

May 23, 2002

The Honorable Jeffrey R. Holmstead  
Assistant Administrator for Air and Radiation  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, N.W.  
Washington, D.C. 20460

**Subject: Proposed Rule; Control of Emissions from Land-based Recreational Engines, 67 Fed. Reg. 21613 (May 1, 2002)**

Dear Administrator Holmstead:

The Office of Advocacy of the U.S. Small Business Administration (Advocacy) was established by Congress pursuant to Public Law 94-305 to represent the views of small business before Federal agencies and Congress. One of Advocacy's primary functions is to monitor agencies' compliance with the Regulatory Flexibility Act (RFA),<sup>1</sup> and to work with Federal agencies to ensure that their rulemakings are supported by analyses.

On May 1, 2002, EPA published the above-referenced notice of proposed rulemaking (NPRM). An earlier NPRM for these vehicles addressing air pollution from tail pipes was published on October 5, 2001.<sup>2</sup> The earlier NPRM followed the recommendations of a Small Business Advocacy Review Panel, convened pursuant to Section 609 of the RFA, and was supported by an adequate initial regulatory flexibility analysis (IRFA).

Advocacy is writing today because it appears that, in the May 2002 NPRM, EPA failed to comply with the RFA. Whenever an agency is required by the Administrative Procedure Act (APA)<sup>3</sup> to publish an NPRM for notice and comment, the agency must provide either an IRFA or a certification of "no significant economic impact on a substantial number of small entities" with the requisite statement of factual basis.<sup>4</sup> EPA did not provide either.

EPA has requested comment on finalizing specific requirements for fuel tanks. These requirements are completely new. The IRFA for the earlier NPRM addressed tail pipes, not fuel tanks. EPA did not make any apparent effort to describe the impact or any

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<sup>1</sup> 5 U.S.C. §§ 601, et. seq.

<sup>2</sup> 66 Fed. Reg. 51098 (October 5, 2001).

<sup>3</sup> 5 U.S.C. § 553.

<sup>4</sup> 5 U.S.C. §§ 603, 605.

flexibility for the small entities affected by these new requirements. As such, affected entities have arguably been denied the right to comment under the APA.

For these reasons, Advocacy recommends that EPA take additional steps to comply with the RFA. Section 603 of the RFA requires an IRFA, however, EPA has asserted that the fuel-tank requirements would, on average, impose minimal burden. If, after considering the impact on small entities, which are likely to be significantly higher than average, EPA finds that these requirements will not have a significant economic impact on a substantial number of small entities, EPA may certify the new proposal in lieu of preparing an IRFA. However, the Agency must provide a factual basis for a certification.<sup>5</sup> In any event, EPA should take these additional steps prior to publishing a rule in final form, so that affected small entities will have an opportunity for notice and comment.

At a minimum, EPA should prepare a final regulatory flexibility analysis (FRFA) that estimates the cumulative effects of the rule (including both the tail-pipe and gas-tank requirements) on small entities and considers less-burdensome alternatives, and publish the FRFA with the final rule for public comment.

Advocacy stands ready to assist EPA in its consideration of these options. If there are any questions, please contact Austin Perez of my staff, (202) 205-6936.

Sincerely,

/s/

Thomas M. Sullivan  
Chief Counsel for Advocacy

/s/

Austin R. Perez  
Assistant Advocate

Cc: Dr. John Graham, Administrator, Office of Information and Regulatory Affairs

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<sup>5</sup> 5 U.S.C. § 605.