

DUNAWAY & CROSS

A PROFESSIONAL CORPORATION

SUITE 400

1146 19TH STREET, N.W.

WASHINGTON, D.C. 20036

(202) 862-9700

TELECOPIER (202) 862-9710

RAYMOND PHILIP SHAFER *
COUNSEL

MAC S. DUNAWAY
GARY E. CROSS
GEORGE C. COURTOT
STANLEY J. GREEN
MATTHEW F. HALL
CHRISTOPHER E. ANDERS
JONATHAN S. SHURBERG
JOAN R. VAIL *

* NOT ADMITTED IN D.C.

November 30, 1993

Anne K. Bingaman, Esquire
Assistant Attorney General
Antitrust Division
Department of Justice
10th Street and Constitution Ave., N.W.
Washington, D.C. 20530

Re: Request for Business Review Letter

Dear Ms. Bingaman:

On behalf of the Portable Power Equipment Manufacturers Association ("PPEMA") and its member companies, this letter seeks a Business Review Letter stating the present enforcement intentions of the Department of Justice ("the Department") regarding participation by PPEMA and its members in a negotiated rulemaking being conducted by the U.S. Environmental Protection Agency ("EPA") for the development of emissions standards for certain small nonroad engines.¹ PPEMA is the national, not-for-profit trade association representing manufacturers of chain saws, trimmers, brushcutters, cutoff saws, and similar portable powered equipment.

In August 1991, PPEMA provided notice pursuant to the National Cooperative Research Act of a joint venture to collect, share, and analyze information and data concerning the development and implementation of technology for purposes of compliance with national and international emissions standards. That notification was made to invoke the Act's limited antitrust protections. PPEMA has since amended its earlier notice to provide for changes in membership. Copies of the notice and amendment are attached. Notwithstanding PPEMA's notification under the National Cooperative Research Act, PPEMA and its members submit this request to the Department for a Business Review Letter.

The factual background to PPEMA's request and a detailed description of the activities that PPEMA anticipates will be

¹ A list of PPEMA member companies joining this request is attached.

Anne K. Bingaman, Esquire
November 30, 1993
Page 2

included in this negotiated rulemaking are provided by this letter and its attachments.

A. Background to Negotiated Rulemaking

The Clean Air Act Amendments Act of 1990 directed EPA to study emissions from nonroad engines and, in the event that EPA determined that certain emissions from nonroad engines contributed significantly to ozone or carbon monoxide levels in more than one nonattainment area, to promulgate emissions standards for those engines. EPA intends to regulate emissions from spark-ignited nonroad engines less than 25 horsepower, excluding engines used to propel recreational or marine equipment, in two steps. First, EPA plans to propose "Phase I" emissions standards for these engines by April 30, 1994 for public comment and to adopt a final standard by May 30, 1995. Second, EPA plans to propose more stringent "Phase II" regulations for the same engines, developed pursuant to a negotiated rulemaking, by April 30, 1996, and to adopt a final standard by April 30, 1997. It is PPEMA's participation in this negotiated rulemaking that prompts this request for a Business Review Letter.

EPA provided notice of its intent to form an advisory committee to develop a negotiated regulation in the June 25, 1993 Federal Register, and notice of actual committee formation in the October 25, 1993 Federal Register. Copies of these notices are attached. PPEMA is one of the participants on the negotiated rulemaking committee. A list of all participants is provided by EPA's October 25, 1993 notice. Since EPA's notification of its intent to form an advisory committee, participants to the negotiated rulemaking have met on three occasions: June 30-July 1; September 27-28; and October 27-28. Attached are copies of the final protocols for the negotiated rulemaking, developed during the first two meetings, and the official minutes for the June 30-July 1 meeting.

B. Information Exchange During the Negotiated Rulemaking

The two working groups formed thus far in the negotiated rulemaking process are composed primarily of industry participants. In PPEMA's understanding of the proceedings, EPA expects working group members to share information concerning present and future nonroad engine technologies, including the costs of such technologies. Under other circumstances, such information is considered highly confidential and is not shared among competitors. EPA has stated that confidentiality procedures will be developed for these activities, but no such procedures yet exist. PPEMA

cannot evaluate the adequacy of EPA's confidentiality procedures until they are proposed.

In addition, each of these working groups contemplates some degree of technology evaluation by working group members. These technology evaluations will be important factors in the selection of emissions standards by the negotiated rulemaking participants.

1. Technology Working Group

The sharing of sensitive technological and cost information arises directly with respect to the planned activities of the Technology Working Group. As stated in the proposed mission statement for this working group, participants will assess specific nonroad engine technologies that might be developed and used to meet Phase II emissions regulations. The working group will consider and compare each of these technologies in light of several factors deemed relevant by the working group. These factors include, but are not limited to, assessment of emissions reduction capability, technological feasibility, cost, energy, noise and safety. The Technology Working Group will meet regularly to address these issues. Copies of the Technology Working Group's membership list and the minutes for the working group's October 28, 1993 meeting are attached. Several of the manufacturers on this working group are direct competitors in the lawn and garden equipment industry.

To provide a specific example of circumstances raising antitrust concerns, EPA suggested at the last working group meeting that the working group undertake emissions testing of prototype, or "new technology," engines. This is but one instance of what PPEMA believes may become standard procedure for the Technology Working Group.

Upon completion of its tasks, the Technology Working Group will present its evaluations to the entire negotiated rulemaking committee. Although the working group will not make any official recommendations to the rulemaking committee, the working group's evaluations will form the basis of Phase II emissions standards and assist EPA to fulfill statutory requirements for these standards, including consideration of technological feasibility and the cost of compliance.

2. Test Procedures Working Group

The Test Procedures Working Group is charged with developing procedures for emissions testing in conjunction with the Phase II standards. Activities of the Test Procedure Working Group could involve the sharing of sensitive information about future emissions

reduction technologies. Due to EPA concerns over the relative merits of steady-state test procedures versus transient test procedures, one of the tasks facing the group is to develop a procedure that accurately measures real-life emissions from engines using future technologies. More specifically, the Test Procedures Working Group will study whether steady-state or transient test procedures provide greater accuracy for measuring actual emissions from engines that are still under development. To accomplish this, the working group will need a detailed understanding of those engine technologies potentially available in the future. Cost information could also be shared, as the working group will examine the cost implications of using different emissions test procedures.

3. Other Concerns

In addition to the activities of the Technology Working Group and the Test Procedures Working Group, other working groups may be formed as part of the Phase II negotiated rulemaking. For example, EPA has suggested that a working group that specifically addresses costs of compliance may be formed to examine costs associated with meeting Phase II standards. Such information is equally as sensitive as technology-related information. Accordingly, PPEMA cannot say that the potential antitrust implications of the Phase II negotiated rulemaking are limited to activities of the Technology and Test Procedures Working Groups.

C. **Need for Business Review Letter**

PPEMA considers the antitrust implications of EPA's Phase II negotiated rulemaking to be sufficiently serious to warrant the Department's review. Under the existing scope of the Phase II proceedings, participants will be evaluating new emissions reduction technologies and their cost of implementation on a regular basis. Although PPEMA recognizes the importance of EPA's project and supports its objectives, in PPEMA's estimation EPA's expectations of the Technology and Test Procedures Working Groups raise significant antitrust concerns. These concerns appear especially reasonable in light of the importance the Department ascribes to maintaining competition in technological innovation, as discussed in the Department's press release describing a recently-filed suit concerning the sale of the automatic transmission division of a large U.S. company. PPEMA does not want participation in this negotiated rulemaking to jeopardize compliance with the antitrust laws.

PPEMA appreciates the Department's consideration of this request for a Business Review Letter. We have attempted to

Anne K. Bingaman, Esquire
November 30, 1993
Page 5

describe the information relevant to the potential antitrust implications of the Phase II negotiated rulemaking in this letter. Due to the bulk of the negotiated rulemaking file, we have attached only some of the more relevant materials affecting this matter. Please feel free to contact the undersigned if you have any questions or need additional information and/or materials.

Very truly yours,

DUNAWAY & CROSS

A handwritten signature in cursive script, appearing to read "Mac S. Dunaway", written over the typed name.

Mac S. Dunaway

Counsel to PPEMA

cc: Donald Purcell (w/o attachments)