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Re: Docket No. EPA-HQ-OAR-2018-0195, Standards of Performance for New Residential Wood Heaters, New Residential Hydronic Heaters and Forced-Air Furnaces

Dear Mr. Topham:

The National Tribal Air Association (NTAA) is concerned about EPA's proposal to extend the deadline for permitted retail sales of "Step 1" wood heaters, hydronic heaters, and force-air furnaces from May 15, 2020 to November 30, 2020. Standards of Performance for New Residential Wood Heaters, New Residential Hydronic Heaters and Forced-Air Furnaces, 85 Fed. Reg. 31,124 (May 22, 2020) (Proposal). The Proposal is unlawful and unnecessary. The basis for the Proposal is speculative and ignores a donation program that the NTAA has created in partnership with EPA and industry, and which would have provided additional air quality benefits while allowing manufactures and retailers to receive tax benefits. The Proposal will harm Tribal air quality, particularly with harmful PM_{2.5} pollution, which EPA unlawfully fails to consider. There is no valid justification for an over six-month extension. While the COVID-19 pandemic has impacted all sectors of the national economy, wood stove retailers have known for several years of the May 15th deadline before stores were closed and EPA should not be modifying rules based on retailers' inability to clear their inventory of stoves. If the Proposal is finalized, it must 1) be based on a complete analysis of lost sales opportunities and actual lost profit for Step 1 products caused by COVID-19, 2) include a complete analysis of the public health harms caused by the extension and who those harms fall on, and 3) get commitments and funding to mitigate the harms caused to Tribal communities by delaying and weakening the donation program.

I. Introduction

The NTAA is a member-based organization with 151 principle member Tribes. The organization's mission is to advance air quality management policies and programs, consistent with the needs, interests, and unique legal status of Indian Tribes. As such, the NTAA uses its resources to support the efforts of all federally recognized Tribes in protecting and improving the air quality within their respective jurisdictions. Although the organization always seeks to represent consensus perspectives on any given issue, it is important to note that the views expressed by the NTAA may not be agreed upon by all Tribes. Further, it is important to understand interactions with the organization do not substitute for government-to-government consultation, which can

only be achieved through direct communication between the federal government and Indian Tribes.

EPA has explained that smoke from residential wood heaters:

contains harmful particle pollution, also known as fine particulate matter or PM_{2.5}, along with other pollutants including carbon monoxide, volatile organic compounds (VOCs), black carbon, and air toxics such as benzene. These heaters, which are used around the clock in some areas, can increase particle pollution to levels that pose serious health concerns. In some areas, residential wood smoke constitutes a significant portion of the particle pollution problem.¹

On February 3, 2014, EPA proposed revisions to the New Source Performance Standards (NSPS or Standards) for residential wood heaters, hydronic heaters and force-air furnaces, and masonry heaters. Standards of Performance for New Residential Wood Heaters, New Residential Hydronic Heaters and Forced-Air Furnaces, and New Residential Masonry Heaters, 79 Fed. Reg. 6330. The NTAA commented in 2014 in support of the Wood Heater NSPS that was finalized on March 16, 2015. The finalized NSPS created particulate matter emission and other limits, eliminated exemptions, updated test methods and the certification process, and added a new subpart that covers wood burning residential hydronic heaters and new forced-air furnaces. Standards of Performance for New Residential Wood Heaters, New Residential Hydronic Heaters and Forced-Air Furnaces, 80 Fed. Reg. 13,672. As the Proposal explains, the 2015 NSPS took a two-step compliance approach, in which certain Step 1 standards became effective May 15, 2015 and more stringent Step 2 standards would become effective May 15, 2020. 85 Fed. Reg. at 31,127. This allowed wood stoves meeting the less stringent Step 1 standards to be sold until earlier this year. EPA found that these standards would reduce “asthma attacks, non-fatal heart attacks, emergency room visits for asthma, lost work days, and premature deaths, among other effects.” (Fact Sheet)

In March of 2020, the Hearth, Patio and Barbeque Association ([HPBA](#)), representing U.S. residential wood heat retailers, approached NTAA with a unique opportunity to facilitate a donation program of Step 1 heaters to benefit Tribal communities with improved ambient and indoor air quality. HPBA requested NTAA facilitate a donation program with up to five non-commercial Tribal Applicants to coordinate with HPBA retailers to facilitate these donations. Donated stoves were to be transferred on paper by May 15, 2020 with the physical delivery of the heaters within 90 days, or by August 14, 2020. The NTAA Wood Stove Work Group worked quickly in April, 2020 to assist. The NTAA Wood Smoke Work Group was established by NTAA and EPA’s Office of Air Quality Planning and Standards to collaborate with Tribal, state, EPA, and other involved entities with a purpose of researching, developing, and implementing a national residential wood stove program to address both the indoor and ambient air quality impacts from residential wood/coal burning stoves, as well as to address other wood smoke related issues on Tribal lands.

Within a few weeks, NTAA released a national [Request for Proposals](#) to identify Tribal Applicants to work with HPBA on their “Stoves to Homes Initiative.” As HPBA’s website

¹ EPA, Fact Sheet: Overview of Final Updates to Air Emissions Requirements for New Residential Wood Heaters (Feb 4, 2015), at <https://www.epa.gov/residential-wood-heaters/fact-sheet-overview-final-updates-air-emissions-requirements-new> (Fact Sheet).



shows, several non-commercial Tribal Applicants were identified and were ready to accept donated stoves from retailers to allow retailers to benefit from a tax donation for the physical donation and delivery of Step 1 stoves. HPBA informed NTAA that just over 60 wood heaters were donated. This is less than the several hundred stoves originally anticipated to be donated, likely because retailers held back donations in anticipation of EPA providing this belated extension.

NTAA responded quickly to HPBA to provide wood stove retailers a viable option that allowed them to benefit from a tax donation while still complying with the May 15th deadline. EPA staff was aware of the donation program and provided [a memo](#) to HPBA that NTAA used in the Request for Proposals to ensure compliance with EPA's terms for donations. EPA's proposed amendments prevented retailers from providing Tribal communities with donated stoves and ignored the viable option provided by NTAA to allow benefits to both retailers and Tribal communities.

II. Lost Sales Opportunities is Not a Valid Reason for Delaying the Step 2 Standards

Clean Air Act Section 111(a)(1), 42 U.S.C. § 7411(a)(1), defines "standard of performance" as, "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 non-air quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated." Nowhere in the Proposal does EPA find that the Step 2 standards are not achievable. Nor does the Proposal conclude that the extension reflects the best system of emission reduction. Two months of lost opportunity to sell noncomplying products is not in the Clean Air Act and is not a lawful reason to modify a standard of performance.

III. The Proposal Provides No Basis to Extend the Step 2 Deadline to November 30

The Proposal says that the COVID-19 pandemic caused the loss of about 60 days of retail sales. The Proposal's only cited support for this is a March 24 letter from the Hearth, Patio & Barbecue Association.

The Proposal does not provide a basis to dispute EPA's statement published on April 2 that, to justify an extension "the Agency first requires sufficient data from manufacturers and retailers demonstrating why a sell-through is needed," and the agency's conclusion that, "insufficient data were provided by manufacturers and retailers to justify a sell-through, especially in light of the fact that in every residential wood heating device category, there are model lines certified to meet the Step 2 standards that are already available, and have been available for considerable time, which supports the conclusion that the Step 2 standards were achievable." Standards of Performance for New Residential Wood Heaters, New Residential Hydronic Heaters and Forced-Air Furnaces, 85 Fed. Reg. 18,448, 18452 (Apr. 2, 2020).

Yet, without good reason, the Proposal reverses course, based solely on a March 24 industry association letter (with survey information of various members). This is arbitrary and capricious. *See Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016). Proposing an over six-month extension from that letter is even more arbitrary and capricious. EPA does not appear to have made any attempts to measure the Proposal's impact beyond blindly trusting industry



anecdotes from before the bulk of the time period at issue.² It is nonsensical on the one hand for the Proposal to say that it is replacing the 60 days of opportunities retailers would have otherwise had in the absence of the pandemic, and then say on the other hand that EPA is unable to quantify the impacts of the Proposal (and to not even discuss the impacts qualitatively). 85 Fed. Reg. at 31,128. EPA must look at expected Step 1 sales from March 15 to May 15, based on prior months and years data, and compare it to actual sales during that time and the months since, to understand if an extension should be granted.

The NTAA disagrees with the proposal to extend the Step 2 deadline by over six months based on 60 days of lost sales out of the original five-year period (around 3% of the total time period). While the Proposal states there is still significant uncertainty as to when retailers can reopen, 85 Fed. Reg. at 31,128, as of the date of these comments, July 6, many stay-at-home orders and closures have been lifted. Additionally, the Proposal asserts that only providing 60 additional days during the summer is insufficient because summer sales are typically low. *Id.* First, the only support for this basis for the extended timeframe is a “2018 December Business Climate Hearth Home Magazine,” *id.* n.4. but when looking for that document in the docket, the page says, “No documents available.”³ Commenters are not able to meaningfully comment on the Proposal without being able to review EPA’s purported basis for it. *See* 5 U.S.C. § 553; 42 U.S.C. § 7607(d).⁴ Second, that statement ignores what sales are typically like during the March 15 to May 15 period. Third, an article in an industry magazine from December 2018 is insufficient to support the Proposal’s six-and-a-half-month extension. Clearly, sales were different in 2018 than they would be in 2020. EPA has access to this data. EPA must base any extension on current and accurate data. If EPA believes an extension is necessary, that extension must be no longer than necessary to replace the lost time for sales and should end by August.

Finally, EPA’s mission is to protect human health and the environment and the first purpose of the Clean Air Act 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. The NTAA is disturbed by a trend of EPA providing industry unreasonably long extensions based on COVID-19 for compliance obligations that actually would benefit public health, the environment, and air quality, while at the same time denying or providing the bare minimum extensions requested by Tribal organizations for public comments on important air quality regulations that would harm air quality and public health.

IV. The Proposal Ignores the Donation Program Benefits

As explained above, NTAA has been working with EPA and industry for several months to develop a donation program for unsellable Step 1 stoves to replace less efficient stoves for Tribal members who otherwise couldn’t afford it. This program would have decreased harmful indoor air pollution that causes respiratory, cardiovascular, and neurological diseases. It also would

² The Proposal states that it is placing the Regulatory Impact Analysis from a 2018 proposed rule that was not finalized into the docket of this rule. 85 Fed. Reg. at 31,128. This is insufficient, particular as EPA rejected an extension based on that RIA, and now is relying on one new letter as the basis for this Proposal.

³ <https://www.regulations.gov/document?D=EPA-HQ-OAR-2018-0195-0243> (visited June 29, 2010).

⁴ EPA has determined that this proposal is subject to Clean Air Act section 307(d). 85 Fed. Reg. at 31,129. To comply with Clean Air Act 307(d)(3), the docket for the proposed rule must include “[a]ll data, information, and documents . . . on which the proposed rule relies.” 42 U.S.C. § 7607(d)(3). Failure to include this information in the docket and/or failure to allow the public to comment on this information violates the Clean Air Act.



have provided retailers and manufacturers with tax benefits based on the value of the donated products.

Tribal members have already lost out on benefits from this program based on the Proposal and EPA's statement that it would de-prioritize enforcement of violations while the Proposal was pending. The Proposal, if finalized, would further reduce and delay the donations that will therefore lead to less efficient stoves remaining in tribal members homes for longer periods of time. Moreover, the Proposal does so without considering the tax benefits retailers and manufacturers would gain under the donation program, thereby inflating the impact of COVID-19. This is arbitrary and capricious.

The NTAA believes that EPA should have stuck with the original deadlines, and allowed the donation program to take effect. At this point, with the deadline past, NTAA recommends that EPA includes language to formalize the donation process created by NTAA and HPBA so that retailers can choose to donate their remaining inventory through HPBA's Stoves to Homes Initiative prior to November, 2020.

V. The NTAA is Concerned that the Proposal Will Harm Air Quality, Particularly Tribal Air Quality

There is no debate that indoor PM_{2.5} and other pollutants emitted from wood cookstoves, negatively impact health. Tribal members are disproportionately at risk of this indoor air pollution from wood cookstoves. The COVID-19 pandemic further forces people to remain inside their homes, and exacerbate these impacts.

The Proposal improperly does not attempt to quantify the air quality impacts it will have, generally or specifically for Tribal communities. Had the Proposal done so, it would have shown the extension, which increases the sales and use of Step 1 cookstoves and increases the use of older and less efficient cookstoves in Tribal communities, would cause increased indoor PM_{2.5} and other pollution that increase respiratory, cardiovascular, and neurological diseases and cause premature deaths. The Proposal would also find that these increases disproportionately impact Indian Tribes. EPA has the data (and the ability to collect more data if necessary) to quantify these impacts and must not finalize a proposal that causes such harms.

The NTAA disagrees with the Proposal's statement that this action does not have disproportionately high and adverse human health or environment effects on minority populations, low-income populations, and/or indigenous peoples. 85 Fed. Reg. at 31,129. The basis for this conclusion is purportedly that the amendment will not have a "significant effect on emissions." *Id.* How can the Proposal reach that conclusion when it hasn't even attempted to analyze the impact the Proposal will have on emissions? Making that statement, without analysis, is arbitrary and capricious. Further, it is clear that the people and communities that most utilize wood cookstoves and have more problems with less efficient stoves, more indoor air pollution from those stoves, and less efficient ventilation are precisely minority populations, low-income populations, and indigenous peoples. This Proposal, including its impact on the donation program, will undoubtedly disproportionately and negatively impact those communities. EPA is



shirking its duty under Executive Order 12,898 and doing so in a way that makes the Proposal susceptible to legal challenge under the Administrative Procedures Act.⁵

The Proposal says EPA will provide outreach through the NTAA and offer consultation to tribal officials. 85 Fed. Reg. at 31,129. It's not clear what EPA has done or what EPA is still planning to do. To remedy the harms caused by this Proposal, EPA must do more than merely provide outreach. At a minimum, NTAA requests that EPA provide an accurate analysis of the impacts of this proposal on Tribes and Tribal members that were going to be taking part in the donation program. NTAA further requests that EPA mitigate all benefits that this proposal would reduce or eliminate, by requiring (or getting commitments for the) donation of Step 1 and Step 2 stoves that otherwise would have been donated, plus additional stoves to make up for the lost benefits in the interim. Further, the NTAA requests EPA provide additional funding for woodstove replacement program.

The November timeline will also be difficult from a standpoint of practicality. By the time the woodstoves are received, and installation can be set up, most areas of the country will be well into the winter season. It will be an unnecessary imposition on families to have this activity take place in potentially sub-zero temperatures.

VI. Conclusion

The NTAA is dismayed by the harm already caused by EPA's actions with this Proposal. The NTAA opposes the finalization of this proposal for the reasons outlined above. Nevertheless, the NTAA looks forward to further discussing this issue further with EPA, and working with EPA to mitigate the increased air pollution, diseases, and premature deaths caused by this Proposal. If you have any questions or require clarification from the NTAA please do not hesitate to contact the NTAA's Project Director Andy Bessler at 928-523-0526 or Andy.Bessler@nau.edu.

Sincerely,

Wilfred J. Nabahe
Chairman
National Tribal Air Association

Cc: Peter Tsirigotis, EPA OAQPS
Pat Childers, EPA OAR
Larry Brockman, EPA OAQPS
Rafael Sanchez, EPA OOC

⁵ Similarly, the NTAA disagrees with the Proposal's assertion that Executive Order 13,045: Protection of Children From Environmental Health Risks and Safety Risks because "it does not concern an environmental health risk or safety risk." 85 Fed. Reg. at 31,129. This is nonsense. Tellingly, EPA stated its similar 2018 extension proposal was subject to Executive Order 13,045. 83 Fed. Reg. 61,574, 61,584 (Nov. 30, 2018).