



STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

LETITIA JAMES
ATTORNEY GENERAL

DIVISION OF SOCIAL JUSTICE
ENVIRONMENTAL PROTECTION BUREAU

July 29, 2020

Jack Goldman
Hearth, Patio, and Barbecue Association
1901 North Moore Street, Suite 600
Arlington, VA 22209

Re: Sale of Step One Wood-Burning Devices After May 15, 2020

Dear Mr. Goldman,

I write to request that you inform your members that sale of certain wood-burning devices violates the U.S. Environmental Protection Agency Performance Standard for New Residential Wood Heaters in 40 CFR Part 60, Subparts AAA, QQQ. Today, the New York Attorney General's Office sent a letter to a large retailer informing them that sale of Step 1 devices after May 15, 2020 violates the New Source Performance Standard. I attach a sample letter.

As you are aware, under the Performance Standard, only new residential wood heaters that meet the lower emissions criteria identified by EPA as "Step 2" devices can be sold after May 15, 2020. Yet, companies have websites that offer for sale residential wood burning devices that only meet the EPA definition of a "Step 1" device. The legal deadline to sell these Step 1 devices passed on May 15, 2020, and their continued sale violates the EPA regulation. The penalty for sales in violation of the performance standard can be tens of thousands of dollars per violation and may also constitute consumer fraud. *See* 42 U.S.C. § 7413(b); 40 CFR § 19.4; New York General Business Law § 349.

In March 2015, EPA finalized New Source Performance Standards for wood-burning devices. *See* 80 Fed. Reg. 13672 (March 16, 2015). In adopting the standard, EPA established a stepped implementation approach that afforded manufacturers and retailers a five-year lead time to transition to the manufacture and sale of cleaner burning wood heaters. In the final regulation, EPA adopted a less-stringent Step 1 performance standard and allowed the sale of Step 1 devices for a period of five years—through May 15, 2020. After May 15, 2020, however, only wood heaters that meet the cleaner, less-emitting Step 2 performance standard could lawfully be sold.

Although EPA has proposed to extend the time that retailers can sell Step 1 devices through various “sell-through” proposals, no sell-through provision is in effect, and in any event a sell-through would violate federal law.

In November 2018, EPA proposed to allow a two year sell-through period for Step 1 devices. 83 Fed. Reg. 61574 (Nov. 30, 2018). The Attorneys General of several states, including New York, opposed that proposed sell-through, explaining that EPA lacked authority to authorize a sell-through period. *See* Comment submitted by States (Jan. 14, 2019), *available at*: <https://www.regulations.gov/document?D=EPA-HQ-OAR-2018-0195-0066>. Further, even if EPA did allow a sell-through, the Attorneys General pointed out that the sale of Step 1 devices after May 15, 2020 may constitute consumer fraud because the devices could lawfully not be installed and used for their intended purpose. *Id.* On April 2, 2020, EPA declined to finalize the proposed sell-through period. 85 Fed. Reg. 18,448 (April 2, 2020).

On May 22, 2020, EPA proposed another sell-through period, but this sell-through period is not in effect, and may never go into effect. *See* 85 Fed. Reg. 31124 (May 22, 2020). Moreover, even if EPA authorizes a sell-through, that sell-through would lack legal authority and sale of Step 1 devices during the sell-through period may violate New York’s consumer fraud laws. The Attorneys General of several states again opposed this sell-through. *See* Comment submitted by States (July 6, 2020), <https://www.regulations.gov/document?D=EPA-HQ-OAR-2018-0195-0313>.

It is important not to sell Step 1 devices to reduce the harms of particulate matter pollution to New Yorkers. Fine particulate matter emissions have drastic health effects, particularly on those with respiratory issues and people struggling with COVID-19. In addition, as EPA noted upon issuing its final rule, residential wood smoke can contribute to unhealthy levels of fine particulates in many neighborhoods nationwide, including in minority and low-income neighborhoods, and impact people in their homes. As the Step 2 units are certified to emit less than half of the fine particulates of Step 1 devices, continued sale of Step 1 devices may be exacerbating air pollutant conditions in these communities and homes. There are also many Step 2 devices available to sell lawfully that would permit your members to continue to sell wood-burning devices while complying with the law and protecting the health of New Yorkers.

For these reasons, the New York Attorney General’s Office has sent a letter to a large retailer informing them that they are selling step one devices in violation of federal and state law. We also are investigating whether other retailers are continuing to sell non-compliant devices. We ask that HPBA encourage its members to protect the health of New Yorkers and follow the law by selling only step two devices.

Sincerely,

s/ Nicholas C. Buttino
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