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MEMORANDUM

TO: Bram Claeys, Massachusetts Department of Energy Resources

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CC: Wendy Jacobs

DATE: June 9, 2015

RE: Preemption Analysis for a State Pellet Standard

QUESTION PRESENTED

The U.S. Environmental Protection Agency (“EPA”) has recently adopted revised New Source Performance Standards (“NSPS”) for new residential wood heaters, hydronic heaters, and forced-air furnaces, which include requirements related to the wood pellets used in those heaters. In light of the NSPS, would the Commonwealth be preempted from adopting its own mandatory wood pellet standards?

BRIEF ANSWER

The NSPS contains three types of requirements related to wood pellets used in certain types of new heaters. First, it sets minimum composition and conformation standards.¹ Second, it requires that wood pellets be approved by the Pellet Fuels Institute, ENplus, CANplus, or another approved certification scheme. Third, it requires that new heaters burn only pellets that were used in the heaters’ certification tests.

The Clean Air Act contains a Savings Clause, 42 U.S.C. § 7416, that clearly preserves the authority of states to adopt regulations more stringent than those adopted by EPA. Therefore, the composition and conformation standards included in EPA’s regulation do not limit the Commonwealth’s freedom to adopt its own composition, conformation, or supply chain standards, as long as its standards for pellets used in new covered heaters are at least as strict as those in the NSPS.

¹ For the purposes of this memorandum, “conformation” refers to the regulations regarding pellet shape, size, and density. “Composition” refers to the chemical and physical make up of pellets, including impurities, ash, and other chemical properties. We use “supply chain” to refer to all potential regulation regarding where the wood comprising pellets is sourced and tracking wood through the chain of custody.

To avoid any risk of preemption by the certification mandate, the Commonwealth could work with one of the approved organizations to develop its standards or seek certification from EPA as a new approved organization. With respect to the requirement that fuels be used in heater certification tests, the Commonwealth could seek an opinion letter from EPA to clarify that pellets subject to Massachusetts standards at least as stringent as EPA's would not need to be separately tested.

ANALYSIS

I. SUMMARY OF FEDERAL WOOD PELLET REGULATION

Under section 111 of the CAA, EPA may promulgate NSPS for new and modified sources belonging to certain categories of industry. *See* 42 U.S.C. § 7411. Pursuant to this authority, on March 16, 2015, EPA finalized amendments to the Standards of Performance for New Residential Wood Heaters to reduce emissions from certain types of residential heaters. Standards of Performance for New Residential Wood Heaters, New Residential Hydronic Heaters and Forced-Air Furnaces, 80 Fed. Reg. 13,672 (Mar. 16, 2015) (to be codified at 40 C.F.R. pt. 60). In addition to regulating the heaters themselves, the NSPS regulates the composition and conformation of the wood pellets that may be used in new heaters. The amendments were the first change to the NSPS for wood heaters since it was adopted in 1988, and represent the first time the federal government has created standards for wood pellets. *See id.* at 13,673.

A. Coverage

Covered heaters: The regulations change the existing standards applicable to new wood heaters and impose standards on new residential hydronic heaters and forced-air furnaces.² Collectively, the types of pellet-burning heaters covered by the NSPS—wood heaters, outdoor residential hydronic heaters, indoor residential hydronic heaters, and residential forced-air furnaces—will be referred to as the “covered heaters” for the purposes of this memorandum.

Covered persons: The NSPS applies only to those who “manufacture, sell, offer for sale, import for sale, distribute, offer to distribute, introduce or deliver for introduction into commerce in the United States, or install or operate . . . an affected wood heater.” 80 Fed. Reg. at 13,702. Notably, producers, distributors, and vendors of pellet fuels are not included in this list of covered parties.³ In addition, the pellet specifications themselves apply only to operators of

² Hydronic heaters convey heat by moving heated water through distribution pipes under floors and/or through radiators. Forced air furnaces and wood stoves convey heat by distributing warm air throughout a building. EPA, *Consumers – Types of Appliances*, <http://www.epa.gov/burnwise/appliances.html#outdoorwoodboilers> (last visited Apr. 29, 2015).

³ There is some question about whether the establishment of pellet standards exceeds EPA's authority to regulate new sources under section 111 of the Clean Air Act, *see* Pellet Fuels Institute Comments on Proposed Rule 2-3 (May 5, 2014), Docket ID Number: EPA-HQ-OAR-2009-0734; however, such an analysis is outside the scope of this memorandum. In March 2015, a trade association challenged the NSPS in the D.C. Circuit. *See Hearth, Patio and Barbecue Ass'n v. EPA, D.C. Cir.*, No. 15-1056, (Mar. 16, 2015). At the time this memorandum was written, the basis for the challenge was unknown, because the petitioner's Docketing Statement and Statement of Issues are not due until June 15, 2015.

covered heaters. *See id.* at 13,704, 13,717. Because these standards apply only to residential heaters, the pellet specifications may only be enforced against homeowners who operate covered heaters.

B. Requirements

The NSPS imposes three kinds of requirements on operators of covered heaters: they must (1) adhere to a pellet certification mandate, (2) meet minimum quality specifications, and (3) avoid the use of certain fuels.

1. *Certification Mandate*

First, the regulations require that operators of covered heaters exclusively use wood pellets that have been certified by the American Pellet Fuels Institute (PFI), European ENplus, Canadian CANplus, or another organization approved by EPA. In particular, regulations provide that:

Operators of [the relevant covered heater] that are certified to burn pellet fuels must only burn pellets that have been specified in the owner's manual⁴ and graded under a licensing agreement with a third-party organization approved by the EPA. The Pellet Fuels Institute, ENplus and CANplus are initially deemed to be approved third-party organizations for this purpose, and additional organizations may apply to the Administrator for approval.

80 Fed. Reg. at 13,705, 13,717.

According to the CANplus handbook, "CANplus currently employs the identical set of parameters as the ENplus certification." WOOD PELLET ASSOCIATION OF CANADA, CANPLUS HANDBOOK FOR THE CERTIFICATION OF WOOD PELLETS FOR HEATING PURPOSES 2.0, 3.1 (2013). In fact, the first step toward obtaining a CANplus certification is to obtain an ENplus certification. *Id.* at 3.2. Because ENplus and CANplus are effectively synonymous, this memorandum will only discuss the ENplus and PFI certification schemes. PFI and ENplus have some overlapping requirements but are independent certification schemes. *See Table 1* below for more information on the requirements under the approved certification schemes.

2. *Minimum Quality Specifications*

Second, the new rule mandates that pellets used in covered heaters meet enumerated composition criteria. In particular, pellets must meet the following minimum specifications:

- (1) Density: consistent hardness and energy content with a minimum density of 38 pounds/cubic foot;
- (2) Dimensions: maximum length of 1.5 inches and diameter between 0.230 and 0.285 inches;

⁴ The requirement that a heater must be operated consistently with the owner's manual was part of the original 1988 NSPS and has not been amended in the revised regulations. 53 Fed. Reg. 5,860 (Feb. 26, 1988). This requirement is also repeated in part (g) which provides that the "user of [covered heater] must operate the heater in a manner consistent with the owner's manual." 80 Fed. Reg. at 13,705, 13,718.

- (3) Inorganic fines: less than or equal to 1 percent;
- (4) Chlorides: less than or equal to 300 parts per million by weight; and
- (5) Ash content: no more than 2 percent.
- (6) Contains no demolition or construction waste;
- (7) Trace metals: less than 100 mg/kg; and
- (8) None of the prohibited fuels in (f).⁵

80 Fed. Reg. at 13,704, 13,716.

The minimum criteria constrain operators' ability to choose between different grades of certified pellets. Both ENplus and PFI certify three grades of pellets. ENplus refers to these grades, from most stringent to least stringent, as "ENplus-A1," "ENplus-A2," and "EN-B." PFI refers to its pellet grades as "Premium," "Standard," and "Utility." The standards for the lowest grade pellet under both schemes, EN-B and Utility, respectively, are less stringent than EPA's minimum standards. As a result, operators of covered heaters cannot use EN-B or Utility pellets. Instead, they must use PFI's Premium or Standard pellets or the ENplus-A1 or ENplus-A2 pellets.

Although the medium-grade pellets (Standard and ENplus-A2) generally satisfy EPA's minimum quality specifications, there are still some minor divergences between the private schemes' standards and EPA's. This is because EPA has set minimum criteria for categories that are not addressed under the PFI and ENplus schemes, and set more stringent criteria than those required by PFI and ENplus in other categories.⁶ See *Table 1* below for a comparison between EPA's minimum specifications and the medium-grade pellet standards under the approved certification schemes. Criteria that are unregulated or regulated less stringently under the PFI and ENplus schemes are shaded. For each category in which the EPA standard is more stringent, the certification scheme's standard is identical in the top and medium-grade categories. As a result, even using the highest-grade PFI and ENplus pellets (as those grades are currently written) will still be insufficient to fully comply with EPA's minimum quality specifications. It is our understanding, however, that PFI has expressed a willingness to work with EPA to conform its standards to EPA's.

Table 1: EPA's minimum specifications for pellet fuels compared with compared with specifications for the medium-grade pellets under the PFI and ENplus certification schemes.

Regulated criteria	EPA minimum^a	PFI: Standard^b	ENplus: ENplus-A2^c
Density	$\geq 38 \text{ lbs/ft}^3$	between 38 lbs/ft ³ & 46 lbs/ft ³	$\geq 37.457 \text{ lbs/ft}^3$
Length	length $\leq 1.5 \text{ in}$	$\leq 1.5 \text{ in. with 1\% variance}^*$	between 0.124 & 1.575 in. with 1% variance*
Diameter	between .230 & .285 in.	between .230 & .285 in.	0.236 in. or .315 in.
Inorganic fines	$\leq 1\%$	$\leq 1\%$	$\leq 1\%$

⁵ This requirement is discussed below.

⁶ The NSPS is silent as to how EPA will monitor and enforce criteria that are more stringent than those required by PFI and ENplus.

Chlorides	≤ 300 ppm	≤ 300 ppm	≤ 200 ppm
Ash content	≤ 2%	≤ 2%	≤ 1.5%
Trace metals	< 100 mg/kg	n/a	n/a
Demolition & construction waste	Prohibition	Accepted under some circumstances ^d	Prohibition
Durability	n/a	≥ 95%	≥ 97.5%
Moisture	n/a	≤ 10	≤ 10
Sulfur content	n/a	n/a	≤ 300 ppm
Nitrogen content	n/a	n/a	≤ 500 ppm
Ash melting behavior	n/a	n/a	≥ 1100° C

a: Standards of Performance for New Residential Wood Heaters, New Residential Hydronic Heaters and Forced-Air Furnaces, 80 Fed. Reg. at 13,704, 13,716.

b: Pellet Fuels Institute, *Pellet Fuels Institute Standard Specification for Residential/Commercial Densified Fuel* (2011), available at <http://www.pelletheat.org/assets/docs/pfi-standard-specification-november-2011.pdf>.

c: EUROPEAN PELLET COUNCIL, ENPLUS HANDBOOK FOR THE CERTIFICATION OF WOOD PELLETS FOR HEATING PURPOSES 2.0, 2.1 (2013).

d: PELLET FUELS INSTITUTE, RESIDENTIAL/COMMERCIAL DENSIFIED FUEL QA/QC HANDBOOK, 6.7 (2011). PFI's handbook suggests that it may accept construction materials under some circumstances, but it the handbook is silent as to the circumstances where this would be possible, so construction material is currently prohibited under the program.

* Up to 1% of all pellets may exceed the maximum length.

3. Prohibitions

Third, EPA prohibits the use of certain fuels,⁷ including “[a]ny materials that were not included in the certification tests for the [covered heater].” 80 Fed. Reg. at 13,705, 13,717. Under the new rules, covered heater manufacturers must certify each model line through a third-party certifying laboratory. *See id.* at 13,705, 13,717. The manufacturer then must submit the laboratory results to EPA for approval. *See id.* at 13,705, 13,717. To be valid, certification tests must demonstrate that the covered heater complies with all of EPA’s standards, including the pellet standards. Generally, manufacturers must recertify model lines every five years. *See id.* at 13,707, 13,718. However, models that were previously certified under the 1988 regulatory

⁷ The relevant provision provides that:

Prohibited fuel types. No person is permitted to burn any of the following materials in an affected wood heater: (1) Residential or commercial garbage; (2) Lawn clippings or yard waste; (3) Materials containing rubber, including tires; (4) Materials containing plastic; (5) Waste petroleum products, paints or paint thinners, or asphalt products; (6) Materials containing asbestos; (7) Construction or demolition debris; (8) Paper products, cardboard, plywood, or particleboard. The prohibition against burning these materials does not prohibit the use of fire starters made from paper, cardboard, sawdust, wax and similar substances for the purpose of starting a fire in an affected wood heater; (9) Railroad ties, pressure-treated wood or pallets; (10) Manure or animal remains; (11) Salt water driftwood or other previously salt water saturated materials; (12) Unseasoned wood; (13) Any materials that are not included in the warranty and owner’s manual for the subject wood heater; (14) Any materials that were not included in the certification tests for the subject wood heater.

80 Fed. Reg. at 13,705 (to be codified at 40 C.F.R. § 60.532(f)).

regime at an emission level equal to or less than the 2015 standards are deemed to have a certificate of compliance for the 2015 emission standards. *See id.* at 13,707, 13,718. This carry-over certificate of compliance is valid until producers must recertify in 2020. *See id.* at 13,707, 13,718.

The pellets to be used in the certification tests can be “only those that have been graded under a licensing agreement with a third-party organization and meet the minimum quality specifications.” *Id.* at 13,678-13,679. In turn, owners and operators of covered heaters “will be required to use only the grades of pellet fuels . . . that are included in the owner’s manual based on the . . . certification tests,” *id.* at 13,676 and are prohibited from burning “[a]ny materials that were not included in the certification tests for the [covered heater].” *Id.* at 13,705, 13,707.

II. PREEMPTION ANALYSIS

The Supremacy Clause in Article VI of the U.S. Constitution dictates that federal laws “shall be the supreme law of the land.” U.S. Const. art VI, cl. 2. Because federal law is supreme over state law, state governments are prohibited (or “preempted”) from passing laws that would interfere with federal statutes or federal regulations. *See, e.g., CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658, 664 (1993). “Pre-emption may result not only from action taken by Congress itself; a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation.” *La. Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 369 (1986).

Deciding whether a state law is preempted by federal law is fundamentally a matter of determining Congress’s intent. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 229 (1947). Congress may demonstrate an intent to preempt state law either expressly, by using explicit language in a federal law, or implicitly, through the structure and purpose of a federal law. *Wyeth v. Levine*, 555 U.S. 555, 565 (2009). Implied preemption can be further divided into field preemption and conflict preemption. Field preemption occurs when the federal law is “so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it.” *Rice*, 337 U.S. at 230. Where Congress has demonstrated an intent to occupy a field, any attempt by the states to regulate the issue will be preempted. *See Wyeth*, 555 U.S. at 565. By contrast, conflict preemption occurs when the dictates of a state law make it impossible to comply with both federal and state law or when the state law stands as an obstacle to fulfilling purposes of the federal law. *See id.* at 589.

When Congress’s intent is not clear, courts apply what is known as a presumption against preemption. *See Oxygenated Fuels Ass’n, Inc. v. Pataki*, 293 F. Supp. 2d 170, 174 (N.D.N.Y. 2003) (“[W]hen Congress legislates in a field traditionally within the police powers of the states . . . there is a presumption that the state law is not invalidated under the Supremacy Clause.”). The Supreme Court has repeatedly affirmed that state law is not to be lightly superseded unless doing so is the “clear and manifest purpose of Congress.” *Altria Grp., Inc. v. Good*, 555 U.S. 70, 77 (2008). Toward this end, courts will “narrowly construe a federal law which is claimed to preempt an exercise of state police power.” *Id.*

A. Express Preemption

As long as a Massachusetts pellet standard does not require operators of covered heaters to use pellets that do not satisfy EPA's minimum specifications, it will not be expressly preempted. The CAA contains a savings clause, 42 U.S.C. § 7416, which provides that:

Except as otherwise provided in [repealed provisions and mobile source provisions] nothing in this chapter shall preclude or deny the right of any State . . . to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution; except that if an emissions standard or limitation is in effect under . . . section 7411 [the NSPS provision] . . . such state may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan or section.

The last clause is an express preemption provision that prohibits states from adopting standards or limitations *less stringent* than those contained in an NSPS. The provision as a whole, however, expressly allows states to adopt standards or limitations that are *more stringent* than those in an NSPS. It also says nothing about standards or limitations that are different in kind or coverage than an NSPS. Thus, as long as a state law or regulation is not less stringent than the standard contained in an NSPS, it is not expressly preempted by the CAA.⁸

The Commonwealth is investigating whether to adopt mandatory standards for all pellets sold or used in Massachusetts. The first thing to observe about such a standard is that it would be different in kind from the pellet standards in the NSPS. The NSPS standards do not apply to all wood pellets; instead, they apply only to pellets used in the covered heaters. Therefore, pellets used in commercial heaters and other non-covered heaters are not regulated by the NSPS. Moreover, the NSPS applies only to heaters sold after its effective date; therefore, pellets used in older heaters are also not regulated by the NSPS.

A mandatory state standard, by contrast, could apply both to pellets used in new covered heaters and to pellets used in older heaters and in types of heaters not covered by the NSPS. If Massachusetts chooses to adopt a single standard that applies to all wood pellets, then, to avoid express preemption, it must ensure that this standard is at least as stringent as the NSPS standards. If Massachusetts chooses to adopt one standard for pellets used in new covered heaters (i.e., those subject to the NSPS) and another for other pellets, then it can set the latter standard at any level—even one less stringent than the NSPS.

⁸ Lending support to this interpretation, cases from the federal appellate courts have consistently held that the Savings Clause permits states to regulate stationary sources more stringently than federal regulations require. In interpreting the Savings Clause in the context of a stationary source provision, the Supreme Court has found that states may impose “more stringent emission standards than those promulgated by [a federal agency].” *See Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 228 (1983). More recently, the Fourth Circuit held that the Savings Clause permits states to adopt “unilateral emissions regulations” for stationary sources that are at least as stringent as federal law requires. *Mirant Potomac River, LLC v. U.S. E.P.A.*, 577 F.3d 223, 227 (4th Cir. 2009). For all of these reasons, it is clear that Congress approves⁸ of more stringent state regulation of new sources.

B. Field Preemption

Field preemption occurs when federal law is “so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it.” *Rice*, 331 U.S. at 229. Congress has not occupied the field with regard to regulating air emissions from stationary sources like wood heaters. As quoted above, the 42 U.S.C. § 7416 Savings Clause indicates that, except as to mobile sources, states may adopt independent “standard[s] and limitation[s] respecting emissions of air pollutants” or “requirement[s] respecting control or abatement of air pollution.” *Id.* In other words, Congress has stated clearly here that it has not occupied the entire field of regulating air emissions from stationary sources, but has left room for states to play a role. The Supreme Court has stated in dicta that the states retain “broad control” to regulate stationary sources after the passage of the CAA. *Washington v. Gen. Motors Corp.*, 406 U.S. 109, 115 (1972).

In addition to the Savings Clause, the structure of the CAA demonstrates that Congress did not intend to occupy the field with respect to stationary sources. The different treatment of stationary sources and mobile sources in the Savings Clause is repeated throughout the CAA. While the mobile source provisions were designed to create a uniform national standard determined by EPA, the stationary source provisions of the CAA were designed to function through a system of cooperative federalism that envisioned the states and federal government acting as partners to address air pollution. *See Washington*, 406 U.S. at 115. The Ninth Circuit describes this cooperative federalism goal as central to the purpose of the Act, stating that “the overriding purpose of the Clean Air Act is to force the states to do their job in regulating air pollution effectively so as to achieve baseline air quality standards.” *Exxon Mobil Corp. v. U.S. E.P.A.*, 217 F.3d 1246, 1256 (9th Cir. 2000).

C. Conflict Preemption

Conflict preemption occurs in one of two ways: either when “compliance with both federal and state regulations is a physical impossibility,” *Hillsborough Cnty., Fla. v. Automated Med. Labs, Inc.*, 471 U.S. 707, 713 (1985), or when “state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Wyeth*, 555 U.S. at 589 (internal quotation marks and alteration omitted). A state regulation will be struck down if it conflicts with either a federal statute or with a properly-promulgated federal regulation. *See Geier v. American Honda Motor Co., Inc.* 529 U.S. 861 (2000) (holding that state tort claim was preempted because it conflicted with a federal regulation).

1. *Physical Impossibility Preemption*

Physical impossibility challenges are limited to cases in which regulated parties cannot comply with state law without necessarily violating federal law. *See Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 143 (1963). This can happen when a state adopts standards wholly outside the range of acceptable federal standards. For example, one case in which the Supreme Court found physical impossibility preemption involved a California law that “excluded from the State any avocado measuring less than 8% oil content” while federal law “forbade the picking and marketing of any avocado testing more than 7% oil.” *Id.*

2. *Obstacle Preemption*

Obstacle preemption occurs where a state regulation stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *Geier*, 529 U.S. at 873. “This occurs where state law ‘interferes with the *methods* by which the federal statute was designed to reach [its] goal.’” *Columbia Venture, LLC v. Dewberry & Davis, LLC*, 604 F.3d 824, 830 (4th Cir. 2010) (quoting *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 103 (1992)). EPA’s statutory authority to develop the NSPS is section 111 of the Clean Air Act, which is a stationary source provision. *See* 42 U.S.C. § 7411. Here, Congress’s purpose in authorizing EPA to promulgate the NSPS and EPA’s purpose in writing the rule are to achieve better air quality and promote cooperative federalism. *Exxon Mobil Corp.*, 217 F.3d at 1256.

The Clean Air Act makes this purpose plain by including the Savings Clause quoted above. The Savings Clause specifically refers to section 7411, the NSPS provision, providing that states are preempted from adopting less stringent standards than EPA. *See id.* The prohibition on states adopting *less* stringent standards than an NSPS, as discussed above, indicates that states are allowed to adopt *more* stringent standards.

3. *Application to NSPS Minimum Quality Specifications:*

“Obstacle” preemption would not be a problem with respect to EPA’s minimum quality specifications. As explained above, the CAA’s Savings Clause specifically allows states to set stricter standards for stationary source emissions than EPA has established. Massachusetts is therefore free to develop standards that are more stringent than the federal standards, whether it does so by including composition and conformation standards that go beyond the federal standards, by adding supply chain requirements, or by expanding their coverage by applying the standards to all pellets sold in Massachusetts rather than only to the pellets used in new covered heaters.

To avoid a “physical impossibility” challenge, the Commonwealth should be careful to adopt standards that do not directly interfere with federal standards. The one context in which such interference would occur is when the NSPS establishes a range for a pellet characteristic rather than setting a minimum or a maximum. In that situation, the Commonwealth should not adopt standards outside the accepted range in the NSPS. For example, the NSPS requires pellets to conform to a diameter between 0.230 and 0.285 inches. In order to avoid a physical impossibility challenge, the Commonwealth could not mandate a diameter outside of this range, such as greater than 0.290 inches.

4. *Application to NSPS Certification Requirement*

The preemption analysis for the two other aspects of the NSPS pellet standards is more complicated. As described above, EPA has chosen to enforce its pellet standards not just by setting composition and conformation standards, but also by requiring that operators use only pellets that are certified by an approved organization and that are used in the wood heater certification tests.

Consider first the requirement that operators use only pellets that are “graded under a licensing agreement with a third-party organization approved by the EPA.” 80 Fed. Reg. at 13.705. EPA

currently allows operators to use pellets certified by PFI, ENplus, or CANplus, and has left open the possibility of approving other certification schemes in the future. If the Commonwealth establishes standards more stringent than those of these organizations, it would mean that pellets certified by PFI, ENplus, and CANplus could not be sold in Massachusetts. As a result, someone might argue that it would be physically impossible to comply with both the Massachusetts standard and the NSPS: under the federal regulations the pellets must be certified by an approved organization while under the Massachusetts standards, pellets certified by those organizations could not be used in the Commonwealth.

The Commonwealth could avoid this type of challenge either by working with one of the organizations to develop a more stringent standard, which Massachusetts would then adopt as its state-specific standard, or by itself seeking EPA recognition as a certified organization. If the Commonwealth adopted one of these approaches, it might then face another conflict preemption challenge: someone might argue that the Massachusetts standard is preempted because it eliminates the choice that operators currently have to select pellets certified by any of these organizations and is therefore an obstacle to the accomplishment of EPA's objectives. When "federal law grants an actor 'a choice,' and state law 'would restrict that choice,' state law is preempted if preserving 'that choice [was] a significant [federal] regulatory objective.'" *McDaniel v. Wells Fargo Investments, LLC*, 717 F.3d 668, 675 (9th Cir. 2013) (quoting *Williamson v. Mazda Motor of Am., Inc.*, 131 S. Ct. 1131, 1137 (2011)). Here, however, there is no indication that the preservation of consumer choice among the certification schemes was a significant concern of EPA in adopting the regulation. Instead, EPA justified the requirement on the grounds that "pellet fuel quality assurance is necessary to ensure that the appliances operate properly and meet the certified emission limits." 80 Fed. Reg. at 13,679. Therefore, any limitation on consumer choice among certification schemes would not result in obstacle preemption.

5. *Application to NSPS Use of Fuels in Certification Tests Requirement*

Next consider EPA's prohibition on burning any fuel not used in certification tests. Covered heater manufacturers only need to certify their products every five years, and all models sold after 2015 must either be newly certified or have a carry-over certificate of compliance valid until 2020. If Massachusetts imposes more stringent standards prior to 2020 (i.e., requires the use of pellets that were not part of the products' certification tests), this requirement could be interpreted to mean that manufacturers who want to sell pellets in Massachusetts must either (a) voluntarily recertify prior to the expiration of their federal certification using the Commonwealth-approved pellets or (b) wait until their certification is renewed in 2020 to use Commonwealth-approved pellets. As a result, it could be argued that Massachusetts-specific standards pose an obstacle to the federal regulation because they would burden covered heater producers beyond what was intended by EPA, who chose to require covered heater manufacturers to certify only once every five years.

The Commonwealth has at least three options to address this argument. First, it could request an opinion letter from EPA indicating that the Commonwealth's standards are not in conflict with the federal requirement that approved fuels be used in heater certification tests. EPA's purpose in requiring that fuels be used in certification tests is to ensure pellet quality so that the covered heaters will "operate properly such that emissions are within the appliance certification limits."

80 Fed. Reg. at 13,682. If Massachusetts establishes pellet standards that are more stringent than the NSPS standards, then there should be no need to separately test the covered heaters with Massachusetts-certified pellets; they would produce results in the certification tests at least as good as those produced with the NSPS-compliant pellets. As a result, EPA might agree that the requirement that fuels be used in certification tests could be waived in this situation. Second, the Commonwealth could argue in response to any challenge that the minimal burden imposed on manufacturers does not rise to the level of a conflict between the NSPS and the Massachusetts standards. Third, the Commonwealth could delay the effective date of any Massachusetts mandatory pellet standards until 2020.

D. Interstate Cooperation

The Commonwealth also aims to work together with states to achieve a regional pellet standard. Such interstate cooperation would pose no additional preemption issues, because the Clean Air Act specifically encourages states to collaborate to achieve air quality goals that exceed EPA's standards. In particular, the CAA requires EPA to:

encourage cooperative activities by the States and local governments for the prevention and control of air pollution; encourage the enactment of improved and . . . uniform State and local laws relating to the prevention and control of air pollution; and encourage the making of agreements and compacts between States for the prevention and control of air pollution.

42 U.S.C. § 7402(a). This statement suggests that Congress approves of multi-state collaboration to achieve clean air goals. In light of this statement, regional cooperation to achieve pellet standards would be considered consistent with Congressional intent. As such, the Commonwealth would not be preempted from working together with other states to regulate pellets, because it is Congress's express intent to facilitate such cooperation.