

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF NEW YORK

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Environmental Protection Bureau
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STATE OF MARYLAND

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COMPLAINT

Index No.

COMMONWEALTH OF
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PUGET SOUND CLEAN AIR
AGENCY
1904 Third Avenue, Suite 105
Seattle WA USA 98101,

Plaintiffs,

- against -

MICHAEL REGAN, as Administrator of the
Environmental Protection Agency,
Mail Code 1101A
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460, and

ENVIRONMENTAL PROTECTION AGENCY
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460,

Defendants.

Plaintiffs New York, Alaska, Illinois, Maryland, Massachusetts, Minnesota,
New Jersey, Oregon, Vermont, and Washington, and the Puget Sound Clean Air
Agency (collectively, the States) bring this action to compel Michael Regan, as
Administrator of the Environmental Protection Agency (EPA), and the EPA to comply

with the nondiscretionary duty under the Clean Air Act (Act) to review and revise as necessary the New Source Performance Standards (NSPS) for particulate matter pollution from new residential wood heaters. The States seek an injunction requiring defendants to promptly propose and take final agency action on the NSPS by dates certain.

JURISDICTION AND VENUE

1. This Court has jurisdiction pursuant to section 304(a)(2) of the Act, 42 U.S.C. § 7604(a)(2), which authorizes any person, after duly giving notice, to commence a citizen suit against EPA where the Administrator has failed to perform a nondiscretionary duty under the Act.

2. Venue in this Court is proper pursuant to 28 U.S.C. § 1391(e) because a substantial part of the events or omissions giving rise to the States' claim occurred in this judicial district, as the Administrator's failure to perform his nondiscretionary duty to timely review and revise as necessary the NSPS for wood-burning devices occurred in this district, and EPA maintains an office in this district.

PARTIES

3. Plaintiff State of New York is a sovereign entity that brings this action on its own behalf and on behalf of its citizens and residents.

4. Plaintiff State of Alaska is a sovereign entity that brings this action on its own behalf and on behalf of its citizens and residents.

5. Plaintiff State of Illinois is a sovereign entity that brings this action on its own behalf and on behalf of its citizens and residents.

6. Plaintiff State of Maryland is a sovereign entity that brings this action on its own behalf and on behalf of its citizens and residents.

7. Plaintiff Commonwealth of Massachusetts is a sovereign entity that brings this action on its own behalf and on behalf of its citizens and residents.

8. Plaintiff State of Minnesota is a sovereign entity that brings this action on its own behalf and on behalf of its citizens and residents.

9. Plaintiff State of New Jersey is a sovereign entity that brings this action on its own behalf and on behalf of its citizens and residents.

10. Plaintiff State of Oregon is a sovereign entity that brings this action on its own behalf and on behalf of its citizens and residents.

11. Plaintiff State of Vermont is a sovereign entity that brings this action on its own behalf and on behalf of its citizens and residents.

12. Plaintiff State of Washington is a sovereign entity that brings this action on its own behalf and on behalf of its citizens and residents.

13. Plaintiff Puget Sound Clean Air Agency is a local air pollution control agency that regulates air pollution in King, Kitsap, Pierce and Snohomish counties in the state of Washington, including the cities of Seattle and Tacoma.

14. Each of the plaintiffs is a “person” as defined in the applicable provision of the Act, 42 U.S.C. § 7602(e).

15. Defendant Michael Regan is Administrator of EPA and is sued in his official capacity. The Administrator is charged with implementation and enforcement of the Act, including timely reviewing and as necessary revising the NSPS for wood-burning devices.

16. Defendant EPA is an executive agency of the federal government charged with implementing and enforcing the Act in coordination with the States.

STATUTORY AND REGULATORY FRAMEWORK

17. Section 111 of the Act requires EPA to develop air pollution control performance standards that apply to specific categories of stationary sources. Section 111(b) requires the Administrator to list categories of stationary sources that the Administrator finds “cause[], or contribute[] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare.” 42 U.S.C. § 7411(b)(1)(A). The Administrator then must establish “standards of performance” for emissions of air pollutants from new and modified sources within each such category. *Id.* § 7411(b)(1)(B). These standards of performance must “reflect[] the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated.” *Id.* § 7411(a)(1).

18. Pursuant to section 111(b)(1)(B) of the Act, EPA must, “at least every eight years, review and, if appropriate, revise such standards” following the

procedure required for promulgation of such standards unless it determines that such a review is not appropriate in light of readily available information on the efficacy of the standard. *Id.* § 7411(b)(1)(B). As part of its review, EPA is required to take into account “emission limitations and percent reductions achieved in practice.” *Id.*

FACTUAL BACKGROUND

A. Wood Smoke Pollution

19. Wood smoke contains several harmful pollutants, including fine particulate matter (PM_{2.5}), carbon monoxide (CO), and polycyclic aromatic hydrocarbons (PAHs). These pollutants are linked to adverse coronary and pulmonary health impacts, including premature death.

20. EPA has documented the harms from exposure to fine particulate matter in its most recent proposal to strengthen the National Ambient Air Quality Standards (NAAQS) for PM_{2.5}. 88 Fed. Reg. 5,558, 5,609 (Jan. 27, 2023).

21. Other studies also confirm that PM_{2.5} exposure causes adverse health impacts, including increased cancer rates and dementia rates, and reduced childhood lung function.

22. According to EPA’s 2020 national emissions inventory, residential wood heaters emitted 485,077 tons of PM_{2.5}, which represents about 8% of total PM_{2.5} emissions in the United States.

23. In some states, the PM_{2.5} emissions from residential wood heaters accounts for a much greater percentage of total PM_{2.5}. For example, in Vermont,

residential wood heater emissions make up about 59% of total PM_{2.5} emissions. In New York, the percentage is about 27%; and, in Alaska, about 56% in the Fairbanks North Star Borough nonattainment area. Wood heater emissions injure the States' air quality.

24. The emissions from residential wood heaters have also impaired the ability of some states, such as Alaska and Oregon, to attain the National Ambient Air Quality Standards for PM_{2.5} and devise an effective State Implementation Plan.

B. EPA's Failure to Timely Review and Revise the NSPS for Residential Wood Heaters

EPA's Issuance of the 2015 NSPS

25. In 2013, New York, Connecticut, Maryland, Massachusetts, Oregon, Rhode Island, Vermont, and the Puget Sound Clean Air Agency sued EPA and its Administrator to update its 1988 NSPS for residential wood heaters.

26. In 2014, the parties entered into a partial consent decree, in which EPA and its Administrator agreed to issue an updated NSPS by dates certain.

27. On March 16, 2015, EPA issued a final rule with phased standards for residential wood heaters. 80 Fed. Reg. 13,672 (Mar. 16, 2015). The first set of standards went into effect on May 15, 2015, and the second set on May 15, 2020.

28. Defendants have not updated the NSPS for residential wood heaters since the 2015 NSPS.

29. More than eight years have passed since EPA issued the 2015 NSPS.

EPA's Ineffective Wood Heater Testing and Certification Program

30. Evidence that EPA's testing and certification program is not effective in ensuring that new residential wood heaters comply with emission limits demonstrates the importance of updating the residential wood heater NSPS.

31. Following initial concerns that EPA's residential wood heater certification program was not effective, the Northeast States for Coordinated Air Use Management and the Alaska Department of Environmental Conservation coordinated review of over 250 certified wood heaters. The study evaluated EPA's compliance program with the 2015 NSPS. 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>.

32. The study identified deficiencies in all reviewed test reports. These deficiencies included lack of publicly available certification test reports and failure to show that the certification tests were conducted according to EPA standards.

33. EPA's own Inspector General's Office corroborated the results of the study. 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), available at: https://www.epaoig.gov/sites/default/files/documents/2023-03/epaoig_20230228-23-E-0012_2.pdf. The Inspector General's Office found that "EPA's residential wood heater program does not provide reasonable assurance that wood heaters are

properly tested and certified before reaching consumers.” *Id.* Further, the Inspector General’s Office 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. *Id.* at 13. Additionally, “[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.” *Id.*

34. EPA has withdrawn certain ineffective tests, but allowed residential wood heaters certified with those withdrawn tests to remain on the market until those certifications expire, which could be as late as 2027.

35. EPA has also acknowledged the deficiencies identified in the Inspector General’s report. U.S. EPA, *Response to Office of Inspector General Final Report* (Apr. 28, 2023) at 1-2. Nevertheless, although it has some intermediate goals, EPA has stated that it does not plan to finalize a new NSPS for residential wood heaters until November 30, 2027—more than 12 years after the 2015 NSPS. Moreover, EPA asserts that the November 30, 2027 date is only aspirational, as EPA “do[es] not have hard deadlines for reaching these milestones[.]” *Id.* at 7.

C. **Notice of Violation of Nondiscretionary Duty Under the Clean Air Act**

36. On June 29, 2023, the States sent a citizen suit notice letter by certified mail to the EPA Administrator notifying him of the violation of a

nondiscretionary duty under 42 U.S.C. § 7411(b)(1)(A) and (B), and of the States' intention to commence a lawsuit if EPA and its Administrator did not correct the violations within 60 days. On its website, EPA acknowledged receipt of this notice letter on June 30, 2023. U.S. Environmental Protection Agency, *Notice of Intent to Sue the U.S. Environmental Protection Agency (EPA)*, <https://www.epa.gov/ogc/notices-intent-sue-us-environmental-protection-agency-epa>.

37. More than 60 days have passed since defendants' receipt of the notice letter and defendants have not completed a rulemaking reviewing, and as appropriate, revising the NSPS for residential wood heaters.

CLAIM FOR RELIEF

(Failure to Perform Nondiscretionary Duty to Timely Review, and as Necessary, Revise NSPS for Residential Wood Heaters)

38. As set forth in the preceding paragraphs, despite the expiration of the mandatory eight-year statutory deadline for the Administrator to complete the required notice-and-comment rulemaking to review the NSPS for residential wood heaters and make any necessary revisions, the Administrator has failed to perform this nondiscretionary duty.

39. The Administrator's failures to timely complete review and promulgate necessary revisions to the NSPS for residential wood heaters violates 42 U.S.C. § 7411(b)(1)(A) and (B), and continues to this day.

40. The violation constitutes a “failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator” under 42 U.S.C. § 7604(a)(2).

41. The delay caused by the Administrator’s failure has harmed and continues to harm the States by delaying the adoption and implementation of more protective NSPS for residential wood heaters, including for indoor heaters and outdoor wood boilers under 40 C.F.R. Part 60, Subparts AAA, QQQQ, that will result in cleaner and healthier air in the States, benefitting the health and welfare of their citizens.

42. Further, EPA’s failure to update the NSPS for residential wood heaters frustrates the States’ ability to implement the Clean Air Act and makes it more difficult for states to attain, or maintain, compliance with the NAAQS for fine particulate matter. Difficulty with maintaining compliance with the NAAQS will both negatively harm the health of our residents and force the States to allocate additional resources to control PM_{2.5}.

43. Additionally, many States have spent state money to subsidize wood stove change out programs. If newer wood heaters do not meet cleaner standards in real world emissions, then programs to change out old wood heaters may provide little health benefits at significant public cost.

REQUESTED RELIEF

WHEREFORE, the States respectfully request that this Court enter a judgment against Defendants as follows:

A. Declaring that Defendants are in violation of 42 U.S.C. § 7411(b)(1)(A) and (B) of the Act for failing to timely review, and as necessary, revise the NSPS for residential wood heaters, 40 C.F.R. Part 60, Subparts AAA, QQQQ.

B. Enjoining Defendants to promptly complete review, propose, and promulgate necessary revisions to the NSPS for residential wood heaters pursuant to 42 U.S.C. § 7411(b)(1)(A) and (B) by dates certain;

C. Awarding the States the costs of litigation, including reasonable attorneys' fees;

D. Retaining jurisdiction over this matter until such time as Defendants have complied with their nondiscretionary duties under 42 U.S.C. § 7411(b)(1)(A) and (B); and:

E. Such other relief as the Court deems just and proper.

Dated: September 21, 2023

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