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Ms. Janet McCabe
Acting Assistant Administrator for the Office of Air and Radiation
United States Environmental Protection Agency
William Jefferson Clinton Building
1200 Pennsylvania Avenue, N. W.
Washington, DC 20460

Re: Extension of effective dates under the Clean Air Act

Dear Janet:

We appreciate the opportunities that the Hearth, Patio & Barbecue Association (HPBA) has had to meet with you and members of your staff regarding issues of concern to the hearth products industry in the proposed revision to the NSPS for Wood Heaters. We also met with Office of Compliance and Enforcement Assurance (OECA) staff earlier this month regarding our concerns about their responsibilities under the new rule. During that meeting, a member of the Office of Air and Radiation team reiterated a position on deadlines that we have now heard several times: that EPA's Office of General Counsel does not believe there is legal authority under the Clean Air Act to issue an NSPS with an extended deadline, in this case for the product category of Warm Air Furnaces (WAFs).

We have asked our legal team to review this issue, and I am forwarding their opinion to you for your consideration.

It is worth noting that, during the same meeting with OECA, HPBA asked when the program would be ready to accept WAF test packages for certification. OECA answered that it would be ready on the effective date of the rule. The key concern is that the many small companies coming under the jurisdiction of the rule for the first time will not be able to submit certification applications to OECA before the effective date of the rule. However, on the effective date, these small businesses face a do-not-make-or-sell deadline in the rule. This is clearly a death sentence for most of these small companies, regardless of the attributes of their technologies. As I'm sure you can understand, this potential Catch-22 has become the focus within the WAF industry regarding the NSPS. We are sharing this concern with members on the Hill, and will be sharing this opinion with their offices as well.

If you have any questions, please do not hesitate to contact me.

Sincerely yours,

Jack H. Goldman
President & CEO



Memorandum

To: Jack H. Goldman, President & CEO
John Crouch, Director of Public Affairs
Hearth, Patio & Barbecue Association

From: David E. Menotti *David E Menotti*
David Y. Chung *DY Chung*

Date: September 9, 2014

Re: Authority to Extend the Effective Date of the Step 1 Standard for Warm Air Furnaces

In its proposed standards of performance for new residential warm air furnaces, EPA solicited comments from the public on whether to extend the effective date for the proposed Step 1 limit by one year.¹ EPA explained that, although it seeks to encourage national achievement of the best system of emission reduction (BSER) for warm air furnaces “as soon as possible and as efficiently as possible,” it also “seek[s] to balance industry’s R&D needs with timely and efficient standards[.]”² Elsewhere throughout the preamble, EPA emphasized the importance of lead time for the industry in determining what constitutes BSER.³

Nowhere in EPA’s proposal did it suggest that it might lack authority to provide transition relief to warm air furnace manufacturers in the form of a one-year extension of the effective date for the proposed Step 1 standards. Yet, the Agency now is strongly considering taking the position that it has no authority under the Clean Air Act to extend the effective date of the proposed warm air furnace new source performance standards (NSPS). While we do not know the exact basis for EPA’s current position, presumably EPA is relying on a strict reading of language in Clean Air Act Section 111(b)(1)(B), which states that “[s]tandards of performance or

¹ See 79 Fed. Reg. at 6,363.

² *Id.*

³ See, e.g., *id.* at 6,332 (describing how the 1988 regulation incorporated a compliance approach “that provided a reasonable, phased implementation of emission limits for manufacturers” and concluding that “such an approach is prudent this time also to allow manufacturers lead time to develop, test, field evaluate and certify current technologies across their consumer product lines”); *id.* at 6,338 (explaining that “if production and sales were to be suspended while designing, testing, field evaluating and certifying cleaner models, the cost of potential lost revenues would be significant, which necessitates reasonable lead times for compliance with proposed emission limitations”); see also *infra* Part I & notes 6 & 7.

revisions thereof shall become effective upon promulgation.”⁴ That language, however, was part of the Clean Air Act when EPA promulgated the existing Subpart AAA standards in 1988, and at that time, the Agency did not interpret it as restricting its ability to extend the effective dates of standards in that rulemaking. For the reasons set forth in this memorandum, we continue to believe that EPA *can* extend the effective date for the proposed warm air furnace standards by at least one year.

I. Because BSER Determinations Require Consideration of Costs and Lead Time, Imposition of a Step 1 Standard Without any Lead Time is not BSER.

EPA has consistently recognized that the BSER determination requires consideration of lead time for industry. When it proposed the original Subpart AAA in 1987, EPA emphasized that BSER only applies to new sources that can meet standards with a reasonable lead time:

To be [BSER], a technology must be available at a reasonable cost. For wood heaters, an important element of the cost of a technology is the cost of delaying production while models with that technology are designed and certified. Thus, [BSER] applies, and the standards apply, only to those classes of new sources that can meet the standards with a reasonable lead time[.]⁵

The preamble to EPA’s current proposal echoes the foregoing statements by declaring that “an element of the BSER determination includes reasonable lead time for R&D to develop and certify cleaner units.”⁶ The current proposal goes on to state that “important elements in determining [] BSER include the significant costs and environmental impacts of delaying production while models with those systems are being designed, field evaluated, and certified.”⁷

Whether the Step 1 standard for WAFs has been adequately demonstrated as achievable, taking into account costs and other considerations, depends in part on whether manufacturers have sufficient lead time. In this rulemaking, the Step 1 standard could very well result in business failures, thereby jeopardizing the very existence of the warm air furnace industry. The costs of imposing the proposed Step 1 standard without any lead time cannot possibly be justified as BSER under these circumstances. Absent an extension of the effective date, the only defensible BSER for warm air furnaces would be no standards or Step 1 standards that are at or near emissions levels achievable by baseline models. Rather than promulgating no standards or going through an essentially meaningless exercise of requiring certification to levels reflecting baseline conditions, however, EPA has authority pursuant to the overriding imperative that Step 1 standards reflect adequately demonstrated BSER to promulgate the Step 1 standard, while

⁴ 42 U.S.C. § 7411(b)(1)(B).

⁵ 52 Fed. Reg. at 5,000 (Feb. 18, 1987).

⁶ 79 Fed. Reg. at 6,364.

⁷ *Id.*

extending the effective date for a modest one-year period.⁸ This is an option EPA was obviously contemplating at the time it proposed the new warm air furnace standards earlier this year. And, as explained in the next section, EPA provided this precise transition relief in the 1988 regulations.

II. EPA Extended Effective Dates for Standards When it Promulgated Existing Subpart AAA, and It Again Proposes To Do So for Step 2 Standards in the Current Proposal.

EPA's claim that it lacks statutory authority to extend effective dates cannot be reconciled with the fact that: (i) in 1988, EPA extended the effective dates of the standards in existing Subpart AAA; (ii) in the ongoing rulemaking, EPA proposes to extend effective dates for the Step 2 standards by five years.

A. EPA Extended Effective Dates in Two Different Respects in the Original Subpart AAA Regulations.

When EPA finalized the existing Subpart AAA in 1988, it extended the effective date of the new standards by one year for small manufacturers,⁹ and it simultaneously established staggered effective dates for the new standards for all other manufacturers.¹⁰ With respect to the former extension, EPA provided two reasons for doing so:

The first was to provide an additional means of reducing a potential logjam problem by delaying for 1 year the compliance date for many manufacturers. The second was to provide additional time to small manufacturers for such purposes as conducting the research and development, obtaining financing, or purchasing complying designs, necessary to meet the standard. Small manufacturers would likely be the least able to meet the compliance deadlines, because, as a rule, they have

⁸ We are aware that, in *Portland Cement Ass'n v. Ruckelshaus*, the Court discussed the importance of lead time in the BSER determination and concluded that, because the standards at issue would take effect immediately, the "latitude" of EPA's projection of the availability of technology would be "correspondingly narrowed." 486 F.2d 375, 390-92 (D.C. Cir. 1973). In that case, the issue of EPA's authority to extend effective dates was not before the Court; thus, the Court did not have to resolve the tension between the statutory language governing BSER determinations and effective dates. Moreover, that case involved standards that would apply to traditional site-built sources (by far the predominant paradigm for Section 111 standards), not standards that apply to sources manufactured on production lines and subject to a model-line certification scheme.

⁹ See 40 C.F.R. § 60.530(d) (1990).

¹⁰ *Id.* § 60.532 (1990).

less technical expertise, more limited investment funds, and less access to capital markets than large manufacturers.¹¹

With respect to the latter extension, EPA established “a two-phased standard with the first phase beginning in July 1988 to be followed by a more stringent standard in July 1990.”¹² Under that rule, the limits under the first phase were 5.5 g/hr (catalytic) and 8.5 g/hr (non-catalytic). The phase two limits, which EPA delayed for a period of two years, were 4.1 g/hr (catalytic) and 7.5 g/hr (non-catalytic).¹³ EPA justified the two-phase approach as follows:

Until this time, control technology had been essentially undemonstrated. The committee concluded, therefore, that a level of control comparable to the Oregon 1988 standard was appropriate and achievable in 1988. It was concluded that a more stringent level of control as early as 1988 would not necessarily be achievable by those models which otherwise would have met the Oregon 1988 standard. Such a standard would cause an unmanageable certification backlog, would present a moving target to those manufacturers who had done the research and development and spent funds for certification in Oregon, and would not be reasonable considering the small environmental gain, if any, that might result. A second phase of the standard, requiring more stringent emission controls, would go into effect 2 years later in July 1990.

These extensions reflect the fact that, when EPA promulgated the 1988 rule, it interpreted the statutory text in Clean Air Act Section 111 as allowing it to establish NSPS that do *not* become effective immediately upon promulgation. Notably, the statutory language at that time already provided that Section 111 standards “shall become effective upon promulgation.”¹⁴ EPA has not articulated any explanation for why it now interprets the statute differently.¹⁵

¹¹ 52 Fed. Reg. at 5,000.

¹² *Id.*

¹³ *See* 40 C.F.R. § 60.532 (1990).

¹⁴ 42 U.S.C. § 7411(b)(1)(B) (1982 ed.).

¹⁵ Even assuming that the only statutory language that is in play here is the “effective upon promulgation” language in Section 111(b)(1)(B)—an incorrect assumption for the reasons discussed above—a recent federal court decision involving Clean Air Act Section 112 standards provides support for the position that the language in Section 111 governing the effective date of standards is not inflexible. *See Sierra Club v. Jackson*, 833 F. Supp. 2d 11, 23-26 (D.D.C. 2012) (holding that EPA has authority to stay the effective date of standards promulgated under Clean Air Act Section 112 pending judicial review even though Section 112(d) states that standards shall be “effective upon promulgation”). Thus, although Section 112 is considerably less flexible than Section 111 regarding effective date and consideration of costs, even that provision’s command to make standards “effective upon promulgation” is not absolute. The same ought to be true with respect to the identical language governing effective dates in (Continued...)

B. EPA’s Current Proposal Delays the Effective Dates for the Step 2 Standards by Five Years.

Consistent with past practice, EPA’s current proposal provides for a five-year extension of the effective dates of the Step 2 standards for all appliance categories.¹⁶ That aspect of the proposal demonstrates that EPA believes it has authority to depart from the language in Section 111 that provides that standards “shall become effective upon promulgation.” It is arbitrary for EPA to interpret the same statutory provision as simultaneously (i) prohibiting it from extending the effective date of the Step 1 standard for warm air furnaces by a modest one-year period, while (ii) authorizing it to promulgate Step 2 standards in the same rulemaking for all appliance categories that do not become effective for five years. EPA either has the authority to extend effective dates or it does not. If it does not, then by implication it would seem that the statute requires EPA to remove the Step 2 standards from the current proposal.

* * *

For these reasons, HPBA and its membership have a strong legal basis to continue to rigorously advocate for at least a one-year extension of the effective date of the proposed Subpart QQQQ standards for warm air furnaces.

Section 111, given the need in the Section 111 context to reconcile effective dates with the overarching imperative that standards reflect BSER.

¹⁶ See 79 Fed. Reg. at 6,375 (proposed 40 C.F.R. § 60.532); see also 79 Fed. Reg. at 6,384-85 (proposed 40 C.F.R. § 60.5474).