



STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

LETITIA JAMES
ATTORNEY GENERAL

DIVISION OF SOCIAL JUSTICE
ENVIRONMENTAL PROTECTION BUREAU

July 29, 2020

Ross W. McCanless
Executive Vice President, General Counsel & Corporate Secretary
Lowe's Companies, Inc.; Lowe's Home Centers LLC
1000 Lowe's Boulevard, Mail Code NB6LG
 Mooresville, North Carolina 28117

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

Dear Mr. McCanless,

We write to inform you that as of July 28, 2020, your company's website (<https://www.lowes.com/>) offers for sale residential wood-burning devices that are in violation of the U.S. Environmental Protection Agency Performance Standard for New Residential Wood Heaters (40 CFR Part 60, Subparts AAA, QQQ).¹ Under this EPA Performance Standard, new residential wood heaters sold after May 15, 2020 must meet the lower emissions criteria identified by EPA as "Step 2" devices. Your website appears to offer for sale of residential wood burning devices that meet only the EPA definition of a "Step 1" device. The legal deadline for the sale of these Step 1 devices passed on May 15, 2020, and their continued sale violates the federal Clean Air Act. The penalty for sales in violation of the performance standard can be tens of thousands of dollars per violation under federal law, and may also constitute consumer fraud subject to additional penalty under New York law. *See* 42 U.S.C. § 7413(b); 40 CFR § 19.4; New York General Business Law § 349. On behalf of the New York State Attorney General's Office (OAG), I request that Lowe's immediately stop selling Step 1 devices in New York or to New York consumers through the company's website.

Additionally, we request that Lowe's provide OAG, within twenty days of the date of this letter, with the number of Step 1 devices, if any, that Lowe's has sold at its retail stores in New York or to New York consumers through the company's website since May 16, 2020.

¹ For example, Lowe's offers the Buck Stove 2600-sq ft Stove (<https://www.lowes.com/pd/Buck-Stove-2600-sq-ft-Stove/1001246094>), which claims EPA approval but emits 3.6 grams per hour of particulate matter, which exceeds the Step 2 limits.

Background

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 you to continue to sell wood-burning devices while complying with the law and protecting the health of New Yorkers.

For these reasons, please immediately stop offering for sale and selling Step 1 wood-burning devices. Although EPA is electing not to enforce the Performance Standard for New

Residential Wood Heaters, the New York Attorney General's Office can pursue penalties under both federal and state law.

By August 10, 2020, please also confirm that Lowe's is not offering for sale or selling Step 1 wood-burning devices in New York or to New York consumers through the company's website.

Sincerely,

s/ Nicholas C. Buttino

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