conducted in accordance with the test methods and procedures specified in § 60.534.

(g) To have a wood heater model certified under § 60.533(e) to meet the emission limits in § 60.532(b), a manufacturer must enter into a contract with the accredited laboratory that performed the certification test, under which the laboratory will:

(i) Conduct the random compliance audit test at no cost to the manufacturer if EPA selects that laboratory to conduct the test, or

(2) Pay the manufacturer the reasonable cost of a random compliance audit test (as determined by EPA) if EPA selects any other laboratory to conduct the test.

(n) Any manufacturer of an affected facility subject under § 60.530(b) to the applicable emission limits of this subpart that does not belong to a model line certified under this section shall cause that facility to be tested in an accredited laboratory in accordance with paragraphs (f)(1), (f)(2), and (f)(4) of this section before it leaves the manufacturer's possession and shall report the results to the Administrator.

(o)(1) For each certified model line, the manufacturer shall conduct a quality assurance program which satisfies the following requirements:

(2) Except as provided in paragraph (o)(5) of this section, the manufacturer or his authorized representative shall inspect at least one from every 150 units produced within a model line to determine that the wood heater is within applicable tolerances for all components that affect emissions as listed in paragraph (k)(2) of this section.

(3)(i) Except as provided in paragraph (o)(3)(iii) or (o)(5) of this section, the manufacturer or his authorized representative shall conduct an emission test on a randomly selected affected facility produced within a model line certified under § 60.533(e) or § 60.533(h), on the following schedule:

If weighted average certification test results were --	**If yearly production per model is --**	
	</= 2500	**>/= 2500**
70% or less of std.	When directed by EPA, not to exceed once every 10,000 stoves.	Every 10,000 stoves or triennially (whichever is more frequent).
Within 30% of std..	Every 5,000 stoves,	Every 5,000 stoves or annually (whichever is more frequent).

(ii) Emission tests shall be conducted in conformity with § 60.534(a), using either approved method for measuring particulate matter (as provided in § 60.534). The manufacturer shall notify EPA by U.S. mail that an emissions test required pursuant to this paragraph will be conducted within one week of the mailing of the notification.

(iii) If the manufacturer stated pursuant to paragraph (b)(3) of this section that the firebox or any firebox component would be composed of a different material than the material used in the wood heater on which certification testing was performed, the first test shall be performed before 1,000 wood heaters are produced. The manufacturer shall submit a report of the results of this emission test to the Administrator within 45 days of the completion of testing.

(4) The manufacturer shall take remedial measures, as appropriate, when inspection or testing pursuant to paragraph (o) of this section indicate that affected facilities within the model line are not within applicable tolerances or do not comply with applicable emission limit. Manufacturers shall record the problem identified, the extent of the problem, the remedial measures taken, and the effect of such remedial measures as projected by the manufacturer or determined by any additional testing.

(5)(i) If two consecutive passing tests are conducted under either paragraph (o) (2) or (3) of this section, the required frequency of testing under the applicable paragraph shall be modified as follows: Skip every other required test.

(ii) If five consecutive passing tests are conducted under the modified schedule provided for in Paragraph (o)(5)(i) of this section, the required frequency of testing under the applicable paragraph shall be further modified as follows: Skip three consecutive required tests after each required test that is conducted.

(iii) Testing shall resume on the frequency specified in the paragraph (o) (2) or (3), as applicable, if a test failure results during any test conducted under a modified schedule.

(6) If emissions tests under paragraph (o) of this section are conducted at an altitude different from the altitude at which certification tests were conducted, and are not conducted under pressurized conditions, the results shall be adjusted for altitude in accordance with paragraph (h)(3)(iii) of this section.

(p)(1)(i) The Administrator shall after July 1, 1990, select for random compliance audit testing certified wood heater model lines that have not already been subject to a random compliance audit under this paragraph. The Administrator shall not select more than one model line under this program for every five model lines for which certification is granted under § 60.533(e) to meet the emission limits in § 60.532(b). No accredited laboratory shall test or bear the expense of testing, as provided in the contract described in paragraph (g) of this section, more than one model line from every five model lines tested by the laboratory for which certification was granted. The Administrator shall use a procedure that ensures that the selection process is random.

(ii) The Administrator may, by means of a neutral selection scheme, select model lines certified under § 60.533(e) or § 60.533(h) for selective enforcement audit testing under this paragraph. Prior to July 1, 1990, the Administrator shall only select a model line for a selective enforcement audit on the basis of information indicating that affected facilities within the model line may exceed the applicable emission limit in § 60.532.

(2) The Administrator shall randomly select for audit testing five production wood heaters from each model line selected under paragraph (p)(1) of this section. These wood heaters shall be selected from completed units ready for shipment from the manufacturer's facility (whether or not the units are in a package or container). The wood heaters shall be sealed upon selection and remain sealed until they are tested or until the audit is completed. The wood heaters shall be numbered in the order that they were selected.

(3)(i) The Administrator shall test, or direct the manufacturer to test, the first of the five wood heaters selected under paragraph (p)(2) of this section in a laboratory accredited under § 60.535 that is selected pursuant to paragraph (p)(4) of this section.

(ii) The expense of the random compliance audit test shall be the responsibility of the wood heater manufacturer. A manufacturer may require the laboratory that performed the certification test to bear the expense of a random compliance audit test by means of the contract required under paragraph (g) of this section. If the laboratory with which the manufacturer had a contract has ceased business due to bankruptcy or is otherwise legally unable to honor the contract, the Administrator will not select any of that manufacturer's model lines for which certification testing has been conducted by that laboratory for a random compliance audit test.

(iii) The test shall be conducted using the same test method and procedure used to obtain certification. If the certification test consisted of more than one particulate sampling test method, the Administrator may

use either one of these methods for the purpose of audit testing. If the test is performed in a pressure vessel, air pressure in the pressure vessel shall be maintained within 1 percent of the average of the barometric pressures recorded for each individual test run used to calculate the weighted average emission rate for the certification test. The Administrator shall notify the manufacturer at least one week prior to any test under this paragraph, and allow the manufacturer and/or his authorized representatives to observe the test.

(4)(i) Except as provided in this paragraph, the Administrator may select any accredited laboratory for audit testing.

(ii)(A) The Administrator shall select the accredited laboratory that performed the test used to obtain certification for audit testing, until the Administrator has amended this subpart, based upon a determination pursuant to paragraph (p)(4)(ii)(B) of this section, to allow testing at another laboratory. If another laboratory is selected pursuant to this paragraph, and the overall precision of the test method and procedure is greater than +/- 1 gram per hour of the weighted average at laboratories below 304 meters (1,000 feet) elevation (or equivalent), the interlaboratory component of the precision shall be added to the applicable emissions standard for the purposes of this paragraph.

(B) With respect to each test method and procedure set out in § 60.534(a), the Administrator shall, by July 1, 1990, publish a decision, after notice of an opportunity for comment, which either

(1) Amends this subpart based on a determination of the overall precision of the method and procedure, and the interlaboratory component thereof, or

(2) Sets forth a determination that the available data are insufficient to determine the overall precision of the method and procedure, and the interlaboratory component thereof.

(iii) The Administrator shall not select an accredited laboratory that is located at an elevation more than 152 meters (500 feet) higher than the elevation of the laboratory which performed the test used to obtain certification, unless the audit test is performed in a pressure vessel.

(5)(i) If emissions from a wood heater tested under paragraph (p)(3) of this section exceed the applicable weighted average emission limit by more than 50 percent, the Administrator shall so notify the manufacturer that certification for that model line is suspended effective 72 hours from the receipt of the notice, unless the suspension notice is withdrawn by the Administrator. The suspension shall remain in effect until withdrawn by the Administrator, or 30 days from its effective date (if a revocation notice under paragraph (p)(5)(ii) of this section is not issued within that period), or the date of final agency action on revocation, whichever occurs earlier.

(ii)(A) If emissions from a wood heater tested under paragraph (p)(3) of this section exceed the applicable weighted average emission limit, the Administrator shall notify the manufacturer that certification is revoked for that model line.

(B) A revocation notice under paragraph (p)(5)(ii)(A) shall become final and effective 60 days after receipt by the manufacturer, unless it is withdrawn, a hearing is requested under § 60.539, or the deadline for requesting a hearing is extended.

(C) The Administrator may extend the deadline for requesting a hearing for up to 60 days for good cause.

(D) A manufacturer may extend the deadline for requesting a hearing for up to six months, by agreeing to a voluntary suspension of certification.

(iii) Any notification under paragraph (p)(5)(i) or (p)(5)(ii) of this section shall include a copy of a preliminary test report from the accredited laboratory. The accredited laboratory shall provide a preliminary test report to the Administrator within 10 days of the completion of testing, if a wood heater exceeds the applicable emission limit in § 60.532. The laboratory shall provide the Administrator and the manufacturer, within 30 days of the completion of testing, all documentation pertaining to the test, including the complete test report and raw data sheets, laboratory technician notes, and test results for all test runs.

(iv) Upon receiving notification of a test failure under paragraph (p)(5)(ii) of this section, the manufacturer may submit some or all of the remaining four wood heaters selected under paragraph (p)(2) of this section for testing at his own expense, in the order they were selected by the Administrator, at the laboratory that performed the emissions test for the Administrator.

(v) Whether or not the manufacturer proceeds under paragraph (p)(5)(iv) of this section, the manufacturer may submit any relevant information to the Administrator, including any other test data generated pursuant to this subpart. The manufacturer shall pay the expense of any testing performed for him.

(vi) The Administrator shall withdraw any notice issued under paragraph (p)(5)(ii) of this section if tests under paragraph (p)(5)(iv) of this section show either --

(A) That all four wood heaters tested for the manufacturer met the applicable weighted average emission limits, or

(B) That the second and third wood heaters selected met the applicable weighted average emission limits and the average of all three weighted averages (including the original audit test) was below the applicable weighted average emission limits.

(vii) The Administrator may withdraw any proposed revocation, if the Administrator finds that an audit test failure has been rebutted by information submitted by the manufacturer under paragraph (p)(5)(iv) of this section and/or (p)(5)(v) of this section or by any other relevant information available to him.

(viii) Any withdrawal of a proposed revocation shall be accompanied by a document setting forth its basis.

Statutory Authority

AUTHORITY:

42 U.S.C. 7401, 7411, 7414, 7416, and 7601

History

SOURCE 53 FR 5873, Feb. 26, 1988

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