



July 2, 2020

VIA ELECTRONIC SUBMISSION

Environmental Protection Agency

Attn: Office of Air Quality Planning and Standards, Environmental Protection Agency

Re: Standards of Performance for New Residential Wood Heaters, New Residential Hydronic Heaters and Forced-Air Furnaces, 85 Fed. Reg. 31,124 (proposed May 22, 2020)

Docket ID: EPA-HQ-OAR-2018-0195

The Institute for Policy Integrity (“Policy Integrity”) at New York University School of Law¹ respectfully submits the following comments to the Environmental Protection Agency (“EPA”) regarding a proposed rule that would amend the 2015 New Source Performance Standards (“2015 NSPS”) to extend the compliance deadline for certain categories of residential wood heating devices (“Proposed Rule”).² Policy Integrity is a non-partisan think tank dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, economics, and public policy.

We write to make the following comments:

- Causing harm that far outweighs any cost savings, as the agency proposes to do in the Proposed Rule, contradicts the Clean Air Act’s mandate, longstanding agency guidance, and Supreme Court caselaw.
- EPA has not provided a reasoned explanation for the Proposed Rule.

I. Background

Section 111(b) of the Clean Air Act requires EPA to establish standards of performance for new stationary sources of air pollution. In accordance with this mandate, EPA announced in 2009 that it was undertaking a review of the New Source Performance Standards for wood heating devices, which had not been updated since 1988.³ Following that review, in the 2015 NSPS, EPA updated existing performance standards for several types of residential wood heaters listed in subpart AAA

¹ This document does not purport to present New York University School of Law’s views, if any.

² Standards of Performance for New Residential Wood Heaters, New Residential Hydronic Heaters and Forced-Air Furnaces, 85 Fed. Reg. 31,124 (proposed May 22, 2020).

³ See Env’tl. Prot. Agency, Regulatory Impact Analysis (RIA) for Residential Wood Heaters NSPS Revision: Final Report, EPA-452/R-15-001 2-1 (2015) [hereinafter “2015 NSPS RIA”], <https://www.regulations.gov/document?D=EPA-HQ-OAR-2018-0195-0011>.

of 40 CFR part 60, including wood stoves.⁴ In addition, the agency added two new categories of wood heating devices, both listed in subpart QQQQ: hydronic heaters and forced-air furnaces.⁵

In the 2015 NSPS, EPA implemented a “stepped compliance approach.”⁶ Under this approach, Step 1 compliance levels were immediately effective upon the rule’s effective date. More stringent compliance levels, classified as Step 2, were to become effective five years later, on May 15, 2020. Step 2 compliance was set five years in the future “in order to allow manufacturers lead time to develop, test, field evaluate and certify current technologies across their consumer product lines.”⁷

On November 30, 2018, EPA proposed to amend the 2015 NSPS by adding an additional two-year “sell-through” period to that five-year timeline for subpart QQQQ hydronic heaters and forced-air furnaces manufactured or imported during or before May 2020—thus delaying the 2020 compliance date by two years (“2018 Proposal”).⁸ EPA prepared a Supplemental Regulatory Impact Analysis (“Supplemental RIA”) assessing the impacts of the 2018 Proposal.⁹ EPA ultimately decided not to implement the 2018 Proposal, stating that there was not enough quantitative data to support it.¹⁰

In the Proposed Rule, EPA is again proposing to add a new sell-through date, lengthening the compliance deadline to November 30, 2020, for both subpart AAA wood heaters and subpart QQQQ hydronic heaters and forced-air furnaces.¹¹ EPA claims that this extension is needed to “mitigate the impact of the ongoing COVID-19 pandemic on retailers who have lost valuable sales opportunities during the closures, stay-at-home orders, and other precautions taken to address the pandemic.”¹² According to EPA, the shutdowns related to the COVID-19 pandemic beginning around March 15, 2020, have deprived manufacturers and retailers of sixty days of time to sell Step 1 compliant devices, and the Proposed Rule is needed to give these sellers the full benefit of the five years outlined in the 2015 NSPS.¹³

EPA did not prepare a regulatory impact analysis in connection with the Proposed Rule. EPA claims that the Proposed Rule will help mitigate lost sales but that the agency is “unable to quantify” costs or environmental impacts.¹⁴ EPA nonetheless states that the Supplemental RIA is “an illustration” of the impacts of additional sales time.¹⁵

⁴ Standards of Performance for New Residential Wood Heaters, New Residential Hydronic Heaters and Forced-Air Furnaces, 80 Fed. Reg. 13,672, 13,673 (Mar. 16, 2015).

⁵ *Id.*

⁶ *Id.* at 13,676.

⁷ *Id.*

⁸ Standards of Performance for New Residential Wood Heaters, New Residential Hydronic Heaters and Forced-Air Furnaces, 83 Fed. Reg. 61,574 (proposed Nov. 30, 2018).

⁹ Env'tl. Prot. Agency, Supplemental Regulatory Impact Analysis (RIA) for “Standards of Performance for New Residential Wood Heaters, New Residential Hydronic Heaters and Forced-Air Furnaces” (2018) [hereinafter “Supplemental RIA”], <https://www.regulations.gov/document?D=EPA-HQ-OAR-2018-0195-0008>.

¹⁰ 85 Fed. Reg. at 31,128.

¹¹ *Id.* at 31,127.

¹² *Id.*

¹³ *Id.* at 31,128.

¹⁴ *Id.*

¹⁵ *Id.*

II. The Proposed Rule Is Arbitrary and Capricious Because It Imposes Net Costs on Society in a Way that Ignores EPA’s Statutory Mandate, Longstanding Agency Guidance, and Supreme Court Caselaw

A. The Clean Air Act, Executive Order 12,866, and Supreme Court Caselaw Require EPA to Promote Public Health and Maximize Benefits

The statutory purpose of the New Source Performance Standards emissions limits under the Clean Air Act is to “promote the public health and welfare.”¹⁶ Executive Order 12,866 mandates that agencies select the regulatory approach “that maximize[s] net benefits (including potential economic, environmental, public health and safety [impacts])” unless a specific approach is statutorily prescribed.¹⁷ Each agency is directed to “tailor its regulations to impose the least burden on society.”¹⁸ In *Michigan v. EPA*, the Supreme Court declared that “[n]o regulation is ‘appropriate’ if it does significantly more harm than good.”¹⁹ But here, as discussed in Section II(B) below, the Proposed Rule violates the Clean Air Act, Executive Order 12,866, and *Michigan v. EPA* by imposing significant net costs on society in the form of forgone benefits. In fact, as discussed in Section II(C) below, the Proposed Rule is even more costly than the Supplemental RIA suggests because the Supplemental RIA (1) contains at least two calculation errors, (2) did not contemplate subpart AAA wood heaters, and (3) was not calculated in light of the health effects of the COVID-19 pandemic.

B. The Supplemental RIA Demonstrates that the Proposed Rule Is Net Costly

Under EPA’s own analysis, it is clear that the Proposed Rule is net costly because any extension in the period of time during which Step 1 heaters can be sold will generate forgone benefits that outweigh cost savings.²⁰ The Step 2 emissions limits imposed by the 2015 NSPS’ May 15, 2020 compliance deadline are expected to greatly reduce human exposure to ambient fine particulate matter (“PM_{2.5}”). PM_{2.5} exposure contributes to a number of detrimental health effects, including heart attacks, strokes, asthma exacerbation, and an array of other respiratory problems.²¹ Both short- and long-term exposure to PM_{2.5} increase the risk of premature death. The Supplemental RIA estimated that annual forgone emissions reductions from additional sales of Step 2 non-compliant forced-air furnaces and hydronic heaters under the 2018 Proposal were anywhere from 271 to 387 tons.²² This would have resulted in \$250 to \$780 million in forgone benefits in the form of increased morbidity and premature death due to human exposure to PM_{2.5} emissions during the 2018 Proposal’s first three years alone.²³ According to the Supplemental RIA, selling Step 1 heaters imposes average annual forgone benefits of anywhere from \$0.1 to \$0.23 billion at a 3% discount rate and \$0.09 to \$0.21 billion at a 7% discount rate.²⁴ In comparison, average annual

¹⁶ Clean Air Act, 42 U.S.C. § 7401(b)(1) (2018).

¹⁷ Exec. Order No. 12,866, 58 Fed. Reg. 51,735, 51,735 (Oct. 4, 1993).

¹⁸ *Id.* at 51,736.

¹⁹ *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015).

²⁰ *See* 83 Fed. Reg. at 61,583 (noting that “the estimated costs are greater than the benefits, leading to a negative net benefit (or net cost)”).

²¹ 2015 NSPS RIA, *supra* note 3, at 7-3 tbl.7-1.

²² Supplemental RIA, *supra* note 9, at 9 tbl.6.

²³ *Id.* at 12 tbl.9.

²⁴ *Id.* at 13–14 tbl.11.

cost savings are only \$0.01 billion.²⁵ Thus, by EPA’s own calculations, the sale of Step 1 heaters imposes annual forgone benefits that outweigh cost savings by somewhere between 9 to 23 times over.

C. The Supplemental RIA Underestimates the Societal Health Costs of the Forgone Emissions Reductions Resulting from the Proposed Rule

While the Supplemental RIA helps to demonstrate that delaying the sale of Step 1 heaters is net costly, relying on that RIA would underestimate the Proposed Rule’s actual forgone benefits for three reasons. First, the Supplemental RIA contains two calculation errors that led to a vast undercounting of forgone benefits. Second, the main analysis in the Supplemental RIA did not contemplate delaying the compliance deadline for subpart AAA wood heaters. Third, the Supplemental RIA did not account for the health effects of the COVID-19 pandemic.

1. The Supplemental RIA Contains At Least Two Serious Calculation Errors

Executive Order 12,866 instructs that the assessment of a regulation’s costs and benefits should be made “on the best reasonably obtainable scientific, technical, economic, and other information,” and effects should be quantified “to the extent feasible.”²⁶ Courts have held that “when an agency decides to rely on a cost-benefit analysis as part of its rulemaking, a serious flaw undermining that analysis can render the rule unreasonable.”²⁷ The Supplemental RIA’s calculations are fundamentally flawed in two ways.

First, EPA underestimated the forgone emissions reductions that will result from additional sales of Step 2 non-compliant wood heating devices by calculating emissions over a truncated three-year period rather than over the lifetime use of these devices.²⁸ But each Step 1 heater that is sold in the place of a Step 2 heater emits higher levels of PM_{2.5} over the lifetime of the product than the Step 2 heater would. In conducting the 2015 NSPS’ Regulatory Impact Analysis, EPA assumed that wood heating devices typically have a twenty year use lifespan.²⁹ Benefits from emissions reductions under that rule were therefore calculated over this period: “our analysis assumes that a stove shipped in 2015 will emit in homes for 20 years – or until 2034.”³⁰ In the Supplemental RIA, however, EPA provided only three years’ worth of those emissions reductions when calculating the forgone emissions. By ignoring the later years, EPA left out a significant category of forgone benefits.

²⁵ *Id.*

²⁶ Exec. Order No. 12,866, 58 Fed. Reg. at 51,736. Longstanding guidance on regulatory analysis from the Office of Management and Budget also instructs agencies that a “good regulatory analysis” will include an evaluation of the “quantitative and qualitative” benefits and costs of a proposed action and its identified alternatives. Office of Mgmt. & Budget, Exec. Office of the President, Circular A-4, Regulatory Analysis 2 (2003) [hereinafter “Circular A-4”], <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A4/a-4.pdf>.

²⁷ *Nat’l Ass’n of Home Builders v. EPA*, 682 F.3d 1032, 1040 (D.C. Cir. 2012); see also *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (arbitrary and capricious standard requires agency to “examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made” (internal quotation marks omitted)).

²⁸ Supplemental RIA, *supra* note 9, at 9.

²⁹ 2015 NSPS RIA, *supra* note 3, at 4-14 (noting that “most wood heaters in consumer homes emit for at least 20 years and often much longer”).

³⁰ *Id.* at 4-15.

Second, EPA deceptively calculated forgone emissions benefits based on a four-year average that includes a year prior to the Proposed Rule taking effect. In the Supplemental RIA, EPA reports that the annual costs of selling Step 1 heaters, in the form of forgone benefits, range between \$0.1 and \$0.23 billion at a 3% discount rate and between \$0.09 and \$0.21 billion at a 7% discount rate.³¹ The agency generated these values by first calculating the value of forgone emissions in each year between 2019 and 2022, and then averaging these values over all four years.³² However, the agency's inclusion of 2019 in its annual average of emissions reductions is misleading. The 2018 Proposal's sole impact would have been to delay the 2020 compliance date, so it would not have generated any forgone emissions until 2020. The year 2019 had no forgone benefits and should not have been included in the average. By including 2019 in its calculation of average impacts, EPA significantly diluted its estimates of annual forgone emissions, dividing by four instead of by three. Had the agency properly omitted 2019, the average annual forgone emissions benefits would have been approximately \$30 to \$80 million higher, ranging between \$0.14 and \$0.31 billion at a 3% discount rate and \$0.12 and \$0.28 billion at a 7% discount rate.

Compliance with the APA requires that “[n]ot only must an agency’s decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational.”³³ By failing to disclose the majority of the Proposed Rule’s forgone benefits and illogically diluting average annual forgone emissions reductions, EPA failed to meet this standard.

2. *The Supplemental RIA Did Not Contemplate Subpart AAA Wood Heaters*

Relying on the Supplemental RIA would not tell the full story about the forgone benefits at issue in the Proposed Rule for another reason: that RIA accounted only for subpart QQQQ hydronic heaters and forced-air furnaces.³⁴ But the Proposed Rule would also extend the compliance deadline for subpart AAA wood heaters. If the delay for subpart AAA wood heaters is included in the analysis, it is likely that forgone benefits would be even higher and continue to greatly outweigh any cost savings. According to an analysis that the agency provided in Appendix A of the Supplemental RIA, subpart AAA wood heaters produce emissions that result in annual forgone benefits ranging between \$36 to \$80 million at a 3% discount rate and \$32 to \$72 million at a 7% discount rate.³⁵ In contrast, the agency’s cost savings estimates for these appliances, range between \$1.1 and \$15.9 million, depending on the year.³⁶ Because the sale of subpart AAA wood heaters

³¹ Supplemental RIA, *supra* note 9, at 13–14 tbl.11.

³² *See id.* at 11; Env’tl. Prot. Agency, PV EAVs Forgone Benefits+ Cost Savings RWH Proposal 2018 Final Spreadsheet, tab ForgoneBenefits (Scenarios 2&3), <https://www.regulations.gov/document?D=EPA-HQ-OAR-2018-0195-0008>.

³³ *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998).

³⁴ *See, e.g.*, Supplemental RIA, *supra* note 9, at 9–10 tbls.6 & 7.

³⁵ *Id.* at 18 tbl.A-8.

³⁶ *Id.* at 16 tbl.A-3.

imposes forgone benefits that significantly outweigh cost savings, the Proposed Rule would be even more net costly than the analysis in the Supplemental RIA suggests.

3. *The Supplemental RIA Did Not Account for the Health Effects of the COVID-19 Pandemic*

Relying on the Supplemental RIA to understand the forgone benefits of the Proposed Rule would lead to an underestimate for a third reason: that RIA did not account for the COVID-19 pandemic's health effects. In the Proposed Rule's preamble, EPA acknowledges the pandemic's effects on retail,³⁷ but the agency ignores the pandemic's effects on the respiratory health of the U.S. population. But evidence links PM_{2.5} exposure with higher COVID-19 death rates. A Harvard University study conducted this spring concluded that "[a] small increase in long-term exposure to PM_{2.5} leads to a large increase in the COVID-19 death rate."³⁸ California Air Resources Board is also planning to investigate the connection between PM_{2.5} exposure and COVID-19 death rates.³⁹ Thus, any increase in PM_{2.5} caused by the Proposed Rule will lead to an additional category of deaths – creating even more net harms. The COVID-19 pandemic is another reason that the emissions the Proposed Rule would impose are even more costly than the Supplemental RIA suggests.

D. The Proposed Rule's Net Harms Violate the Clean Air Act, Executive Order 12,866, and Supreme Court Caselaw

The Proposed Rule cannot be "appropriate" under *Michigan v. EPA*, as "it does significantly more harm than good."⁴⁰

A regulation that "does significantly more harm than good"⁴¹ also cannot be consistent with the Clean Air Act's mandate to "promote the public health and welfare."⁴² While EPA has some discretion in its implementation of the Clean Air Act's mandate, that discretion must be exercised in a reasonable manner and must be grounded in the agency's statutory authority.⁴³ Yet EPA has pointed to nothing in the Clean Air Act that would support the view that the agency has discretion to impose public health and environmental harms on society, as the Proposed Rule would.

³⁷ 85 Fed. Reg. at 31,128.

³⁸ Xiao Wu et al., *Exposure to Air Pollution and COVID-19 Mortality in the United States: A Nationwide Cross-Sectional Study 2* (2020), https://projects.iq.harvard.edu/files/covid-pm/files/pm_and_covid_mortality_med.pdf.

³⁹ Curt Barry, *CARB Study on Pollution Link to Virus Deaths May Spur Push for PM Cuts*, InsideEPA.Com (May 6, 2020), <https://insideepa.com/daily-news/carb-study-pollution-link-virus-deaths-may-spur-push-pm-cuts>.

⁴⁰ *Michigan v. EPA*, 135 S. Ct. at 2707 (internal quotation marks omitted).

⁴¹ *Id.*

⁴² Clean Air Act § 7401(b)(1).

⁴³ *Chevron v. NRDC*, 467 U.S. 837, 844 (1984) ("[A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."); *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 321 (2014) ("Even under Chevron's deferential framework, agencies must operate within the bounds of reasonable interpretation." (internal quotation marks omitted)); *see also North Carolina v. EPA*, 531 F.3d 896, 906 (D.C. Cir. 2008) (evaluating the reasonableness of an agency's discretionary interpretation under the familiar "arbitrary and capricious" framework of *State Farm*, 463 U.S. at 43, including that the agency "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise").

A regulation that “does significantly more harm than good”⁴⁴ further cannot be consistent with Executive Order 12,866’s guidance to “maximize net benefits”⁴⁵ and “impose the least burden on society.”⁴⁶ Moreover, Executive Order 12,866 advises that when agencies calculate the costs and benefits of a contemplated action they should consider “the alternative of not regulating.”⁴⁷ EPA should spare the imposition of massive health costs on the American people by declining to finalize the Proposed Rule.

III. The Proposed Rule Is Arbitrary and Capricious Because EPA Has Failed to Provide a Reasoned Explanation Supporting It

Even if the governing statute, agency guidance, and Supreme Court caselaw did allow EPA to cause harm as contemplated in the Proposed Rule, the APA still requires EPA to “examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made” when issuing any new regulation.⁴⁸ An agency cannot “fail[] to consider an important aspect of the problem” or “offer[] an explanation for its decision that runs counter to the evidence before the agency.”⁴⁹

In issuing the Proposed Rule, EPA has failed to meet these basic requirements in two ways. First, EPA has not considered the Proposed Rule’s costs in the form of forgone benefits. Second, EPA’s rationale for the Proposed Rule does not demonstrate that the rule is necessary or justified.

A. EPA Runs Afoul of Executive Order 12,866, the APA, and Caselaw by Ignoring the Proposed Rule’s Forgone Benefits

1. EPA Cannot Ignore the Proposed Rule’s Forgone Benefits

Executive Order 12,866 instructs agencies to consider “any adverse effects on . . . health, safety, and the natural environment” when assessing a regulation’s costs.⁵⁰ Courts have consistently required agencies to take the costs of their actions into account.⁵¹ Costs include forgone benefits, as well as harm to human health and the environment.⁵² The Proposed Rule’s forgone benefits also must be considered under the APA because they are “an important aspect of the problem”⁵³ given that they significantly outweigh the rule’s cost savings, as discussed in Section II(B) above.

⁴⁴ *Michigan v. EPA*, 135 S. Ct. at 2707.

⁴⁵ Exec. Order No. 12,866, 58 Fed. Reg. at 51,735.

⁴⁶ *Id.* at 51,736.

⁴⁷ *Id.* at 51,735.

⁴⁸ *State Farm*, 463 U.S. at 43 (internal quotation marks omitted).

⁴⁹ *Id.*

⁵⁰ Exec. Order No. 12,866, 58 Fed. Reg. at 51,741.

⁵¹ *Michigan v. EPA*, 135 S. Ct. at 2707 (“No regulation is ‘appropriate’ if it does significantly more harm than good.”); *New York v. Reilly*, 969 F.2d 1147, 1153 (D.C. Cir. 1992) (remanding a rule where the agency failed to explain how economic benefits would justify forgoing promised air benefits); *Johnston v. Davis*, 698 F.2d 1088, 1094–95 (10th Cir. 1983) (remanding an environmental study because it made “no mention” of a crucial factor that would make the action net costly).

⁵² See *Michigan v. EPA*, 135 S. Ct. at 2707.

⁵³ *State Farm*, 463 U.S. at 43.

But the Proposed Rule’s preamble makes no mention of forgone benefits, nor does it discuss emissions or health consequences. EPA says only that the agency is “unable to quantify what, if any, impacts there may be” and points to the Supplemental RIA,⁵⁴ which, as explained above,⁵⁵ is flawed and underestimates the full extent of the Proposed Rule’s costs. That statement is insufficient because the Proposed Rule causes significant harms of its own, and those harms must be quantified in an unflawed manner.

EPA’s failure to consider and calculate the Proposed Rule’s forgone benefits is a failure to follow the APA’s mandate to “examine the relevant data and articulate a satisfactory explanation for its action.”⁵⁶ It is also a failure to follow Executive Order 12,866’s instruction to conduct regulatory impact analyses for rules that “adversely affect in a material way . . . the environment, [or] public health.”⁵⁷ In fact, in EPA’s correspondence with the Office of Management and Budget (“OMB”) concerning the Proposed Rule, OMB asked EPA to provide economic analysis to support the rule, stating that “[t]his time shift in sales is equivalent to a sell through and requires an economic analysis.”⁵⁸ If EPA wants to move forward with the Proposed Rule, the agency must conduct a regulatory impact analysis.

2. *By Ignoring the Proposed Rule’s Forgone Benefits, EPA Impermissibly Puts a Thumb on the Scale in Favor of the Proposed Rule*

Courts have held that it is impermissible for agencies to simply consider “one side of the [cost-benefit] equation.”⁵⁹ Yet here EPA “inconsistently and opportunistically frame[s] the costs and benefits of the rule”⁶⁰ by only mentioning the Proposed Rule’s cost savings in recouped sales, while ignoring the Proposed Rule’s forgone benefits in emissions reductions. EPA impermissibly “put[s] a thumb on the scale”⁶¹ in favor of the Proposed Rule because the agency emphasizes the Proposed Rule’s cost savings for retailers and manufacturers while ignoring its forgone benefits for populations affected by PM_{2.5} emissions.

B. EPA Fails to Articulate a Satisfactory Explanation as to Why the Proposed Rule Is Necessary

Even if EPA had acknowledged the Proposed Rule’s forgone benefits, the agency still must “explain why the costs saved were worth the benefits sacrificed.”⁶² The agency bears the ultimate

⁵⁴ 85 Fed. Reg. at 31,128.

⁵⁵ See *supra* Section II(C).

⁵⁶ *State Farm*, 463 U.S. at 43.

⁵⁷ Exec. Order No. 12,866, 58 Fed. Reg. at 51,738.

⁵⁸ Correspondence between Env’tl. Prot. Agency and Office of Mgmt. & Budget, Exec. Office of the President, EO12866 Correspondence 05072020 RE Interagency Passback Round 1 on Wood Heaters Rule 16 (May 7, 2020), <https://www.regulations.gov/document?D=EPA-HQ-OAR-2018-0195-0246>.

⁵⁹ *California v. BLM*, 277 F. Supp. 3d 1106, 1123 (N.D. Cal. 2017); see also *Sierra Club v. Sigler*, 695 F.2d 957, 979 (5th Cir. 1983) (holding that an agency “cannot tip the scales . . . by promoting [an action’s] possible benefits while ignoring [its] costs”); *U.S. Telecom Ass’n v. FCC*, 290 F.3d 415, 424–25 (D.C. Cir. 2002) (remanding a rule for failure to consider costs).

⁶⁰ *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1148–49 (D.C. Cir. 2011).

⁶¹ *Ctr. for Biological Diversity v. Nat’l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1198 (9th Cir. 2008).

⁶² *Pub. Citizen, Inc. v. Mineta*, 340 F.3d 39, 58 (2d Cir. 2003).

burden of supplying “a satisfactory explanation for its action,” including due consideration of “relevant factors” like costs.⁶³

Yet EPA fails to “articulate a satisfactory explanation”⁶⁴ as to why the Proposed Rule is necessary. First, EPA claims that the COVID-19 pandemic hurt sellers, but that claim rests on speculation, in part because the agency fails to quantify the pandemic’s effects on sales. Second, EPA fails to explain why extending the Step 2 compliance deadline does not overcompensate sellers.

1. EPA Claims that the COVID-19 Pandemic Hurt Sellers, but the Agency Fails to Quantify the Pandemic’s Effects on Sales

EPA’s primary explanation for the Proposed Rule is that “the COVID-19 pandemic has resulted in very significant losses of retail sales,”⁶⁵ but the agency provides almost no evidence to support this assertion. In assessing whether a regulation is supported by the reasoned explanation required under the APA, courts “do not defer to the agency’s conclusory or unsupported suppositions.”⁶⁶ And here EPA’s suppositions about the pandemic are conclusory and unsupported. The agency relies only on a single letter from Jack Goldman of the Hearth, Patio & Barbecue Association, which claims that \$4 to \$10 million in inventory will be stranded if the deadline is not extended and contains anecdotal evidence from sellers describing the effects of the pandemic.⁶⁷

EPA provides no context demonstrating that this \$4 to \$10 million figure is significant and has made no attempt to quantify the pandemic’s effects on sales, or the actual revenue shortfalls and number of wood heaters that would be stranded if the Proposed Rule is not implemented. Further, EPA provides no quantifiable data about which sellers were affected by the pandemic – big box stores like Walmart, for example, have remained open throughout the shutdowns.⁶⁸ There is only anecdotal evidence in Mr. Goldman’s letter, and EPA has given no indication about whether this evidence is reliable. Nor has EPA made any effort to weigh this evidence against the harms the Proposed Rule would impose. EPA’s speculation about the negative retail effects of the COVID-19 pandemic “is an inadequate replacement for the agency’s duty to undertake an examination of the relevant data and reasoned analysis.”⁶⁹

⁶³ *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009) (quoting *State Farm*, 463 U.S. at 43); *Fox*, 556 U.S. at 549 (Breyer, J., dissenting).

⁶⁴ *State Farm*, 463 U.S. at 43.

⁶⁵ 85 Fed. Reg. at 31,128.

⁶⁶ *United Techs. Corp. v. U.S. Dep’t of Def.*, 601 F.3d 557, 562 (D.C. Cir. 2010) (internal quotation marks omitted); *NetCoalition v. SEC*, 615 F.3d 525, 539 (D.C. Cir. 2010) (holding that the court would not “defer to the agency’s conclusory or unsupported suppositions” (internal quotation marks omitted)).

⁶⁷ Letter from Jack Goldman, President & CEO, Hearth, Patio & Barbecue Ass’n, to Andrew Wheeler, Adm’r, Env’tl. Prot. Agency (Mar. 24, 2020) (on file with Env’tl. Prot. Agency), <https://www.regulations.gov/document?D=EPA-HQ-OAR-2018-0195-0242>.

⁶⁸ Annie D’Innocenzio, *Big Box Stores Were Already Pulling Ahead of Mall-Based Retailers Like Macy’s. ‘The Pandemic Is Now Pushing It to the Brink.’* Chicago Tribune (May 22, 2020, 2:48 PM), <https://www.chicagotribune.com/business/ct-nw-virus-outbreak-macys-coronavirus-20200522-xvt3psrp3vexxedp7rynpj24e-story.html>.

⁶⁹ *Horsehead Res. Dev. Co. v. Browner*, 16 F.3d 1246, 1269 (D.C. Cir. 1994); *see also Ariz. Cattle Growers’ Ass’n v. U.S. Fish & Wildlife*, 273 F.3d 1229, 1244 (9th Cir. 2001) (holding that agency action is arbitrary and capricious when it is based on “speculation . . . not supported by the record”).

2. EPA Fails to Explain Why Extending the Step 2 Compliance Deadline Does Not Overcompensate Sellers

EPA claims that the Proposed Rule is justified because it replaces the sixty sales days lost between March 15 and May 15 due to the COVID-19 pandemic.⁷⁰ But (even if this was a valid reason to delay the rule, and it is not), that statement is invalid because the Proposed Rule does not replace those sixty days, it instead overcompensates sellers.

First and foremost, the lost sixty days should not be considered lost sales days. According to EPA, the typical selling season for wood heaters runs from October to March.⁷¹ Mr. Goldman's letter further contains testimony admitting that most sales occur in August, September, October, and November⁷² and that March is part of "our historic slow period anyway."⁷³ Thus, even according to EPA's evidence, sellers lost at most fifteen days during the typical selling season, and these days were so close to the May 2020 compliance deadline that no rational seller should have had Step 1 heaters in stock during that time.

Second, the days that EPA proposes to give sellers under the Proposed Rule are very different from any possible sales days lost. In EPA's public hearing on June 8, 2020, the agency stated that, if adopted, the Proposed Rule would be implemented in September. The Proposed Rule would thus replace the days lost outside the typical selling season with sixty days during the peak selling season in October and November, plus additional days in September. EPA has provided no explanation as to why the agency assumes that these sixty or more days between September and November will not result in more sales than would have occurred from March 15 to May 15 under normal circumstances. EPA says only that the "summer months are typically a very low selling season for wood heating devices," so sixty summer days is not an adequate replacement.⁷⁴ But EPA's own statements suggest that the period from March 15 to May 15 is not part of the typical selling season.⁷⁵ There is no "rational connection between the facts found and the choice made," and EPA's decision "runs counter to the evidence before the agency."⁷⁶

Additionally, per OMB guidance, when a rule is net costly, as the Proposed Rule is, an agency is required to "conduct further analysis" to check all of its underlying assumptions using "alternative plausible assumptions."⁷⁷ Through this analysis, the agency should determine and explain which of the alternative assumptions "is more appropriate" while also making "any hidden assumptions explicit."⁷⁸ EPA has not explained why its assumption that sales during the fall will be equal to the sales lost in the spring is more appropriate than the alternative plausible assumption that there will

⁷⁰ 85 Fed. Reg. at 31,128.

⁷¹ Env'tl. Prot. Agency, A Qualitative Assessment of Impacts of Not Including a Sell-Through for Wood Heating Devices 2 (2020) [hereinafter "Qualitative Assessment"], <https://www.regulations.gov/document?D=EPA-HQ-OAR-2018-0195-0237>.

⁷² Goldman, *supra* note 67, at 3.

⁷³ *Id.* at 12.

⁷⁴ 85 Fed. Reg. at 31,128.

⁷⁵ Qualitative Assessment, *supra* note 71.

⁷⁶ *State Farm*, 463 U.S. at 43 (internal quotation marks omitted).

⁷⁷ Circular A-4, *supra* note 26, at 42.

⁷⁸ *Id.*

be more sales during the fall than there would have been during the spring. In fact, evidence suggests that this alternative assumption is more plausible than the assumption EPA made.

IV. Conclusion

For the foregoing reasons, the Proposed Rule is arbitrary and capricious.

Sincerely,

Madison Condon
Bethany Davis Noll
Samuel Klotz