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Minnesota, New Jersey, Oregon, Vermont, and Washington, and the Puget
Sound Clean Air Agency**

June 29, 2023

By Certified Mail, Return Receipt Requested and Email

Administrator Michael Regan
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**Re: New Source Performance Standards for Residential Wood
Burning Heaters – Notice of Intent to Sue Pursuant to 42 U.S.C.
§ 7604(b)(2)**

Dear Administrator Regan,

The Attorneys General of New York, Alaska, Illinois, Maryland, Massachusetts, Minnesota, New Jersey, Oregon, Vermont, and Washington, and the Puget Sound Clean Air Agency (collectively, the States), provide notice of their intent to sue the United States Environmental Protection Agency (EPA) for failing to timely review and revise the New Source Performance Standards (performance standards) for Residential Wood Heaters (wood heaters) under the Clean Air Act (the Act). EPA must review the 2015 performance standards to determine if they are adequate to protect the public health. This letter provides 60-days' notice pursuant to section 304(a)(2), 42 U.S.C. § 7604(b)(2), of the Act of the States' intent to file a lawsuit for EPA's failure to perform a mandatory duty under the statute.

1. *Background*

Section 111(b)(1)(A) of the Act requires EPA to list categories of stationary sources that “cause, or contribute significantly to, air pollution which may reasonably be anticipated to endanger public health and welfare.”¹ EPA must review and, as appropriate, revise, the standards for stationary sources at least every eight years based on the best technological system of continuous emission reduction.²

¹ 42 U.S.C. § 7411(b)(1)(A).

² *Id.* § 7411(b)(1)(B).

In 1988, EPA issued the first emissions standards for particulate matter for new wood heaters.³ In 2013, New York, Connecticut, Maryland, Massachusetts, Oregon, Rhode Island, Vermont, and the Puget Sound Clean Air Agency sued EPA to update these standards. In 2014, the parties entered into a partial consent decree, in which EPA agreed to issue updated performance standards by dates certain.

On March 16, 2015, EPA issued a final rule with two sets of updated performance standards for wood heaters.⁴ That rule had an effective date of May 15, 2015, on which the first set of updated standards went into effect.⁵ The second, more stringent set of the 2015 standards, with lower levels of particulate matter emissions, went into effect on May 15, 2020.⁶

The same day that EPA issued the final performance standards, a wood heaters trade association challenged the rule in the D.C. Circuit.⁷ The association later limited its challenge to EPA's compliance audit testing provisions.⁸

In response, the states of New York, Alaska, Connecticut, Illinois, Maryland, Minnesota, New Jersey, Oregon, Rhode Island, Vermont, and Washington, and the Puget Sound Clean Air Agency filed an amicus brief in support of EPA.⁹ In that brief, amici described the negative health impacts of wood smoke on residents of amici states.¹⁰ Amici argued that the audit testing was necessary because, as determined by the Alaska Department of Environmental Conservation, the majority of certifications had inaccurate data and non-representative testing methods.¹¹ These errors allowed wood heaters to receive certifications without gaining the real benefits

³ 40 C.F.R. Part 60, Subpart AAA.

⁴ 80 Fed. Reg. 13,672 (Mar. 16, 2015).

⁵ *Id.* at 13,676.

⁶ *Id.* 13,680.

⁷ See Petition at 1, *Hearth, Patio & Barbecue Ass'n. v. EPA*, No. 15-1056, (D.C. Cir. Mar 16, 2015), ECF No. 1544461.

⁸ See Petitioner's Brief at 1, *Hearth, Patio & Barbecue Ass'n. v. EPA*, No. 15-1056, (D.C. Cir. June 25, 2020), ECF No. 1849004.

⁹ See Corrected Amicus Brief at 1, *Hearth, Patio & Barbecue Ass'n. v. EPA*, No. 15-1056, (D.C. Cir. Sept. 21, 2020), ECF No. 1862523.

¹⁰ *Id.* at 12–15.

¹¹ *Id.* at 21–23.

of stricter emissions limits. The D.C. Circuit upheld the regulations.¹² While knowing of these issues, EPA has failed to take steps to review and update its standards, despite the requirements of 42 U.S.C. § 7411(b)(1)(B).

2. *Public Health Hazards from Wood Smoke*

As EPA acknowledged in the 2015 performance standards, wood smoke contains fine particulate matter (PM_{2.5}), carbon monoxide, polycyclic aromatic hydrocarbons, and other toxic air pollutants.¹³ All of these compounds negatively impact public health.¹⁴

Of direct relevance to the performance standards, wood smoke contains PM_{2.5}, which causes an array of adverse health impacts. Acknowledging those harmful impacts, EPA recently proposed to strengthen the National Ambient Air Quality Standards (NAAQS) for PM_{2.5}.¹⁵ In doing so, EPA documented a causal relationship between PM_{2.5} exposure and mortality and cardiovascular effects.¹⁶ Multiple studies also confirm adverse health impacts of PM_{2.5} exposure, including on cancer rates,¹⁷ dementia rates,¹⁸ and childhood lung function.¹⁹

¹² *Hearth, Patio & Barbecue Ass'n v. EPA*, 11 F.4th 791, 796 (D.C. Cir. 2021).

¹³ 80 Fed. Reg. 13,672, 13,673 (Mar. 16, 2015).

¹⁴ Agency for Toxic Substances and Disease Registry, *Case Studies of Environmental Medicine, Toxicity of Polycyclic Aromatic Hydrocarbons (PAHs)* at 31, 34, 38 (July 1, 2009), available at: https://www.atsdr.cdc.gov/csem/polycyclic-aromatic-hydrocarbons/information_sources.html; Agency for Toxic Substances and Disease Registry, *Toxicological Profile for Carbon Monoxide* at 10-20 (July 2012), available at: <https://wwwn.cdc.gov/TSP/ToxProfiles/ToxProfiles.aspx?id=1145&tid=253>.

¹⁵ 88 Fed. Reg. 5,558 (Jan. 27, 2023).

¹⁶ 88 Fed. Reg. at 5,609.

¹⁷ William Hill, et al., *Lund Adenocarcinoma Promotion by Air Pollutants*, 616 *Nature* 159–167 (2023), available at: <https://www.nature.com/articles/s41586-023-05874-3>

¹⁸ Elissa Wilker, et al., *Ambient Air Pollution and Clinical Dementia: Systematic Review and Meta-Analysis*, 2023 *BMJ* 381 (2023), available at: <https://www.bmj.com/content/381/bmj-2022-071620>.

¹⁹ Hsiao-Hisen Hsu, et al., *Prenatal Ambient Air Pollutant Mixture Exposure and Early School-age Lung Function*, 2023 *Environmental Epidemiology* 7(2) (2023), available at: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC10097575/>.

Further, PM_{2.5} exposure is particularly harmful to environmental justice communities.²⁰ As the 2015 Rule acknowledged, “[r]esidential wood smoke can contribute to unhealthy levels of PM_{2.5} in many neighborhoods nationwide, including in minority and low-income neighborhoods[.]”²¹ Environmental justice communities are exposed to higher levels of air pollution,²² and may be more susceptible to its ill effects.²³ Congress mandated that EPA review, and as necessary, revise the standards every eight years to ensure that these communities do not have to bear the pollution burden of ineffective standards.²⁴

3. *EPA’s Ineffective Wood Heater Testing and Certification Program*

In addition to failing to timely review and update the performance standards for PM_{2.5}, EPA’s wood heater testing and certification program to implement the performance standards is failing to ensure that new wood heaters comply with emission limits.²⁵ As explained below, the current program does not provide reasonable assurance that wood heaters are properly tested and certified before reaching consumers.²⁶ Revising the 2015 performance standards for wood heaters

²⁰ See Executive Order 12898, 59 Fed. Reg. 7,629 (Feb. 16, 1994) (identify and address disproportionately high and adverse human health or environmental effects of their policies on minority populations and low-income populations).

²¹ 80 Fed. Reg. at 13,673

²² Bongki Woo, et al., *Residential Segregation and Racial/Ethnic Disparities in Ambient Air Pollution*, 11 Race & Social Problems 60 (2019), available at: <https://pubmed.ncbi.nlm.nih.gov/31440306/>.

²³ Kevin Josey, et al., *Air Pollution and Mortality at the Intersection of Race and Social Class*, 388 New England Journal of Medicine 1396 (2023), available at: <https://www.nejm.org/doi/full/10.1056/NEJMsa2300523>.

²⁴ See 42 U.S.C. § 7401(b) (stating the Act’s purpose is “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”).

²⁵ Northeast States for Coordinated Air Use Management, *Assessment of EPA’s Residential Wood Heater Certification Program*, at iii (Mar. 2021), <https://www.nescaum.org/documents/nescaum-review-of-epa-rwh-nsps-certification-program-rev-3-30-21.pdf>.

²⁶ U.S. EPA Office of Inspector General, *The EPA’s Residential Wood Heater Program Does Not Provide Reasonable Assurance that Heaters Are Properly Tested and Certified Before Reaching Consumers*, At a Glance (Feb. 28, 2023),

presents an important opportunity for EPA to set clear testing and reporting expectations for wood heaters to address this pervasive problem.

Following initial concerns that EPA's wood heater certification program was not well functioning, the Northeast States for Coordinated Air Use Management²⁷ and the Alaska Department of Environmental Conservation coordinated review of over 250 certified wood heaters.²⁸ The study evaluated EPA's compliance program with the 2015 performance standards.²⁹

The study identified deficiencies in all reviewed test reports.³⁰ Manufacturers must seek certification of compliance with the performance standards for each model line, based on a test report from a designated laboratory.³¹ Many of the wood heater models did not have publicly available certification test reports, violating the regulations implementing the performance standards.³² The study did not find any of the other reports to be complete and in full compliance with regulatory requirements.³³

Based on this review, the Northeast States for Coordinated Air Use Management and the Alaska Department of Environmental Conservation found that EPA's certification program did not assure that new wood heaters, subject to the 2015 performance standards, are cleaner than devices sold under the 1988 performance

https://www.epa.gov/system/files/documents/2023-03/epa_oig_20230228-23-E-0012_2.pdf.

²⁷ Northeast States for Coordinated Air Use Management is a nonprofit association that provides scientific, analytical, and policy support to air quality agencies in Connecticut, Maine, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, and Vermont. Northeast States for Coordinated Air Use Management (NESCAUM), *About Us*, <https://www.nescaum.org/about-us> (last visited May 16, 2023).

²⁸ Northeast States for Coordinated Air Use Management, *Assessment of EPA's Residential Wood Heater Certification Program* (Mar. 2021).

²⁹ *Id.* at xiii, 71.

³⁰ *Id.* at 71.

³¹ 40 C.F.R. §§ 60.533, 60.5475.

³² Northeast States for Coordinated Air Use Management, *Assessment of EPA's Residential Wood Heater Certification Program* (Mar. 2021) at 71.

³³ *Id.*

standards.³⁴ The study found that EPA’s failures stem from unclear test methods, an ineffective third-party certification review process, and a lack of audits.³⁵ As a result, the program cannot ensure that wood heaters satisfy the 2015 performance standards.³⁶ If newer wood heaters do not meet cleaner standards, then programs to change out old wood heaters may provide little health benefits at significant public cost.³⁷

EPA’s Office of Inspector General corroborated the study’s findings, determining that “EPA’s residential wood heater program does not provide reasonable assurance that wood heaters are properly tested and certified before reaching consumers.”³⁸ It found that EPA lacks internal controls to ensure that certification tests are appropriately conducted because it lacks procedures to review test reports, does not conduct audit tests, does not have standard templates for test reports, does not use staff with appropriate expertise, and has not exercised oversight authority.³⁹

Furthermore, the Inspector General found that the 2015 performance standards have unclear expectations for test procedures and documentation, which leads to testing labs and manufacturers using their own interpretations, like obscuring failing test runs as invalid and not reporting them.⁴⁰ “[C]ertification test methods also contain vague language,” create “imprecise expectations” for what fuel must be used during testing, “and do not represent real-world conditions.”⁴¹

Indeed, EPA itself has withdrawn multiple test methods after they were demonstrated to be ineffective.⁴² But, because of EPA’s interpretation of the 2015

³⁴ *Id.* at 72.

³⁵ *Id.* at 68.

³⁶ *Id.* at 72.

³⁷ *Id.* at iii.

³⁸ U.S. EPA Office of Inspector General, *The EPA’s Residential Wood Heater Program Does Not Provide Reasonable Assurance that Heaters Are Properly Tested and Certified Before Reaching Consumers*, At a Glance (Feb. 28, 2023).

³⁹ *Id.* at 13.

⁴⁰ *Id.* at 13–14.

⁴¹ *Id.* at 13.

⁴² *Id.* at 13–14.

performance standards, wood heaters certified with those tests continue to have valid certificates of compliance that will not be reevaluated until those certificates expire, as late as 2027.⁴³ Those wood heaters remain available for sale, and could remain in homes—causing harm to residents of nearby communities—for decades.⁴⁴

In response to the Inspector General Report, EPA acknowledged deficiencies in its program.⁴⁵ Apart from updated training, the creation of additional certification information, and lists of wood heaters certified with withdrawn tests, EPA does not plan to start implementing regulatory revisions until 2024.⁴⁶ EPA outlines a serial process of updating test methods, starting in 2024, but does not plan to finalize new performance standards until November 30, 2027.⁴⁷ Even these timelines may be optimistic as EPA has stated that it “do[es] not have hard deadlines for reaching these milestones[.]”⁴⁸ EPA’s uncommitted proposal will take years longer than its statutory deadline, does not explain why EPA cannot work on some of the regulatory updates, such as testing requirements, in parallel, and continues to allow the sale of wood heaters with flawed certifications and certification of improperly tested devices, in the meantime.

In sum, as currently implemented, EPA’s program allows continued sale of high-emitting wood heaters.⁴⁹ Many of these devices will be installed in communities that are overburdened by environmental harms and other inequities, further exacerbating environmental justice issues.⁵⁰ EPA must address the systemic problems with its wood heater certification program when revising the 2015 performance standards.

4. *Notice of Intent to Sue*

⁴³ *Id.* at 14, 25.

⁴⁴ *Id.* at 25.

⁴⁵ U.S. EPA, Response to Office of Inspector General Final Report (April 28, 2023) at 1-2.

⁴⁶ *See id.* at 2-8.

⁴⁷ *Id.* at 6-8.

⁴⁸ *Id.* at 7.

⁴⁹ NESCAUM, *Assessment of EPA’s Residential Wood Heater Certification Program*, at iii (Mar. 2021).

⁵⁰ *See id.*

As discussed above, section 111(b)(1)(B) of the Act requires EPA to undertake a notice-and-comment rulemaking to “review and, if appropriate, revise” each performance standard at least once every eight years, and take into account “emission limitations and percent reductions achieved in practice,” in cases where those emission reductions exceed those required by existing performance standards. Although the current emission standards for wood heaters have been in place since May 2015, EPA has not even started the required notice-and-comment rulemaking proceeding to review the scope or stringency of those standards and make the necessary revisions to ensure they result in actual emissions reductions. EPA is required to review, and as appropriate, revise its regulations to ensure the best technological system of continuous emission reduction.⁵¹ Without accurate testing and certification, there is no way to ensure that the wood heaters meet these standards.

The States’ accordingly request that EPA promptly propose and finalize revised performance standards for wood heaters under 40 C.F.R. Part 60, Subpart AAA, QQQQ. The States also request that EPA promptly revise the testing and certification process for those wood heaters. This letter constitutes notice from the States, pursuant to section 304 of the Clean Air Act and Title 40, Part 54 of the Code of Federal Regulations, of their intent to commence a civil action to enforce the Act due to EPA’s failure to undertake these non-discretionary duties.

Respectfully submitted,

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⁵¹ 42 U.S.C. § 7411(b)(1)(B).

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