U.S. Department of Justice

Antitrust Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

JUL - 5 1994

Mac S. Dunaway
Dunaway & Cross
Suite 400
1146 19th Street, N.W.
Washington, D.C. 20036

Dear Mr. Dunaway:

This is in response to your request on behalf of the Portable Power Equipment Manufacturers Association ("PPEMA") for the issuance of a business review letter pursuant to the Department of Justice's business review procedure, 28 C.F.R. § 50.6. You have requested a statement of the Department's current antitrust enforcement intentions regarding participation by PPEMA and its members in a negotiated rulemaking proceeding being conducted by the Environmental Protection Agency ("EPA") with a view toward establishing more stringent emission regulations for small nonroad engines. Based on the information and assurances that you have provided us, the Department has no current intention to challenge the participation of PPEMA and/or its members in the EPA's negotiated rulemaking proceeding under the conditions indicated.

PPEMA is a not-for-profit trade association that represents manufacturers of small gasoline powered chain saws, brushcutters, string trimmers, blowers, cutoff saws, and similar equipment. Its members also manufacture the engines for such equipment. The Clean Air Amendments Act of 1990 authorized EPA under designated circumstances, to promulgate pollution emission standards for nonroad engines. You have informed us that EPA proposes to regulate emissions from spark-ignited nonroad engines with less than 25 horsepower in two stages. Phase I regulations were proposed on May 1, 1994, and more stringent ("Phase II") regulations are planned for 1997, after development by EPA in a negotiated rulemaking proceeding.

EPA has formed a negotiated rulemaking committee to initiate the first phase of developing more stringent Phase II emission regulations for small nonroad engines. The committee consists of representatives from industry, environmental advocacy groups, and state and federal regulatory agencies. The committee has created several task forces that will investigate assigned issues relevant to developing the Phase II emission regulations, and prepare reports and recommendations for the committee consideration. PPEMA is a member of the committee and each of

the task forces established to date. Finally, you note that meetings of the committee will be open to the public and that meetings of the task forces, though not open to the public, will be open to all committee members.

It is contemplated that the task force and committee members will share information concerning existing and future nonroad engine technologies including the costs of such technologies. Thus, you state that the Technology Task Force "will assess and report on the relevant aspects of potential technologies to reduce air pollutant emissions associated with small nonroad engines." In so doing the Task Force will consider:

> "feasibility, potential environmental effects and emission benefits; costs; risks; performance and utility; durability; noise; safety and energy impacts; patent status; current state of research and development; impacts on equipment design; maintenance; ergonomics; lead time; and sensitivity to in-use conditions.

As part of the process of testing existing and future technologies, EPA contemplates that the task forces will design, build and test prototype engines.

In requesting a statement of the Department's current antitrust enforcement intentions, you state that PPEMA and its members will their activities to supplying the EPA with accurate information and participating in the EPA proceedings. They will not enter into any anticompetitive agreement whose effects would be independent of any competitive effects of the regulations ultimately imposed by EPA. While acknowledging the economic interests of PPEMA's members in the regulations ultimately promulgated, you contend that the nature of the negotiated regulation process, i.e., its openness to all interested parties, and the fact that EPA will make the final decisions significantly reduces, if not eliminates, completely the possibility that participation by PPEMA and its members in the regulatory process will result in a violation of the antitrust laws.

In addition, to the extent that task force or committee members need to consider what would ordinarily be considered confidential business information pertaining to new technologies or the costs of potential emissions control strategies and technologies, PPEMA will collect the information from its individual members, aggregate it, and make sure that no such confidential information is disclosed to other members. Only the aggregated information will be distributed to PPEMA members, the EPA and committee and task force members.

The EPA also will take steps to reduce the possibility that its small nonroad engine negotiated rulemaking proceeding will restrain competition. It will include the following two

paragraphs in the Protocol to the Advisory Committee:

> "D. During the course of the negotiations, members may not conspire to limit output, raise prices, restrict entry, or otherwise establish or support restraints on competition among the organizations which they represent. This in no way prohibits members from developing a proposed rule that may have such incidental effect(s) on the regulated community.
>
> E. The committee does not have authority to protect confidential business information (CBI). When information required for committee deliberations can only be derived from CBI (i.e., innovative technology, costs, or pricing information), then the information may only be received by the committee in aggregate form so as to protect specific CBI from release."

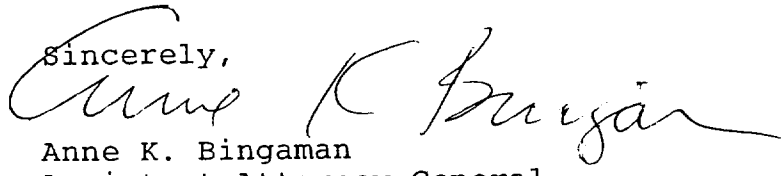
Based on the information and assurances that you have provided, the Department has no current intention to challenge the participation of PPEMA or its members in the EPA's negotiated rulemaking proceeding on emission standards for small nonroad engines. The steps taken by PPEMA and the EPA should significantly reduce the risk that actions by your members outside of the regulatory process would violate the antitrust laws. Those steps should also reduce the risk that their participation in the process will have anticompetitive effects that are not "incidental" to petitioning the government within the meaning of that term as articulated in Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc. 365 U.S. 127 (1961), and subsequent decisions on that issue.

This letter expresses the Department's current enforcement intentions. In accordance with its normal practice, the Department reserves the right to bring an enforcement action in the future if the actions of PPEMA or its members proves to be anticompetitive in a manner independent of the effects of the regulations adopted by the EPA.

This statement is made in accordance with the Department's business review procedure, 28 C.F.R. § 50.6. Pursuant to its terms, your business review request and this letter will be made publicly available immediately and any supporting data will be made publicly available within thirty (30) days of the date of

this letter, unless you request that any part of the material be withheld in accordance with Paragraph 10(c) of the business review procedure.

Sincerely,



Anne K. Bingaman
Assistant Attorney General