(Slip Opinion)

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BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In re:	)	
Woodkiln Inc.	)	CAA Appeal No. 96-2
Docket No. CAA-HQ-111-001	)	

[Decided July 17, 1997]

FINAL DECISION

Before Environmental Appeals Judges Ronald L. McCallum, Edward E. Reich and Kathie A. Stein.

WOODKILN INC.

CAA Appeal No. 96-2

FINAL DECISION

Decided July 17, 1997

Syllabus

This appeal concerns a wood heater, "Model WK23G," designed by Woodkiln Inc. ("Woodkiln"), that is subject to the particulate matter ("PM") emission limits set forth in 40 C.F.R. Part 60, Subpart AAA. Subpart AAA, which is a new source performance standard ("NSPS") enacted by EPA under section 111 of the Clean Air Act, requires models of wood heaters to be tested for compliance with applicable PM emission limits under testing procedures that are specified by regulation; the set of testing procedures to be followed in a Subpart AAA certification test is known as "Method 28." Subpart AAA provides that if a wood heater meets the PM emission limits when tested under Method 28 procedures, EPA will issue a "certificate of compliance" to the product's manufacturer. Wood heater models lacking such a certificate cannot lawfully be manufactured or sold at retail.

Among other things, Method 28 requires the performance of at least one test run in which the rate of fuel consumption -- the "burn rate" -- is less than or equal to 1.00 kilogram per hour ("kg/hr"). The published regulatory history associated with Subpart AAA indicates that that is a burn rate at which wood heaters are sometimes operated by consumers in their homes and at which PM emissions, in the absence of effective regulatory controls, could become high owing to "incomplete combustion" of the fuel.

In October 1993, Woodkiln tested its Model WK23G for compliance with Subpart AAA. The tested unit did not, however, complete a test run with an average burn rate less than or equal to 1.00 kg/hr, as required by Method 28. EPA's Office of Air Quality Planning and Standards ("OAQPS") therefore informed Woodkiln that it was not entitled to a certificate of compliance for Model WK23G based on those results. Further testing in January 1994 failed to yield the necessary test run, and in May 1994, OAQPS issued a letter denying Woodkiln's

request for a certificate of compliance for Model WK23G. Woodkiln then requested a hearing before an administrative law judge ("ALJ") pursuant to 40 C.F.R. § 60.539(a)(1).

Woodkiln continued to assert, as in its earlier correspondence with OAQPS, that consumers would be unlikely to operate Model WK23G at a burn rate less than or equal to 1.00 kg/hr, and that Method 28's 1.00 kg/hr burn rate requirement should therefore not apply to Model WK23G. The ALJ ruled, however, that Subpart AAA clearly makes all of the Method 28 requirements, including burn rate requirements, applicable to Model WK23G. He declined to reach the merits of Woodkiln's contention that it is unreasonable for Subpart AAA to impose Method 28 testing requirements upon all wood heaters (including Model WK23G) to which Subpart AAA applies, because he concluded that contentions of that nature were required to have been presented to EPA during the rulemaking process in which Subpart AAA was developed. Specifically, the ALJ looked to the statutory provision (Clean Air Act § 307(b), 42 U.S.C. § 7607(b)) governing judicial review of new source performance standards, and he noted that when such a standard has become final and effective, it can thereafter be challenged in court only on very limited kinds of grounds -- namely, grounds that have arisen within the sixty-day period immediately preceding the institution of the challenge. He found that Woodkiln's challenge to the 1.00 kg/hr burn rate requirement was not based on grounds that were still judicially reviewable under section 307(b), and he concluded that review should likewise be unavailable in the context of an administrative adjudication. The ALJ therefore issued an Initial Decision dated June 10, 1996, ruling that OAQPS had properly denied Woodkiln's application for a certificate of compliance for Model WK23G. Woodkiln appealed.

On appeal, Woodkiln argues: (1) Subpart AAA should recognize a new category of appliances, called "efficient fireplaces," that would include Model WK23G and that would be subject to certification testing requirements other than those in Method 28; (2) Subpart AAA is unnecessarily burdensome and involves EPA too deeply in regulating the details of wood heater design; (3) The ALJ and the Agency have exhibited prejudice against wood burning appliances; (4) The Subpart AAA hearing and appeal procedures (40 C.F.R. § 60.539) include a reference to "discretion," which should be read to authorize the ALJ and the Board to waive Method 28's burn rate requirements; and (5) Subpart AAA, and its application in this case, violate the constitutional rights of Model WK23G's inventor and of the product's potential buyers.

Held: Woodkiln's first two arguments are rejected. The Board declines to address Woodkiln's challenges to the Subpart AAA regulations in this proceeding. There is a strong presumption against reviewing final Agency regulations in administrative adjudications, and the Board finds no compelling circumstances warranting a departure from that presumption in this case. The ALJ, thus, ruled correctly when he declined to reach the merits of Woodkiln's objections to Subpart AAA, although his exclusive focus on the timeliness of those objections -- on whether they were still judicially reviewable under Clean Air Act § 307(b) -- was mistaken. His focus on timeliness alone seems to imply that challenges to Subpart AAA, if timely, will be considered and addressed in certification proceedings governed by 40 C.F.R. § 60.539. Section 60.539, however, nowhere suggests that applicants for certification may seek amendments to, or waivers or exemptions from, the Subpart AAA requirements in the course of proceedings before an ALJ or the Environmental Appeals Board. Moreover, in seeking relief for which the procedural rules do not provide, Woodkiln also relies on the kinds of arguments and assertions that are typically made and considered only in a rulemaking context. Woodkiln's challenges are subject to the established presumption against reviewing regulations in administrative adjudications, and are rejected on that basis.

Woodkiln's argument that the Initial Decision reflects prejudice on the part of the ALJ is rejected for lack of any factual support. To the extent that the claim of Agency prejudice against wood burning is an objection to Subpart AAA itself, the claim is rejected because Subpart AAA is presumptively not reviewable in this proceeding. The argument that section 60.539 provides the ALJ and the Board with "discretion" to waive compliance with Method 28 is based on an incorrect reading of the regulation, and is therefore rejected. Although 40 C.F.R. § 60.8(b) of the general regulatory provisions regarding new stationary sources does authorize the EPA Administrator to act on certain properly supported requests for approval of alternative testing procedures, as far as the Board is aware, Woodkiln has submitted no such request, and the Administrator has not, in any event, delegated her authority to act on such requests to the Agency's ALJs or to the Board. Finally, Woodkiln's constitutional arguments are rejected because constitutional challenges to Agency regulations are presumptively not reviewable in administrative adjudications.

Before Environmental Appeals Judges Ronald L. McCallum, Edward E. Reich and Kathie A. Stein.

Opinion of the Board by Judge Stein:

Woodkiln Inc. ("Woodkiln") brings this matter before the Environmental Appeals Board pursuant to the hearing and appeal provisions of 40 C.F.R. Part 60, Subpart AAA. Subpart AAA sets forth Standards of Performance for New Residential Wood Heaters, promulgated by EPA in accordance with the requirements of section 111 of the Clean Air Act, 42 U.S.C. § 7411. Pursuant to 40 C.F.R. § 60.539(h)(1), Woodkiln appeals from an Initial Decision issued by Administrative Law Judge Gerald Harwood ("ALJ") on June 10, 1996, in which the ALJ upheld the denial, by EPA's Office of Air Quality Planning and Standards ("OAQPS"), of a certificate of compliance sought by Woodkiln for its Model WK23G wood burning appliance.

As explained more fully below, Woodkiln's appeal is fundamentally a challenge to the validity of the final regulations establishing the wood heater certification program. As to this challenge, the Board will follow its consistent practice and will decline to examine in this proceeding the validity of the regulations challenged by Woodkiln. To the extent that Woodkiln's appeal raises other issues, the Board has considered those issues and has found no error in the ALJ's Initial Decision. The Initial Decision is therefore affirmed.

I. *BACKGROUND*

A. *Factual Background*

Woodkiln manufactures a wood burning heater, Model WK23G, that is a "stationary source" subject to regulation under Clean Air Act § 111. The Act directs EPA to promulgate "standards of performance" applicable to each stationary source category that, in EPA's judgment, "causes, or contributes significantly to, air pollution which may

reasonably be anticipated to endanger public health or welfare." EPA has promulgated such performance standards to control particulate matter ("PM") emissions from residential wood heaters such as Woodkiln's Model WK23G.[1]

The performance standards (40 C.F.R. Part 60, Subpart AAA) require that any wood heater model line manufactured on or after July 1, 1990, or sold at retail on or after July 1, 1992, be tested by an accredited testing laboratory for compliance with specified PM emission limits under specified testing conditions. If the manufacturer tests a representative unit under the conditions described in the regulations and that unit is shown to meet the prescribed PM emission limits, EPA issues a "certificate of compliance" for the entire model line; the manufacturer is then authorized to affix a label to each unit indicating that the unit satisfies applicable Clean Air Act requirements. 40 C.F.R. § 60.536(b). Sale of a regulated wood heater whose Clean Air Act compliance has not been certified in that manner is prohibited by the Subpart AAA regulations. *Id*. § 60.538(b). Violation of any "requirement or prohibition of any rule" promulgated under Clean Air Act subchapter I -- such as the rules prescribing standards of performance for new stationary sources -- may trigger the various federal enforcement options described in section 113(a)(3) of the Act, 42 U.S.C. § 7413(a)(3), including the assessment of appropriate penalties.

This appeal arises from Woodkiln's efforts to obtain EPA certification for its Model WK23G appliance. Model

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[1]"Health effects associated with exposure to wood heater PM include both mortality and morbidity resulting from respiratory disease, cardiovascular disease, and some risk of carcinogenesis." *Standards of Performance for New Residential Wood Heaters; Proposed Rule and Notice of Public Hearing*, 52 Fed. Reg. 4994, 4997 (1987) (hereinafter *Proposed Rule*).

WK23G is a combination wood and gas burning stove, consisting of Woodkiln's previously certified Model WK23 (a model designed to burn only wood) with a gas burner tube added to the rear of the firebox. *See* Test Report Dated October 18, 1993 (EPA Hearing Exhibit No. 1), at 1. Certification testing was initially performed for Model WK23G during October 1993 by an EPA-accredited testing laboratory, Warnock Hersey, Inc., under the "Method 28" test conditions specified by Subpart AAA. *See* 40 C.F.R. § 60.534(a). The pre-scribed "Method 28" certification testing protocol directed Woodkiln to report, among other things, a weighted average PM emission rate for Model WK23G based on emission test runs conducted on a test fuel in each of four "burn rate" categories -- including "at least one test run with an average burn rate of 1.00 kg/hr or less." 40 C.F.R. Part 60 Appendix A, Method 28, section 5 (Note).[2]

Although Model WK23G performed within regulatory limits at several burn rates exceeding 1.00 kg/hr, no test run was completed at an average burn rate of 1.00 kg/hr or

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[2]*Burn rate* refers to the rate at which test fuel is consumed in a heater while the heater is in operation. The burn rate is expressed, for purposes of EPA's wood heater performance standards, as the number of kilograms of wood (dry basis) consumed per hour ("kg/hr"). 40 C.F.R. Part 60 Appendix A, Method 28, section 2.1.

We note that Method 28 ordinarily requires the performance of a test run with a burn rate less than 0.80 kg/hr -- lower, that is, than the 1.00 kg/hr burn rate we have cited in the text. Until July 1, 1990, Method 28 allowed manufacturers who were demonstrably unable to achieve a burn rate below 0.80 kg/hr to perform, instead, an extra test run within the next of the four defined burn rate categories (*i.e.*, between 0.80 and 1.25 kg/hr). But Method 28 expressly states, in a Note following section 5, that "[a]fter July 1, 1990, if a wood heater cannot be operated at a burn rate less than 0.80 kg/hr, at least one test run with an average burn rate of 1.00 kg/hr or less shall be conducted." That is the source of the 1.00 kg/hr burn rate requirement cited in the text.

less during the October 1993 certification testing.[3] Nonetheless, after the testing was completed, Woodkiln proposed "to submit the test data on this unit [for EPA's consideration] even though it would not burn at less than 1 kg/hr." October 10, 1993 Letter from Woodkiln to Dwight Poffenberger, U.S. EPA. Woodkiln explained that, in its view, a consumer would be unlikely to operate Model WK23G at a burn rate less than 1.00 kg/hr, and that it was therefore unimportant to measure the unit's PM emissions under those particular operating conditions. *Id*. "This design," Woodkiln asserted, "has been field tested for over a year * * * and needs no further engineering. * * * I think this product is good for the environment and that the EPA should find some way to bless it or allow it to be manufactured." *Id*. Shortly thereafter, Woodkiln wrote again to express frustration over the requirement that its product satisfy "a five year old standard" as a precondition to obtaining an EPA certificate of compliance. October 26, 1993 Letter from Woodkiln to Dwight Poffenberger, U.S. EPA.

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[3]According to the report prepared by Warnock Hersey, six test runs were performed during the October 1993 certification testing for Model WK23G. For each completed test run, an average burn rate and PM emission rate are reported, for the purpose of showing compliance with the emission "caps" specified in 40 C.F.R. § 60.532(b)(2). (Generally, PM emissions may not exceed 15 grams of particulates per hour ["g/hr"] for a test run at any burn rate less than or equal to 1.50 kg/hr, and may not exceed 18 g/hr for a test run at any burn rate greater than 1.50 kg/hr.) Each completed test run is also classified, based on average burn rate, as falling within one of the four burn rate "categories" that must be represented in the calculation of a weighted average emissions rate. During the October 1993 testing, the first two test runs yielded burn rates of 1.159 and 1.188 kg/hr; the second two test runs were aborted prior to completion; and the final two test runs yielded burn rates of 1.979 and 2.681 kg/hr. Test Report Dated October 18, 1993 (EPA Hearing Exhibit No. 1), at 9-10. Thus, Woodkiln's October 1993 certification test report did not include results for a test run with an average burn rate of 1.00 kg/hr or less.

OAQPS clearly indicated in response, however, that it would be unwilling to certify Model WK23G based on the October 1993 test results. By letter dated December 8, 1993, the Director of the Stationary Source Compliance Division within OAQPS advised Woodkiln as follows:

> Although your appliance appears to meet the emissions standards of the regulation, it does not perform at a burn rate less than one kilogram per hour. The requirement that an appliance burn less than one kilogram an hour is an express requirement of Method 28 of the regulation. EPA will not certify an appliance unless the appliance has been tested at an EPA-accredited laboratory using the test methods and procedures of Method 28 (see section 60.534).

In response, Woodkiln conducted further testing, including "three attempts to get under 1 kg/hr in addition to our attempt in October." January 13, 1994 Letter from Woodkiln to Dwight Poffenberger, U.S. EPA.[4] Those attempts were unsuccessful, but Woodkiln continued to press for EPA certification of Model WK23G, insisting that "[i]t is our contention that the product is good for the environment and the consumer as it is." *Id*.

On May 2, 1994, OAQPS formally denied Woodkiln's request for certification of Model WK23G. As stated in its

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[4]The first two test runs conducted by Warnock Hersey in January 1994 yielded average burn rates of 1.303 kg/hr and 1.212 kg/hr. Test Report Dated January 27, 1994 (EPA Hearing Exhibit No. 2), at 8. Warnock Hersey reports that, during the third and final attempt to conduct a test run with an average burn rate less than or equal to 1.00 kg/hr, "there was smoke spillage [from the appliance] and this would not constitute an allowable test." *Id*. at 9.

earlier correspondence with Woodkiln, OAQPS based its decision on Woodkiln's failure to conduct a "valid certification test" for Model WK23G, as required by the terms of the wood heater performance standards. More specifically, 40 C.F.R. § 60.533(e) states that the Administrator shall issue a certificate of compliance for a model line if he or she determines, based on the information submitted by the applicant and any other relevant information, that "[a] valid certification test has demonstrated that [a] wood heater representative of the model line complies with the applicable particulate emission limits." The following subsection of the performance standards, 40 C.F.R. § 60.533(f), states that "[t]o be valid, a certification test must be * * * [c]onducted in accordance with the test methods and procedures specified in § 60.534." Section 60.534, in turn, specifies that "Method 28 shall be used to establish the certification test conditions and the particulate matter weighted emission values." EPA denied Woodkiln's application for a certificate of compliance for Model WK23G because a wood heater representative of that model line was not shown to comply with applicable PM emission limits under "Method 28" test conditions, which expressly require the performance of at least one test run with an average burn rate of 1.00 kg/hr or less.

B. *Statutory and Regulatory Background*

Given the nature of the issues sought to be raised by Woodkiln in its appeal, it will be helpful, before considering them, to review certain details of the wood heater performance standards and of the regulatory history underlying their promulgation. In particular, because Woodkiln's challenge principally targets the 1.00 kg/hr burn rate requirement of Method 28, we will examine the origin of that requirement at some length.

Clean Air Act section 111 states that a "standard of performance" for a new stationary source must reflect "the degree of emission limitation achievable through the application of the best system of emission reduction which * * * the Administrator determines has been adequately demonstrated." In promulgating performance standards for new residential wood heaters, EPA determined that "[t]he basic control technique * * * is to improve or enhance the combustion process," *Proposed Rule* at 5005, and that two alternative methods qualified as the "best demonstrated technology" ("BDT") for doing so.[5] One method, which relies on a catalyst to promote complete combustion, is not at issue in this case and will not be considered further. The second, or "noncatalytic," variety of BDT -- which is at issue in this case -- does not require that the heater incorporate any specific device or design, but rather requires the manufacturer to emphasize certain design principles for the purpose of promoting more-complete combustion and thereby reducing PM emissions:

> [A]chieving low emissions using noncatalytic technology is attributed to careful integration of several features into a heater design. The proper integration of these features allows increased firebox temperatures, increased turbulence (air and fuel mixing) and increased residence time of combustion gases in high temperature zones.

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[5]The term "BDT" is often used, for convenience, to refer to the technology reflected in a standard of performance for a stationary source category, *i.e.*, "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." Clean Air Act § 111(a)(1).

Proposed Rule at 5005-06. In other words, because high PM emissions result from incomplete combustion,[6] EPA sought to encourage manufacturers of residential wood heaters to utilize certain kinds of design features likely to promote complete combustion.

The design of a wood heater is not, however, the only key determinant of the level of particulate matter emissions. A second significant factor is the burn rate at which the appliance is operated. "[L]ow burn rate, high emission conditions" (*Proposed Rule* at 5002) are produced by restricting the rate of air introduction such as, for example, when "overnight burns" are desired by the user. *See Final Rule* at 5862. In recognition of the variability of consumer practices, EPA crafted its wood heater performance standards so as to ensure that emissions would be reduced to an acceptable level across a range of burn rates:

> Emission profiles showing emission rates as a function of burn rate (or heat output) for different heaters show that emission characteristics are heater-specific. The overall emission performance of a wood heater cannot be determined by performing emission tests at a single burn rate or heat output condition. * * * [T]he [regulatory

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[6]*See, e.g.*, *Proposed Rule* at 4998 (wood heater characteristics that contribute to PM emissions, in the absence of regulatory controls, include "poor air and fuel mixing, low air flows, [and] relatively high concentrations of unburned material in the exhaust"); *Standards of Performance for New Residential Wood Heaters; Final Rule*, 53 Fed. Reg. 5860, 5863 (1988) (hereinafter *Final Rule*) ("Both catalytic and noncatalytic controls serve to increase combustion efficiency, thereby reducing [carbon monoxide] and PM, both of which are the result of incomplete combustion.").

> negotiation] committee[7] agreed conceptually that multiple emission test runs spanning the operating range of a heater were necessary to adequately characterize a heater's emission performance.

Proposed Rule at 5001-02.

In developing the Subpart AAA performance standard, EPA examined preexisting regulatory controls that had been enacted at the State level in Colorado and Oregon and also relied on systems of performance testing and governmental certification. In both of those States, testing was required to be conducted in four different burn rate (heat output) categories. EPA adopted a similar approach, expressing the ultimate emission limitation as a "weighted average" of the

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[7]The rulemaking record refers to a "committee" because the wood heater performance standards were developed through the process of regulatory negotiation, "in which individuals and groups with negotiable interests directly affected by the standard work with EPA in a cooperative venture to develop a standard by committee agreement." *Proposed Rule* at 4995. As proposed, the wood heater performance standards thus "reflect[ed] a consensus of representatives of the wood heater industry, the environmental community, consumer groups, state air pollution control and energy agencies, and the EPA," *id.*, even before the proposal was issued for public comment under the Administrative Procedure Act. Final standards emerged only after "an extraordinary effort [was made] to inform and involve the public in the early stages of the rulemaking":

> Representatives of all parties affected by the regulation were given the opportunity to participate [on the negotiating committee]. * * * The general public was welcome to attend and was allowed opportunities to make presentations and to comment from the floor during the committee's deliberations. Notice of these [committee] meetings was provided in the Federal Register and in trade journals.

Final Rule at 5862.

results obtained during each of the four required test runs.[8] The "weighting" of the results was designed to reflect the frequency with which consumers had been found, during in-home studies conducted in New York, Vermont, and Oregon, to operate their wood heaters in each of the burn rate categories being tested. EPA determined, however, that one major refinement was needed to eliminate a perceived "loophole" in the Colorado and Oregon approaches to certification testing:

> Wood heaters could comply with the emission limits by modifying the air introduction system to eliminate low burn rate, high emission conditions. This type of modification reduces substantially the sustainable burn time and is generally contrary to typical wood heater usage. For example, data on actual homeowner usage showed that approximately 50 percent of the time burn rates are less than 1.2 kg/hr. The several heaters that had been modified for Oregon certification were set up to not burn at rates below about 20,000 Btu/hr or about 1.6 kg/hr. Such appliances, although clean burning during certification tests, could easily be modified by the consumer either by removing damper stops or through use of a stack damper to achieve longer burn times, and thereby create high emissions. Consumers would be motivated to do this in order to extend burn times and to lower the heat output of the wood heater. Statements by several committee members

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[8]The EPA performance standard also sets absolute PM emission "caps" not to be exceeded during any of the test runs that are required to be used in computing the weighted average. *See supra* note 3; 40 C.F.R. § 60.532(b)(2). Those caps are not at issue in the present case.

> indicated that such modifications were not uncommon.
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> The committee agreed at the outset that multiple test points were needed and that the burn rate loophole needed to be closed by specifying minimum burn rate criteria. * * * The committee also concluded that the regulation should specify quantitatively a minimum burn rate that must be achieved during certification tests. * * * [A] burn rate less than 1.0 kg/hr must be achieved for the 1990 standard.

Proposed Rule at 5002.

Such, then, was the origin of the 1.00 kg/hr burn rate requirement that is the focus of Woodkiln's objections. The requirement was introduced to help ensure that performance testing, while necessarily standardized to allow fair and meaningful comparisons between different noncatalytic wood stove designs,[9] would also approximate what EPA had found to be the actual patterns of wood heater usage at the consumer level. Moreover, before finalizing the standards of performance, EPA specifically considered and addressed a commenter's concern that the regulation's "minimum burn rate" requirement (1.25 kg/hr for heaters manufactured before July 1, 1990; 1.00 kg/hr for heaters manufactured on or after July 1, 1990)[10] could

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[9] *See Final Rule* at 5867 ("Standardized test methods are necessary to achieve objective comparison among heaters and comparison of emission performance of individual heaters to a specified regulatory limit.").

[10] *See supra* note 2.

create an unacceptable burden for manufacturers of noncatalytic wood heaters:

> [A] manufacturer of noncatalytic stoves [commented] that the negotiation committee was biased against noncatalytic stoves because the minimum burn rate requirement will make the standard difficult for noncatalytic stoves to meet.
>
> Tests on several wood heaters have demonstrated that the low burn rate requirement is achievable for noncatalytic wood heaters. *The minimum burn rate requirement is based on data showing that homeowners*, primarily in New England, but also in Oregon, *averaged burn rates less than 1 kg/hr over a third of the time the stove was operating*. The data from the cold New England climate suggest that even lower burn rates than these may be selected by owners in areas with milder climates than New England.

Final Rule at 5868 (emphasis added).

C. *The Initial Decision*

Woodkiln challenged the denial of certification for Model WK23G by requesting a hearing before an administrative law judge pursuant to 40 C.F.R. § 60.539(a)(1). After briefing and oral argument, the ALJ issued an Initial Decision upholding the denial of certification.

The ALJ recognized that "[t]here is no dispute that Model WK23G will not comply with the minimum burn rate when tested under the Method 28 protocol required by the

regulation." Initial Decision at 12. The ALJ therefore faced a threshold question concerning the nature of the relief (if any) that 40 C.F.R. § 60.539 might make available in a certification "dispute" in which the applicant acknowledges, as a factual matter, its own inability to qualify for certification under the regulatory requirements currently in force. The Agency's Office of Enforcement and Compliance Assurance ("OECA"), representing EPA in the proceedings before the ALJ (and before this Board), argued that the form of relief Woodkiln appeared to be seeking from the ALJ -- namely, an actual change in the existing regulations or some type of ad hoc exemption for which the existing regulations make no provision -- is simply unavailable under the Subpart AAA hearing and appeal procedures. Specifically, OECA asserted:

> Modification of the regulations is not appropriate or warranted in this case, nor do such modifications appear to be an available remedy under the 40 CFR § 60.539 procedures governing this matter.
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> * * * * * * *
>
> If what Woodkiln really wants to do is challenge the pertinent regulation in this case, it has missed its opportunity. It is well settled that challenges to the validity of Agency regulations are rarely entertained in administrative enforcement proceedings. * * * This is particularly true where, as here, the statute involved contains a "preclusive review" provision designed to preclude challenges to the validity of regulations in enforcement proceedings.

EPA Memorandum in Support of Motion for Summary Decision at 12, 13-14 (Nov. 30, 1995) (citing Clean Air Act section 307(b), 42 U.S.C. § 7607(b)).[11] As paraphrased by the ALJ, OECA took the position that Woodkiln "is not only in the wrong forum but [its] objections are made too late." Initial Decision at 8.

The ALJ ruled, not that Woodkiln was "in the wrong forum" for seeking relief from the existing regulatory requirements, but rather that Woodkiln could not prevail because its objections were, indeed, "made too late." He implicitly agreed with the contention by OECA that Clean Air Act § 307(b), although it directly precludes only untimely judicial challenges to final Agency regulations, also bars untimely challenges that are raised in administrative adjudications. But he emphasized that section 307(b) does allow challenges to final regulations beyond the initial sixty-

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[11]Clean Air Act section 307(b) -- the statutory "preclusive review" provision on which OECA sought to rely -- states in relevant part:

> **(b) Judicial review**
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> **(1)** A petition for review of any action of the Administrator in promulgating * * * any standard of performance or requirement under section 7411 of this title * * * may be filed only in the United States Court of Appeals for the District of Columbia. * * * 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.
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> **(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.

day judicial review period, provided that the challenge is "based solely on grounds arising after" those initial sixty days and is filed with the Court of Appeals "within sixty days after such grounds arise." Initial Decision at 9 (quoting Clean Air Act § 307(b)(1)). Reasoning that an administrative challenge based on such "new grounds" should likewise be regarded as timely, the ALJ concluded that Woodkiln's challenge was properly before him -- at least for the purpose of deciding whether the challenge was indeed based solely on "new grounds" that he could proceed to address on the merits. The ALJ put aside, however, the other concern raised by OECA, concerning whether Woodkiln was raising its objections (timely or otherwise) in a proper forum; indeed, he strongly implied that the section 60.539 hearing procedures do provide a forum in which to consider "modifying" the performance standard itself, provided that the grounds being advanced in support of such a modification are "new" and hence timely:

> The question presented, then, is whether [Woodkiln's] application for certification is based solely on grounds that could not have been considered by EPA in selecting the burn rates for testing emissions * * * and Method 28 as the test for determining compliance, because [those grounds] arose after the standards were issued. If it is [based solely on such new grounds], *then it is appropriate to consider [Woodkiln's] claim that the standard should be modified* to include a wood heater having the design of Model WK23G. If it is not, [Woodkiln's] objections to the denial of certification must be dismissed. I find that I have jurisdiction to consider that question.

Initial Decision at 9 (emphasis added).

After thoroughly examining Woodkiln's arguments, the ALJ concluded that Woodkiln's certification request was not based solely on grounds that had arisen after the initial sixty-day judicial review period:

> In conclusion, I find that none of the matters urged by [Woodkiln] in support of its certification are so different from the matters considered by the EPA when it promulgated the rule that they can be said to be new grounds not considered by the EPA when it promulgated the rule so as to make the Method 28 test requirements inapplicable to Model WK23G.

Id. at 18. He therefore ruled that Woodkiln's application for certification had been properly denied. *Id*. at 19. Woodkiln then filed this appeal with the Environmental Appeals Board pursuant to 40 C.F.R. § 60.539(h)(1).

D. *Woodkiln's Appeal*

On appeal, Woodkiln raises the following arguments as grounds for reversal of the Initial Decision: (1) Notwithstanding the terms of Subpart AAA, Model WK23G should not be regulated as a "wood heater" under the Subpart AAA performance standards, but rather as an "efficient fireplace" governed by a different, as-yet undeveloped, set of performance standards; (2) the Agency underestimated the impact of its wood heater performance standards when it promulgated them, and the standards have involved the Agency too closely in regulating the details of wood heater design; (3) the Agency and the ALJ have exhibited "prejudice" against wood burning; (4) the ALJ failed to recognize that under the regulations as written, the Agency's certification decision is a matter of "discretion"; and (5) the performance standards and the Agency's application

of those standards in this case violate the constitutional rights of Model WK23G's inventor and of the product's potential purchasers. For the reasons that follow, we reject those contentions and affirm the ALJ's Initial Decision.

II. *ANALYSIS*

A. *Challenges to the Subpart AAA Performance Standards*

Woodkiln's first two arguments on appeal directly challenge the substance of the Subpart AAA performance standards. Woodkiln argues, first, that Subpart AAA should recognize a distinct category of appliances called "efficient fireplaces," and should allow those appliances to be tested for certification under conditions other than the Method 28 conditions prescribed for "wood heater" testing. Woodkiln concedes, however, that "there is presently no provision for such [an 'efficient fireplace' category] in the regulation," Woodkiln Brief at 1, and that Model WK23G meets the air-to-fuel ratio criterion for regulation as a "wood heater" under the existing performance standards.[12] Similarly, Woodkiln argues that Subpart AAA has had an undesirable effect on product design: that some of the design features useful for achieving compliance with Subpart AAA have proven to be unpopular with consumers, for reasons of "cost or function." Woodkiln Brief at 2. But that argument, too, simply

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[12]The regulations define "wood heater" to include appliances having, among other features, "[a]n air-to-fuel ratio in the combustion chamber averaging less than 35-to-1." 40 C.F.R. § 60.531. In its appeal, Woodkiln seems to be suggesting that Model WK23G exhibits a high air-to-fuel ratio relative to most other kinds of enclosed wood burning appliances, and that Model WK23G resembles a "fireplace" in that respect. We have no basis for accepting or rejecting that contention, and no occasion to examine it in any detail. For present purposes, all that matters is that, by Woodkiln's own admission, Model WK23G "has an air to fuel ratio of 10 to 1" (Woodkiln Brief at 1) and is therefore currently subject to the testing and certification requirements of Subpart AAA.

amounts to a claim by Woodkiln that Subpart AAA ought to be changed -- *not* that OAQPS misapplied Subpart AAA when it refused to certify Woodkiln's Model WK23G.

We decline to address Woodkiln's challenges to the Subpart AAA performance standards. We do so, however, for reasons somewhat different than those cited by the ALJ. The ALJ seems to have asked only whether Woodkiln's challenges were based solely on grounds arising more than sixty days after the promulgation of the wood heater performance standards. Focusing exclusively on the question of timeliness, the ALJ found that Woodkiln's challenges were not based on any "new grounds" and thus were untimely under the analytical framework he had borrowed from Clean Air Act section 307(b). While the ALJ appears to have been correct in finding Woodkiln's challenges untimely,[13] we think it important to point out that neither Subpart AAA generally, nor section 60.539 in particular, appears to authorize an ALJ to grant relief of the kind sought by Woodkiln in this case, either by modifying

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[13]The ALJ's reasoning as to when, chronologically, Woodkiln's objections to Subpart AAA can be said to have "arisen" remains essentially unchallenged. In its appellate brief, Woodkiln acknowledges that the product proposed for certification in this proceeding "existed in crude form at the time the regulation was promulgated," but Woodkiln states that "the facts were not understood by [Woodkiln] or by the industry until many years later." Woodkiln Brief at 3. Woodkiln does not say, however, which specific "facts" were not then understood, nor does it explain how or why the current state of knowledge is so fundamentally different as to represent (in the terminology of the ALJ's Initial Decision) new grounds for review that "could not have been [presented to] the EPA" when Subpart AAA was being promulgated. *See* Initial Decision at 9. Indeed, as far as we can tell, the kinds of issues that Woodkiln seeks to argue to the Board are -- insofar as they pertain to wood heater regulation generally, rather than to the detailed design specifications of Model WK23G -- exactly the kinds of issues that were actually presented to and considered by EPA in the context of the original rulemaking.

the wood heater performance standards or exempting an individual applicant from those standards. We have carefully examined Subpart AAA and have simply found no reference to any such form of relief,[14] such as a specific regulatory provision providing for a waiver or an exemption under specified circumstances. Thus, we think the ALJ was wrong in assuming that the hearing and appeal procedures might provide an appropriate forum for the airing of Woodkiln's concerns about the regulations if only those concerns could be found to have been timely raised.[15]

As we read them, the Subpart AAA hearing and appeal procedures allow an applicant such as Woodkiln to show that its product complies with the existing regulatory

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[14]As discussed in Section II.C, *infra*, the "General Provisions" of the regulations governing Clean Air Act new source performance standards (40 C.F.R. Part 60, Subpart A) describe a mechanism whereby the EPA Administrator, acting upon a properly supported request from the owner of a source, can approve the use of specific kinds of "equivalent" or "alternative" performance test methods under certain circumstances. *See* 40 C.F.R. § 60.8(b). So far as we are aware, no such request was submitted to the Administrator or her delegatee in this case; in any event, there is nothing in Subpart A or Subpart AAA to suggest that either the ALJ or this Board has been endowed with or delegated any comparable authority.

[15]The ALJ cited *Oljato Chapter of the Navajo Tribe v. Train*, 515 F.2d 654 (D.C. Cir. 1975), as authority for examining whether Woodkiln's arguments were based on "new grounds" and hence not barred by Clean Air Act § 307(b). We recognize that *Oljato* directs the Agency, when presented with a *rulemaking petition* seeking revision of a section 111 performance standard based on "new information," to "respond to the petition and, if it denies the petition, set forth its reasons." *Oljato*, 515 F.2d at 666. But nothing in *Oljato* suggests that an ALJ, if confronted with objections to a performance standard in an adjudicatory proceeding such as this one -- governed by procedural regulations (40 C.F.R. § 60.539) that do not establish any framework for rulemaking -- should conduct some type of improvised rulemaking process within the context of the adjudication.

requirements for certification. But Woodkiln is not trying to make that showing, and admits that it cannot do so. Woodkiln is arguing, instead, that the existing regulations do not make sense and that, if a different set of certification requirements were to be applied, Woodkiln could make the necessary showing of compliance. Not surprisingly, the issues and concerns cited by Woodkiln in support of that argument -- including technical matters such as the combustion efficiencies of different appliances, and policy matters such as the relative economic impacts of different Clean Air Act regulatory approaches -- are of a kind typically associated with the rulemaking process. It is in the rulemaking context that issues are appropriately presented to the Agency concerning, for example, what does or does not constitute BDT for a particular stationary source category, or whether particular testing methods and procedures adequately distinguish between high-emitting and low-emitting facilities. The negotiated rulemaking process that gave rise to the wood heater performance standard (*see supra* Section I.B) addressed just those sorts of issues. Among other matters, the 1.00 kg/hr burn rate requirement that Woodkiln specifically seeks to avoid received the attention of Agency experts, and of representatives of the affected industry, during that rulemaking process.

Based on considerations similar to those outlined above, the Board has refused to review final Agency regulations that are attacked because of their substantive content or alleged invalidity, both in the exercise of the Board's permit review authority and in the enforcement context. *See, e.g., In re Suckla Farms, Inc.*, 4 E.A.D. 686, 698 (EAB 1993) ("[W]e will not allow this permit appeal to be used as a vehicle for collaterally challenging the distinction drawn by the UIC program regulations between 'hazardous' and 'nonhazardous' injection wells."); *In re Ford Motor Co.*, 3 E.A.D. 677, 682 n.2 (Adm'r 1991) (administrative permit

appeal does not "provide a forum for entertaining challenges to the validity of the applicable regulations"); *In re B.J. Carney Industries*, CWA Appeal No. 96-2, slip op. at 32 (EAB, June 9, 1997), 7 E.A.D. __ (affirming that "there is a strong presumption against entertaining challenges to the validity of a regulation in an administrative enforcement proceeding * * * 'and a review of a regulation will not be granted absent the most compelling circumstances'") (quoting *In re Echevarria*, 5 E.A.D. 626, 634 (EAB 1994)). Indeed, the Board has reasoned that a presumption of nonreviewability in the administrative context is especially appropriate when Congress, as in Clean Air Act section 307(b), has set precise limits on the availability of a judicial forum for challenging particular kinds of regulations:

> [O]rdinarily, the only way for a regulation that is subject to a preclusive review provision to be invalidated is by a court in accordance with the terms of the preclusive review provision. * * * Once the rule is no longer subject to court challenge by reason of the statutory preclusive review provision, the Agency is entitled to close the book on the rule insofar as its validity is concerned.

In re Echevarria, 5 E.A.D. 626, 634-35 (EAB 1994).[16] Nothing in Woodkiln's briefs, or in the record of the proceedings before the ALJ, persuades us that this case

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[16]We recognize that *Echevarria* arose in an "enforcement" context -- involving alleged violations of final Clean Air Act regulations by the party belatedly seeking to challenge those regulations -- and that the present appeal is more akin to a permit appeal. Nonetheless, the reasons of "practicality" cited in *Echevarria* for turning aside untimely challenges to the validity of final Clean Air Act regulations are fully applicable here.

In *Echevarria*, our reliance on Clean Air Act § 307(b) was guided by several qualifications that are not explicitly reflected in the ALJ's Initial Decision in this case. We recognized, for instance, that no absolute prohibition against our entertaining challenges to the validity of final Clean Air Act regulations follows from the specific language in section 307(b) itself, which "only makes direct reference to preclusion of judicial review, not administrative review." *Echevarria*, 5 E.A.D. at 634. We nonetheless acknowledged that we have adhered to a presumption of nonreviewability based, to some degree, on considerations of "practicality" (*id.*) and "administrative efficiency" (*id.* at 635). We made clear that, under established Agency precedent, "challenges to rulemaking are rarely entertained in an administrative enforcement proceeding"; that "[t]he decision to entertain such challenges is at best discretionary, and review of a regulation will not be granted absent the most compelling circumstances." *Id.* at 634 (citing *In re South Coast Chemical, Inc.*, 2 E.A.D. 139, 145 (CJO 1986), and *In re American Ecological Recycle Research Corp.*, 2 E.A.D. 62, 64-65 (CJO 1985)). But we acknowledged that, notwithstanding the statutory preclusion of untimely petitions for judicial review, the presumption against our entertaining an untimely administrative challenge might be overcome in "an exceptional case," such as where a challenged regulation has been effectively invalidated by a court but has yet to be formally repealed by the Agency. *Id.* at 635 n.13. The considerations that have guided our reliance on Clean Air Act § 307(b) principles in the administrative context are, in other words, rather more complex than is evident from the ALJ's Initial Decision in this case. Be that as it may, however, we think it clear that the presumption of nonreviewability described in *Echevarria* does apply to this proceeding, and that no "compelling circumstances" are cited by Woodkiln that might tend to overcome that presumption.

presents any compelling circumstances warranting a departure from our practice of not reviewing final Agency regulations when faced with the type of challenge to such regulations presented here. Woodkiln's claim that Subpart AAA should include a different regulatory framework for "efficient fireplaces" than for "wood heaters," and its related claim that Subpart AAA -- by incorporating the Method 28 certification test procedures -- results in overly burdensome design restrictions that unwisely preclude the sale of desirable products, are therefore rejected.

B. *"Prejudice" Against Wood Heaters*

Woodkiln offers no support whatsoever for its assertion that the Agency generally, or the ALJ in particular, have required compliance with the minimum burn rate component of Method 28 based on a "prejudice" against wood heaters. The origin of the minimum burn rate requirement is described in the introductory portions of our opinion. As that discussion makes clear, the requirement was subject to public comment and Agency deliberation. It was neither a product of "prejudice" nor otherwise irrational. Woodkiln simply disagrees with it, and would have preferred that the ALJ not apply it. But Woodkiln's preference, standing alone, provides no grounds for reversal of the Initial Decision. Moreover, we think it clear that the ALJ, far from exhibiting any sort of bias that might have disadvantaged Woodkiln in its quest for certification of Model WK23G, actually went to great lengths in evaluating any possible basis for reaching the merits of Woodkiln's claims before concluding, based on the evidence and arguments presented to him, that those claims had not been shown to have arisen after the promulgation of Subpart AAA. Woodkiln, in short, received a full and fair consideration of its views from the ALJ. Woodkiln's claim of "prejudice," insofar as it specifically relates to the conduct of the ALJ, is without foundation and is rejected. Insofar as

the claim of "prejudice" is intended to suggest that the Agency, by enforcing Subpart AAA, unfairly disadvantages manufacturers of wood burning appliances, that claim is an attempt to challenge the substance of the Subpart AAA regulations, and will not be entertained for the reasons detailed in Section II.A, *supra*.

C. *Role of Agency "Discretion" Under Subpart AAA*

Woodkiln contends that the wood heater performance standards, by their terms, refer to an exercise of Agency "discretion," and that the ALJ should simply have exercised his discretion to excuse Woodkiln's noncompliance with the minimum burn rate requirement of Method 28. Woodkiln, however, has not correctly understood the regulatory provision on which it seeks to rely.

The regulatory provision cited by Woodkiln is 40 C.F.R. § 60.539, which states that the Agency's decisions in contested wood heater certification proceedings shall include written findings and conclusions "on all the material issues of fact, law, or discretion presented." The provision says nothing about what kinds of issues might constitute "issues of * * * discretion." It merely directs the Agency's decisionmakers, if and when a "material issue of discretion" is presented in a wood heater certification proceeding, to explain how the issue has been resolved and why. In determining whether a particular issue actually represents an appropriate subject for an exercise of discretion, section 60.539 is of no assistance.

In its appellate brief, Woodkiln states that it "looks to the Board to authorize a specific exemption * * * on a discretionary basis," whereby the minimum burn rate requirement would simply be deemed inapplicable to Woodkiln's Model WK23G. We know of no authority, however, under which we might consider recognizing such an exemption.

In an effort to identify any possible source of authority to entertain Woodkiln's argument, we issued an order requesting the parties to address the applicability to this proceeding of 40 C.F.R. § 60.8(b). *See* Order Requesting Submission of Briefs and Establishing Briefing Schedule at

3 (July 17, 1996) (requesting the parties to address, among other issues, whether Woodkiln had ever sought any of the forms of relief described in section 60.8(b) in connection with the certification testing of Model WK23G). Section 60.8(b) states, in reference to new source performance standards generally:

> Performance tests shall be conducted * * * in accordance with the test methods and procedures contained in each [performance standard] unless the Administrator (1) specifies or approves, in specific cases, the use of a reference method with minor changes in methodology, (2) approves the use of an equivalent method, (3) approves the use of an alternative method the results of which he has determined to be adequate for determining whether a specific source is in compliance, (4) waives the requirement for performance tests because the owner or operator of a source has demonstrated by other means to the Administrator's satisfaction that the affected facility is in compliance with the standard, or (5) approves shorter sampling times and smaller sample volumes when necessitated by process variables or other factors.

EPA counsel responded by explaining that Woodkiln has never petitioned the Administrator for approval of an alternative or equivalent test method pursuant to section 60.8(b); Woodkiln, instead, has tried unsuccessfully to follow the testing requirements specified in the existing wood heater performance standard, and has then urged the ALJ and the Board to waive those requirements after the fact as an exercise of Agency "discretion." EPA Brief at 9-10. Woodkiln, for its part, concedes that it has never sought relief pursuant to section 60.8(b), but claims to have been

unaware of the provision's existence "until late in the hearing process" before the ALJ. Woodkiln Brief at 2. Whatever the reasons for Woodkiln's failure to seek relief pursuant to section 60.8(b), its failure to do so is undisputed.[17] Moreover, this Board has no authority to act on behalf of the Administrator or her delegatee under section 60.8(b), and certainly has no authority to review final action by the Administrator or her delegatee granting or denying relief under that provision. We are, accordingly, aware of no legal authority under which this Board could create a "specific exemption" from Method 28 requirements at Woodkiln's behest.

D. *Constitutional Issues*

Finally, Woodkiln argues for reversal of the ALJ's Initial Decision on constitutional grounds. The argument rests on two assertions:

> [1.] The constitutional right of the American people to enjoy the beauty of a clean burning wood fire and keep themselves warm with a renewable energy source has been severely limited by the regulation and the way it is administered.

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[17]In one of the briefs submitted to the ALJ, EPA counsel identified a specific individual within OAQPS to whom Woodkiln might direct a request for relief under section 60.8(b). *See* Supplemental Information and Briefing Materials at 10 (May 1, 1996). Woodkiln's appellate brief states that it regards any such request as futile. We have no way of gauging the likelihood that the Administrator or her delegatee would act favorably on such a request if one were submitted by Woodkiln under section 60.8(b).

> [2.] The constitutional right of an inventor such as myself to create a better wood burning appliance has been destroyed.

Constitutional challenges to the validity of final Clean Air Act regulations are, like nonconstitutional challenges, subject to a strong "presumption of nonreviewability" in administrative adjudications pursuant to section 307(b) of the Act. *See In re Echevarria*, 5 E.A.D. at 637 (declining to entertain constitutional challenges to the regulations establishing national air emissions standards for asbestos: "the [B]oard has concluded that § 307(b) establishes a presumption of nonreviewability that [appellant] has not overcome"). With the period for obtaining judicial review of Subpart AAA having long ago expired, Woodkiln's constitutional objections to Subpart AAA are presumptively unreviewable by this Board. Nor has Woodkiln made any showing of "compelling circumstances" that might overcome the presumption of nonreviewability. *See Echevarria*, 5 E.A.D. at 634; *B.J. Carney Industries*, slip op. at 32, 7 E.A.D. at __. To the contrary, although we acknowledge Woodkiln's evident frustration with what it perceives as the inflexibility of the performance standards for new residential wood heaters, Woodkiln's appeal to constitutional principles is far too insubstantial to warrant reexamining the validity of these final regulations in contravention of our established practice. Woodkiln's constitutional arguments for reversal of the ALJ's Initial Decision are, accordingly, rejected.

III. *CONCLUSION*

Pursuant to 40 C.F.R. § 60.539(h)(2), the Environmental Appeals Board finds and concludes that:

1. The information submitted by Woodkiln in support of its application for certification of the Model WK23G appliance did not include the results of a certification test

run with an average burn rate of 1.00 kg/hr or less; Woodkiln therefore failed to document the performance of a "valid certification test" for Model WK23G, within the meaning of 40 C.F.R. § 60.533.

2. A "valid certification test," conducted in accordance with the test methods and procedures specified in 40 C.F.R. § 60.534, has not demonstrated that a representative unit of Woodkiln's Model WK23G appliance complies with the applicable particulate emission limits in 40 C.F.R. § 60.532.

3. Woodkiln's application, under 40 C.F.R. § 60.533, for a certificate of compliance for its Model WK23G model line was correctly denied.

The Initial Decision of the ALJ is therefore affirmed.

So ordered.