

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

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BEFORE THE ADMINISTRATOR

In the Matter of)
WOODKILN, Inc.,) Docket No. CAA-95-111-001
Petitioner)

Initial Decision

This is a proceeding under the standards of performance regulating the emissions of particulate material from new residential wood heaters, 40 C.F.R. §§ 60.530 - 539b.¹ The EPA denied Petitioner's application for a certificate that Petitioner's woodburning appliance complies with the applicable emission limits stating that it failed to satisfy the test requirements. Acting pursuant to 40 C.F.R. §60.539, Petitioner requested a hearing on that denial, and this proceeding is upon that request. For the reasons stated below, it is concluded that Petitioner's certification was properly denied.

The matter is now before me on the EPA's motion for a summary decision. The rules of practice applicable to this proceeding, 40 C.F.R. §60.539, do not specifically provide for summary decisions. They do, however, vest in the presiding officer discretion as to

¹ The standards are issued pursuant to the Clean Air Act, sections 101 et seq., 42 U.S.C. 7401 et seq. They implement section 111 of the Act, 42 U.S.C. 7411, which provides for standards of performance for new stationary sources of air pollutants. 53 Fed. Reg. 5860 (Feb. 26, 1988),

how the hearing shall be conducted.² Both parties have submitted documents in support of their respective positions. In addition, argument on the matter was heard before me on March 28, 1996.³ If each party has had the opportunity to submit all evidence to support its position and to counter the submissions of the other side, and the record thus constituted shows that there are no genuine issues of material fact that need to be resolved, and the question involves only one of law or policy, I find that the requirements of a hearing under the rules have been satisfied.⁴ In ruling upon the EPA's motion, I shall be guided by the general rule applicable to summary judgement in the Federal courts, namely, that the burden of showing that there are no genuine issues of material fact is upon the EPA as the moving party.⁵

The Regulatory Background

The EPA on February 26, 1988, promulgated standards of performance for new residential wood heaters.⁶ These standards are issued under the Clean Air Act, section 111, 42 U.S.C. §7411, and

² 40 C.F.R. §60.539(g).

³ The arguments were summarized by me in a letter to the parties dated April 2, 1996.

⁴ Cf., Puerto Rico and Sewer Authority v. U.S. EPA, 35 F 3d 600, 606 (1st Cir. 1994); cert. denied, ___ U.S. ___, 130 L. Ed. 2d 1065 (1995) (Administrative Summary Judgement upheld as a valid procedure).

⁵ 10A Wright, Miller & Kane, Federal Practice and Procedure §2727, p. 121 (2d ed 1983); 6 J. Moore, W. Taggart & J. Wicker, Moore's Federal Practice ¶56.15[3] (2d ed 1996).

⁶ 53 Fed. Reg. 5873 (Feb 26, 1988). The standards are codified at 40 C.F.R. §§60.530 - 60.539(b).

are based upon the degree of emission limitation demonstrated to be achievable by the "best demonstrated technology."⁷ They apply to all wood heaters, as defined in the regulation, manufactured on or after July 1, 1988, or sold at retail on or after July 1, 1990, and limit the emissions of particulate matter ("PM") from the wood heaters measured as grams of particulate per hour (g/hr).⁸ PM emissions carry with them a risk of respiratory disease, cardiovascular disease and carcinogenesis. They can also affect visibility. In addition, the increased wood heater efficiencies resulting from the standards are expected to result in reduced wood consumption thereby saving timber and preserving woodlands and vegetation for aesthetics, erosion control and ecological needs.⁹

Compliance with the standards is determined by testing a model of the heater according to specified test methods and procedures.¹⁰ If the model tests satisfactorily, the EPA issues a certificate of compliance for that model line.¹¹ Certification is evidenced by a

⁷ "Best demonstrated technology" means "the best technological system of continuous reduction which (taking into consideration the cost of achieving such emission reduction and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated." Preamble to proposed rule, 52 Fed. Reg. 4994; Clean Air Act section 111(a)(1), 42 U.S.C. §7411(a)(1).

⁸ 40 C.F.R. §§ 60.530, 60.532.

⁹ Final rule, 53 Fed. Reg. 5861 (Feb 26, 1988). Hereafter, Federal Register citations to the final rule and to the proposed rule are to their respective preambles.

¹⁰ 40 C.F.R. §§60.533, 60.534.

¹¹ 40 C.F.R. §60.5333(e)(1).

label affixed to the heater and a heater which does not have a label stating that it complies with EPA standards cannot be sold.¹²

The test prescribed for measuring the PM emissions is Method 28.¹³ Under this test, emissions are measured over a range of burn rates using standardized fuel and fuel loading procedures.¹⁴ The burn rate at which the heater is operated is the amount of fuel consumed in a given amount of time (kg/hr). It affects both PM emissions and the heat output of the heater and is regulated by the air inlet supply.¹⁵ Significant to this proceeding is the requirement that wood heaters manufactured after July 1, 1990, must be able to operate under test conditions at a minimum burn rate of less than 1 kg/hr.¹⁶

The Facts

Petitioner makes a wood burning stove, "Model WK23G." The appliance is an "affected facility" (wood heater) subject to the standards of performance for new residential wood heaters.¹⁷ The

¹² 40 C.F.R. §60.538.

¹³ 40 C.F.R. §60.534(a). Method 28 is set out in 40 C.F.R. Part 60, App. A at 901.

¹⁴ 40 C.F.R. Part 60, App. A at 901, 903.

¹⁵ Proposed rule, 52 Fed. Reg. 5001-5002 (Feb. 18, 1987).

¹⁶ Method 28, section 5 (Burn Rate Criteria), 40 C.F.R. Pt. 60 App. A, at 903.

¹⁷ For the criteria, see the definition of a "wood heater" in 40 C.F.R. §60.531. For the conformity of the model with the criteria, see letter of John Meeker to Dwight Poffenberger dated November 1, 1993, admitting to an air-to-fuel ratio of 10-to-1; EPA Exhibit 1, Appendix A, p. 4, showing a usable fire box volume of 1.96 cubic feet; EPA Exhibit 2, p. 4 (Item II.B.), showing a minimum burn rate of less than 5 kg/hr and EPA Exhibit 1, App. A,

model includes an optional gas burner in the firebox and can be operated either with burning wood alone or burning wood and gas in combination. It has a trapezoidal shaped firebox which is tilted to the rear. It also has a large glass front to provide a full view of the fire. The upper part of the glass is fixed and is said to maximize radiant heat into the room. The lower part is a sliding glass door for loading.¹⁸ The burn rate is controlled exclusively by a stack damper.¹⁹

Petitioner had Model WK23G tested in 1993 for compliance with the regulation, with the intent of marketing it in 1994.²⁰ On October 15, 1993, Mr. John Meeker, Petitioner's owner, wrote the EPA as follows:

I have asked Warnock Hersey [the testing laboratory] to submit the test data on this unit [Model WK23G] even though it would not burn at less than 1 KG/HR....This design has been field tested for over a year in three very different installations. It works well with real fuel in real conditions and needs no further engineering. It is a very different product than what was envisioned when the standard was developed over five years ago. It is not air tight and will emit smoke into the room if the damper is closed too much. It has 2.5 square feet of glass exposed to the fire which becomes very dirty and hard to clean if burned too slowly. With the option of burning gas alone when not much heat is needed there is no reason why the user would intentionally burn wood so

p.2, showing a shipping weight of 107.1 lbs or less than 800 KG.

¹⁸ Promotional literature in file; EPA Exhibit 1, p. 1 and Appendix F.

¹⁹ EPA Exhibit 1, p.10. Air is supplied to the unit through a manifold with two rectangular inlets located at the lower rear corners of the firebox. Air also enters through the gas tube when gas is not entering the unit. Id.

²⁰ EPA Exhibit 1 (report of the tests done in 1993) and letter of Meeker to Poffenberger dated February 8, 1994.

slowly as to get the glass all coated with creosote.²¹

After reviewing the test data, the EPA on December 8, 1993, wrote to Mr. Meeker advising him that the EPA would not certify the model because it does not perform at a burn rate of less than one kilogram per hour as required by Method 28 of the regulation. The EPA also stated that a stove which burns both wood and natural gas must be tested in the wood-only mode. The EPA finally told petitioner that if petitioner decides to retest the unit it must do so in the wood-only mode and must achieve a burn rate of under one kilogram an hour.²²

Petitioner went ahead and had additional testing done on the unit.²³ On January 30, 1994, Mr. Meeker wrote the EPA as follows:

By a copy of this letter I am directing Warnock Hersey to cease work on a report of the January testing with wood only.

Any user of this product who burned 2x4's and 4x4's [as required by Method 28] at even 1.2 KG/HR would find very black glass and a dead coal bed upon reloading. The gas would be used to dry out the new charge and clean up the gas [sic]. That, is the primary reason for paying extra to have it. As with the KG/HR low burn rate, I maintain that the regulatory process six years ago did not envision this kind of product.

* * * *

I intend to market the WK23G as a 2 GPH device when burned in accordance with the owner's manual. The regulation does have the word "discretion" in the appeals

²¹ Letter of Meeker to Poffenberger dated October 15, 1993.

²² Letter of Rasnic to Meeker dated December 8, 1983. See Final rule, 53 Fed. Reg. 5869 (Appliance which uses as fuel a combination of both wood and natural gas must be tested in a wood-only, not a mixed-fuel, mode).

²³ EPA Exhibit 2.

process. I would hope that the EPA can find a way to bless this innovative new product.²⁴

The EPA, however, adhered to its position that Model WK23G was subject to the requirements of Method 28, and that the unit cannot be certified because it did not comply with the requirement that it have a burn rate of less than one kilogram per hour. By letter dated May 2, 1994, the EPA formally notified Petitioner that it would not certify the appliance.²⁵

Discussion

Petitioner initially raised the objection that its product is not a wood heater as defined by the regulation because the regulation defines a wood heater as an "appliance capable of and intended for space heating and domestic water heating" (emphasis added).²⁶ Petitioner points out that his product is not intended for domestic water heating. This argument was discussed briefly at the oral argument held on March 28, 1996. It was pointed out that the definition in the regulation differed from that in Method 28 where a wood heater was defined as an appliance "capable of and intended for space heating or domestic water heating" (emphasis added). Accordingly, the parties were given the opportunity to submit further briefing on the issue.²⁷

The EPA then submitted a supplemental brief pointing out that

²⁴ Letter of Meeker to Poffenberger dated 1/30/94.

²⁵ Letter of Miller (for Rasnic) to Meeker dated May 2, 1994.

²⁶ 40 C.F.R. §60.531.

²⁷ Letter of Senior ALJ Harwood to the parties dated April 2, 1996, summarizing the proceedings at the oral argument

the preamble to the proposed regulation and the proposed regulation as well as the proposed Method 28 test protocol all include domestic water heating in the definition as an alternative use to space heating so that either use would satisfy the definition.²⁸ This legislative history supports the EPA's argument that the use of "and" rather than "or" in the definitions is a typographical error. Accordingly, I find that Model WK23G is wood heater within the meaning of the regulation even if it is intended for use only as a space heater.

We are faced at the outset with the EPA's claim that the petition must be dismissed on jurisdictional grounds. Petitioner's objections, so the EPA claims, are really directed to the validity of the regulation, and, in particular, to test Method 28, and not to whether certification has been wrongly denied under the regulation. Such claims can be raised only by seeking judicial review of the regulation within sixty days after notice of the promulgation of the rule has been published in the Federal Register.²⁹ Petitioner, in short, is not only in the wrong forum but his objections are made too late.

The EPA, however, does not really understand the nature of Petitioner's claim. His argument seems to be that his appliance incorporates a technology developed after the rulemaking proceeding

²⁸ See proposed rule, 52 Fed. Reg. 4995, 5015, 5044. It is interesting to note that in the preamble to the final rule, a wood heater is defined as an appliance used for space heating. Domestic water heating is not mentioned. 53 Fed. Reg. 5860.

²⁹ CAA, section 307(b), 42 U.S.C. §7607(b).

and, therefore, not considered by the EPA in prescribing the minimum burn rate and test Method 28 as the standard for determining compliance with that requirement. Under the statute, the sixty-day time limit for seeking judicial review does not apply to petitions based solely on grounds arising after the sixtieth day.³⁰

Petitioner, of course, is not seeking judicial review of the regulation, but an administrative determination whether certification has been wrongfully denied because the appliance will not pass the minimum burn rate requirement. The appliance does meet the emission limitations when burned at the other burn rates.³¹ The question presented, then, is whether Petitioner's application for certification is based solely on grounds that could not have been considered by the EPA in selecting the burn rates for testing emissions under operating conditions and Method 28 as the test for determining compliance, because they arose after the standards were issued. If it is, then it is appropriate to consider Petitioner's claim that the standard should be modified to include a wood heater having the design of Model WK23G. If it is not, Petitioner's objections to the denial of certification must be dismissed. I find that I have jurisdiction to consider that question.³² I do not have

³⁰ CAA section 307(b) (1), 42 U.S.C. §7607(b)(1); Oljato Chapter of Navajo Tribe v. Train, 515 F. 2d 654 D.C. Cir 1975).

³¹ EPA Exhibit 2, pp. 1 - 4.

³² The final decision in this matter should serve as a response on the merits to Petitioner's request that the standard be revised to not require that a heater having the design of MODEL WK23G be required to comply with the minimum burn rate of less than 1 kg/hr.

jurisdiction, however, to consider the propriety of the EPA's decision in promulgating the standards to use Method 28 as the standardized test for determining a heater's performance under operating conditions. Consideration of that question is barred by the preclusive review provisions of the statute.

The principal feature which Petitioner mentions as a distinguishing feature of its appliance is the large glass viewing area of the firebox, a feature that apparently keeps the heater from being air tight.³³ Petitioner also stresses that the design using gas assisted combustion and having a stack damper as the sole means for controlling the combustion rate makes the unit simple to operate, efficient in heat output and clean burning.³⁴ When the appliance is operated under test conditions at a burn rate below 1 kg/hr, however, smoke is emitted and the glass becomes covered with creosote.³⁵

See Oljato Chapter of Navajo Tribe v. Train, 515 F. 2d 667.

³³ Meeker to Poffenberger dated October 27, 1993; Meeker to ALJ Harwood dated February 20, 1995 (EPA APPEAL DETAILS). Apparently air also enters the unit through the gas tube when gas is not entering the unit. EPA Exhibit 1, p 10.

³⁴ Meeker to Poffenberger dated January 30, 1994; Document headed "Best Available Technology???" dated April 23, 1996.

³⁵ Meeker to Poffenberger dated 10/10/93; Meeker to Poffenberger dated 1/13/94; Meeker to Poffenberger dated January 30, 1994; Meeker to ALJ Harwood dated February 20, 1995 (EPA APPEAL DETAILS); Meeker to Marshall dated August 29, 1995; Meeker to Cherry dated November 5, 1995; Meeker to ALJ Harwood dated December 8, 1995. Petitioner's explanation is that the fuel load required under Method 28 of 2x4's and 4x4's spaced 1.5" apart presents too much surface area involved in the combustion process and that the product was optimized to burn two or three logs closely nestled together. Meeker to Cherry dated November 5, 1995. See also Test Report, EPA Exhibit 2, p. 9 (Low burn rates would spill smoke

The facts with respect to the design and operation of Petitioner's heater appear to be undisputed with one exception. The EPA contends that the low burn rate under the Method 28 protocol could be achieved by reducing the air supply to the firebox by either creating a tighter seal around the glass door or cutting off the excess air to the supplemental gas fuel supply.³⁶ Petitioner argues, however, that its appliance would not operate properly if it were made airtight.³⁷

This issue, however, is capable of being resolved on the papers before me. The EPA does not offer any evidence that would substantiate what it claims is its analysis of the failure of Petitioner's stove to meet the Method 28 test protocols. Petitioner, on the other hand, designed the heater and the evidence does show that he did try to make it comply with the standard while retaining its desirable features. His position is the more credible one. Accordingly, I find that if the unit, as presently designed by Petitioner, is made airtight, this may eliminate smoke escaping from the heater into the room, but operating it at the minimum burn rate can still cause creosote buildup on the glass, when it is

through the glass partitions and the unit would not be run in this manner).

³⁶ EPA Statement of the case, p.4

³⁷ ALJ to Parties, April 2, 1996, summarizing the oral argument on March 28, 1996. Apparently burning the wood too slowly will get the glass all coated with creosote. Meeker to Poffenberger, 10/10/93 and 1/13/94; Meeker to ALJ Harwood, February 20, 1995 (EPA APPEAL DETAILS). Petitioner does admit that it could shut off the air supply while the gas burner was not operating, but this would add to the cost, complexity and safety considerations of the product. Meeker to Poffenberger, 1/13/94.

operated under load conditions prescribed by Method 28.³⁸

It remains, then to determine, whether on the facts, as established, Petitioner is entitled to prevail on the merits.³⁹

There is no dispute that Model WK23G will not comply with the minimum burn rate when tested under the Method 28 protocol required by the regulation. Petitioner, then, must show that his petition is based solely on grounds arising after the time for seeking review of the regulation in the court of appeals has expired.⁴⁰ On this issue, Petitioner has the burden.⁴¹

The EPA selected the burn rate as a test parameter because it affects both the PM emissions and the heat output. In explaining why it was necessary to specify a minimum burn rate, the EPA stated as follows:

³⁸ Petitioner does admit that under certain conditions its unit can operate at under 1 kg/hr. See Meeker to ALJ Harwood, April 27, 1996: "At the moment, I have a one log fire going. I can assure you that it is clean and is burning at under 1 KG/HR. The glass is clean and if you go outside and look at the top of the chimney, you see no smoke."

³⁹ Petitioner states that he would like to call as an expert witness, the director of the wood burning facility that was once operated by the EPA, if necessary to achieve a favorable ruling. Meeker to ALJ Harwood dated April 27, 1996. Petitioner, however, has not shown that there exists a factual issue on which such evidence would be material. The tests run by Warnock Hersey, Inc. are fully documented and there is no evidence either that they are not fully competent to perform the tests or that any error was committed in running the tests. Petitioner selected Warnock Hersey to do the tests and he must abide by the results. The EPA's records of tests on other burners in the past is simply not material.

⁴⁰ CAA, section 307(g)(b)(1), 42 U.S.C. §7607(b)(1).

⁴¹ See United States v. First City National Bank, 386 U.S. 361, 366 (1967) (One who claims the benefits of an exemption to a statutory prohibition has the burden of proving that the claim comes within the exemption).

Wood heaters could comply with the emission limitations by modifying the air introduction system to eliminate low burn rate, high emission conditions. This type of modification reduces substantially the sustainable burn time and is generally contrary to typical wood heater usage. For example, data on actual homeowner usage showed that approximately 50 percent of the time burn rates are less than 1.2 kg/hr. The several heaters that had been modified for Oregon certification were set up to burn at rates below about 20,000 Btu/hr or about 1.6 kg/hr. Such appliances, although clean burning during certification tests, could easily be modified by the consumer either by removing damper stops or through the use of a stack damper to achieve longer burn times, and thereby create high emissions. Consumers would be motivated to do this in order to extend burn times and to lower the heat output of the wood heater. Statements by several committee members indicated that such modifications were not uncommon.⁴²

The EPA further explained the basis of the standard:

Heaters using noncatalytic control technologies [such as Petitioner's heater] modify process features to promote more complete combustion thereby reducing emissions.

. . . . [A]chieving low emissions using noncatalytic technology is attributed to careful integration of several features into a heater design. The proper integration of these features allows increased firebox temperatures, increased turbulence (air and fuel mixing), and increased residence time of combustion gases in high temperature zones.

Features that are common among low-emitting designs include smaller fireboxes, baffles, low firebox heights, primary air inlets located high in the firebox, and preheated secondary air.

Both technologies [catalytic and noncatalytic] result in higher priced wood heaters but lower operating costs due to reduced firewood consumption and reduced chimney cleanings.⁴³

In answering the objections addressed specifically to Method 28, the EPA gave the following explanation for the standardization imposed by that Method:

⁴² Proposed rule, 52 Fed. Reg. 5002.

⁴³ Proposed rule, 52 Fed. Reg. 5005 - 5006.

Standardized test methods are necessary to achieve objective comparison among heaters and comparison of emission performance of individual heaters to a specified regulatory limit. There is almost an infinite number of variables that affect natural draft wood heaters. A standardized test method creates the reproducible test conditions that are necessary for comparing performance of one wood heater to another.⁴⁴

The EPA then went on to explain that there is a significant emissions data base that has been generated using Method 28 (the Oregon data base) showing that Method 28 is a reasonably reliable test method, that a standardized woodstove testing approach is commonly practiced in industry for safety and efficiency measurements and the concept of a standardized testing approach was accepted by the committee members and that available data on wood loading practices indicated that standardized wood loading specified in Method 28 approximates average consumer wood load densities.⁴⁵

Finally, the EPA stated:

In response to the comments that Method 28 does not reflect "real world" practices, it must be recognized that there is no single set of consumer wood selection, wood loading, and heater operating practices. There may be as many such practices as there are wood heaters in operation. EPA recognizes that neither Method 28 or any standardized method necessarily reflects each individual loading. In actual use every loading is different even for the same user. Available data on consumer practices indicate that the procedures in Method 28 fall well within the range of "real world" practices.⁴⁶

⁴⁴ Final rule, 53 Fed. Reg. 5867.

⁴⁵ Final rule, 53 Fed. Reg. 5867. For the use of a committee composed of persons affected by the standard in developing the standard, see the proposed rule, 52 Fed. Reg. 4995.

⁴⁶ Final rule, 53 Fed. Reg. 5867 - 5868.

According to Petitioner, the consumer would not be motivated to operate its appliance at a burn rate below 1 kg/hr, because the unit would smoke and the glass would become covered with creosote.⁴⁷ Also, petitioner argues that the reason for operating a wood heater at the low burn rate in 1988, when the standards were promulgated, was to keep the fire burning over night so as to have a bed of live coals in the morning to start a new fire. Such a reason would not be present in Petitioner's appliance because the gas burner operates as a log lighter and eliminates the need for a bed of live coals.⁴⁸

It may be that Model WK23G has features not present in other wood heaters.⁴⁹ The characteristic, however, which Petitioner contends makes the minimum burn rate requirement unreasonable is that owing to its design, the heater will smoke or the glass will become coated with creosote at the low burn rate, making it unlikely that the heater will be operated at a rate below 1 kg/hr. The operation of the heater, nevertheless, as the EPA recognized

⁴⁷ As Petitioner wrote Mr. Dwight Poffenberger of the EPA in October 15, 1993 (also dated 10/10/93): "WITH THE OPTION OF BURNING GAS ALONE WHEN NOT MUCH HEAT IS NEEDED THERE IS NO REASON WHY THE USER WOULD INTENTIONALLY SO SLOWLY AS TO GET THE GLASS ALL COVERED WITH CREOSOTE."

⁴⁸ Oral argument heard on March 28, 1996, as summarized in letter of Senior ALJ to the parties dated April 2, 1996.

⁴⁹ The EPA, however, has submitted information showing that there are other wood heaters with large glass viewing areas that have passed the Method 28 test. The EPA also states that the combination of a wood and gas heater is not unique in concept but to its information no combination like WK23G has satisfied the Method 28 test or been commercially sold. Supplemental Information and Briefing Materials dated May 1, 1996.

depends upon the consumer's preferences, in this case, the consumer's motive to save fuel by a slow burn, a motive which Petitioner does not really dispute. The gas log lighter may eliminate the need to have the heater operate overnight, but some consumers may still prefer to have a slow burn rather than starting a new fire each day. Optimum operation will also depend upon having the proper wood supply, which Petitioner describes as seasoned wood, and suggests that it be hardwood, dead one year minimum and stacked with a ventilated cover over 6 months.⁵⁰ It is also recommended that for a slow burn, the consumer use large pieces of wood - up to a single 10" diameter log.⁵¹ The consumer, however, may not have this wood available and so use other wood. Improper operation may result in smoke or a creosote buildup, but how much the consumer will tolerate again depends upon the consumer.

Petitioner may have designed a heater that may make it less likely for consumers to operate the heater at a low burn rate that could cause excess emissions, but Petitioner has not demonstrated that the heater's design makes such operation so unlikely as to make irrelevant the EPA's reasons for requiring compliance with the minimum burn rate category.⁵²

Another argument Petitioner makes is that it is unreasonable

⁵⁰ Woodkiln owner's manual, p. 6.

⁵¹ Woodkiln Owner's manual, p. 4.

⁵² Petitioner, for example, believes that the smoke is caused by not enough air supply for the fuel load. *Supra*, n. 35. A consumer might attempt to achieve a minimum burn by adjusting the movable glass door. See Woodkiln Owner's manual, p.4, under the heading Glass Door Operations.

to require that the test be conducted with 2x4's and 4x4's loaded as specified by Method 28, because a slow burn is achievable by Petitioner's appliance using one log weighing about 8 pounds compared to the 12.5 pounds that Petitioner says is required under Method 28.⁵³

The EPA recognized that neither Method 28 nor any standardized method necessarily reflects each individual loading. In actual use every loading can be different even for the same user.⁵⁴ Holding all heaters to a uniform standard, rather than testing each heater according to what are claimed to be its unique operating conditions, fuel types and arrangements, ensures that there is a valid basis for comparing the performance of one heater to another.⁵⁵ It further found that the wood loading and heater operating practices specified in Method 28 were reasonably representative of actual consumer practices.⁵⁶

Petitioner argues that its heater is unique in its heating efficiency. It was also argued before the EPA when it was considering the regulation that Method 28 would discourage unique

⁵³ Meeker to ALJ Harwood dated April 27, 1996 ("HOW TO GET A SLOW BURN").

⁵⁴ Final rule, 53 Fed. Reg. 5867.

⁵⁵ Final Rule, 53 Fed. Reg. 5867-5868. Compliance with uniform test requirements would be of use not only to the EPA in evaluating the appropriateness of its regulatory limits, but to manufacturers who are given a definite standard in seeking certification applicable to all heaters, and to consumers who can chose among competing heaters which have all have been subject to the same requirements.

⁵⁶ Id.

and innovative designs. The EPA, however, decided that heater manufacturers should be required to make their heaters conform to a uniform test standard rather than that the EPA would have to tailor its test to conform to each individual heater. The wisdom of that choice is not open for review in this proceeding. I find, however, that the EPA's reasons for a uniform standard are equally applicable to Model WK23G. Nothing in the information presented by Petitioner indicates to the contrary.⁵⁷

In conclusion, I find that none of the matters urged by Petitioner in support of its certification are so different from the matters considered by the EPA when it promulgated the rule that they can be said to be new grounds not considered by the EPA when it promulgated the rule so as to make the Method 28 test requirements inapplicable to Model WK23G.

This hearing came about because of the denial by the EPA's Director, Stationary source Compliance Division, Office of Air Quality Planning and Standards to certify Petitioner's Model WK23G.

⁵⁷ The EPA pointed out that its standards do provide for the use of alternative test procedures for truly unique wood heater designs where fuel loading is atypical. See 40 C.F.R. §60.8(b). As an example of such design it gave pellet burners. Final rule, 53 Fed. Reg. 5868; see also 40 C.F.R. Pt. 60, App. A, Method 28, §2.13 at 901. Petitioner has not claimed that the design of its heater is unique in the same way that a pellet burner is to be distinguished from a stove burning wood logs. Its claim to uniqueness is only that its heater will not perform properly under the Method 28 loading and fuel requirements.

On review of the file, and for the reasons stated, I agree and find that Petitioner's application for certification is properly denied.⁵⁸

Gerald Harwood

Gerald Harwood
Senior Administrative Law Judge

Dated: June 10, 1996, 1996

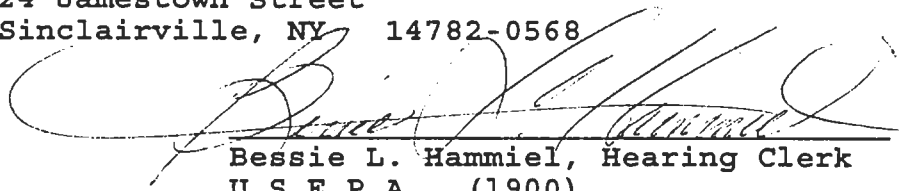
⁵⁸ Under the rules of practice this initial decision denying the certification of Petitioner's Model WK23G becomes the decision of the Environmental Appeals Board (to whom the Administrator has delegated authority to issue the final decision in a case such as this) unless an appeal is taken to the Environmental Appeals Board within 20 days of the date the initial decision is filed. 40 C.F.R. §60.539(h).

CERTIFICATE OF SERVICE

I do hereby certify that the foregoing Initial Decision was filed in re Woodkiln, Inc.; Docket No. 95-111-001 and exact copies of the same were mail to the following:

(Interoffice) Andrew B. Cherry, Esq. (2224-A)
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Dated: June 10, 1996