

In the United States of America
Before the Consumer Product Safety Commission

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In the Matter of the Petition of
Consumer Federation of America,
To Ban All-Terrain Vehicles for Use
By Children under 16 years old and
To Provide Refunds for Consumers

No. CP 02-4/HP 02-1

Pursuant to the Administrative Procedures Act, 5 U.S.C. section 553 (e) and regulations of the Consumer Product Safety Commission (CPSC), 16 C.F.R. section 1051, Consumer Federation of America hereby petitions CPSC to determine, under section 8 of the Consumer Product Safety Act (CPSA), 15 U.S.C. section 2057, that adult-size four-wheel All-Terrain Vehicles (ATVs) which may be used by and/or sold for children under age sixteen; whether new or commercially resold, and all three-wheel ATVs in use and/or available for resale present an unreasonable risk of injury, that no feasible consumer product safety standard would adequately protect children from the unreasonable risk of injury associated with ATVs, and, therefore, that all three-wheel ATVs and adult-size four-wheel ATVs as used by children under age sixteen are a banned hazardous product. Consumer Federation of America also petitions CPSC to exercise its authority under section 15 of the CPSA, 15 U.S.C. section 2064 to require manufacturers to offer a refund for all three-wheel ATVs and for four-wheel ATVs intended for adults purchased for use by children under sixteen.

I.

Interest of Petitioners

This petition is brought by nine organizations on behalf of their members and all children and their families affected by all-terrain vehicles (ATVs).

Consumer Federation of America (CFA) is the nation's largest consumer advocacy organization representing over 300 state, local, and national consumer organizations and over 50 million consumers. CFA has a long-standing history of working on ATVs dating back to the consent decree in 1987. CFA brings this petition on behalf of its members and all consumers who ride ATVs.

The American Academy of Pediatrics (AAP) is a non-profit professional organization of 57,000 primary care pediatricians, pediatric medical subspecialists, and pediatric surgical specialists. The AAP is dedicated to the health, safety, and well-being of infants, children, adolescents, and young adults.

The American College of Emergency Physicians (ACEP) is a non-profit, voluntary professional and educational society of nearly 23,000 emergency physicians practicing in the United States and other countries. Founded in 1968, ACEP is the nation's oldest and largest association of emergency physicians. ACEP fosters the highest quality of emergency medical care through the education of emergency physicians, other health care professionals, and the

public; the promotion of research; the development and promotion of public health and safety initiatives; and the provision of leadership in the development of health care policy.

Bluewater Network is a national organization aggressively confronting the root causes of climate change and fighting environmental damage from the shipping, oil, and motorized recreation industries. Bluewater Network has a long history of working at the local, state and national levels to address safety problems associated with a wide range of off-road vehicles.

The Center for Injury Research and Policy (CIRP) at Columbus Children's Hospital, Columbus, Ohio, works at the local, state, national, and international levels to reduce death and disability due to injuries through research, education, advocacy, and advances in clinical care. CIRP aims to improve the scientific understanding of the epidemiology, prevention, treatment, and biomechanics of injuries. CIRP focuses on injury research as the cornerstone for successful injury control, because scientific evidence will best direct educational efforts, identify opportunities for safer product design and environmental modification, allow evaluation of clinical care, and provide the rationale for responsible public policy. CIRP educates health and other professionals, policy makers, and the public regarding injury research and prevention. CIRP provides leadership in the development, implementation, and scientific evaluation of public policy regarding control of injuries.

The Danny Foundation for Crib & Child Product Safety is a national non-profit organization with sixteen years of recognized leadership in the field of childhood injury prevention. The Foundation was founded in 1986 to help prevent unintentional injuries, conduct research and to provide leadership in setting regulatory standards for safe childhood products. Its primary mission is to educate the public about crib dangers and to eliminate the millions of unsafe cribs currently in use or in storage. The organization's mission was broadened in 2000 to include educating the public about other childhood products such as play yards, bath seats, strollers, bunk beds and high chairs.

Kids in Danger is a non-profit organization dedicated to protecting children by improving product safety. Kids in Danger educates the public, advocates for children and promotes the development of safer children's products.

National Association of Orthopaedic Nurses is composed of 8,000 nurses throughout the United States, whose goals are to improve the delivery of care for those with orthopaedic and musculoskeletal diseases and to improve the science of health care for those who experience injury.

U.S. PIRG is the national lobbying office for the State Public Interest Research Groups. State PIRGs are non-profit, non-partisan public interest advocacy groups. The state PIRGs have been active on ATV safety issues since the 1980s. U.S. PIRG has released a series of reports and surveys documenting the failure of the consent decree in preventing sale or use of adult-size ATVs by children, litigated against the CPSC on ATV matters and previously petitioned the commission to re-open the consent decree docket.

II.

The Product

All-terrain vehicles, commonly known by the acronym "ATV" or "ATVs," have been on the market for approximately 30 years. ATVs are three- or four-wheel machines specifically designed for off-road travel. Three-wheel machines have not been manufactured since 1988, but many remain in use. ATVs are equipped with wide, knobby or paddle-like tires and special suspension systems capable of handling extremely rough terrain and cushioning jumps. Adult-size ATVs are

defined by CPSC and industry as having an engine size greater than 90 ccs. Although the earliest three-wheel machines had little more power than a large riding lawnmower, CPSC has found that the number of ATVs with large engines increased three-fold between 1989 and 1997.¹

These machines are generally marketed under four broad categories, including general use, sport, utility, and youth.² ATVs in the sport category are designed especially for recreation and racing. Machines in the sport/utility and utility classes are also recreational vehicles, but they have cargo racks and can be fitted with attachments, including trailers. By the mid-1980s, a handful of major manufacturers were selling as many as 600,000 three- and four-wheel ATVs annually in the United States.³

This petition addresses adult-size four-wheel ATVs which may be used by and/or sold for children under 16 including both new and used ATVs as well as all three-wheel ATVs in use and/or available for resale.

III.

Hazards Presented by All-Terrain Vehicles

ATVs pose an unreasonable risk of injury and death to children. According to the most recent CPSC data, between 1982 and 2001 there were reports of 4,541 ATV-related deaths.⁴ Children under sixteen years of age made up 38% of the total deaths or 1,714 victims.⁵ In year 2001 alone, 111,700 people were injured seriously enough to require emergency room treatment for ATV-related injuries and 34,800 of those injured were under age sixteen.⁶

A. Previous Consideration by the Consumer Product Safety Commission

Faced with increasing rates of injury and death to children in ATV-related incidents, CPSC took a two-tiered approach: initiating rulemaking and filing a lawsuit against ATV manufacturers. In 1985, the Commission initiated ATV rulemaking when it issued an Advanced Notice of Proposed Rulemaking to address the risk of injuries associated with ATVs. In May 1991, despite increasing numbers of children injured and killed in ATV incidents, CPSC voted to terminate its rulemaking.

In 1987, when in the midst of rulemaking and faced with increasing rates of ATV-related deaths and injuries, the Commission filed suit in the U.S. District Court for the District of Columbia against five major ATV manufacturers. The CPSC asked a federal court to declare ATVs to be "imminently dangerous consumer products."⁷ The lawsuit sought to require that manufacturers: 1) end production of three-wheel ATVs; 2) repurchase all three-wheel ATVs from dealer stocks; 3) offer financial incentives to encourage owners of three-wheel ATVs to return them; and 4) provide safety education.

¹ U.S. Consumer Product Safety Commission, *All-Terrain Vehicle Exposure, Injury, Death and Risk Studies*, April 1998, p. 3.

² ANSI/SVIA - 1- 2001, *American National Standard for Four Wheel All-Terrain Vehicles- Equipment, Configuration, and Performance Requirements*, section 3- Definitions, February 15, 200, p. 2.

³ Ford G, Mazis M, *Informing Buyers of Risks: Analysis of Marketing and Regulation of All Terrain Vehicles*, Journal of Consumer Affairs, 1996; 30(1).

⁴ U.S. Consumer Product Safety Commission, *2001 Annual Report: All-Terrain Vehicle (ATV)-Related Deaths and Injuries*, August 2002. The deaths reported to the Commission represent a minimum count of ATV-related deaths.

⁵ Id.

⁶ Id. at 6.

⁷ *United States of America v. U.S. v. Polaris Industries, L.P.*, 1987 WL 33507, 1 (D.D.C., 1987).

The lawsuit was settled on the day it was filed by a consent decree that proved ineffective in protecting children from being killed and injured on ATVs. The industry opposed the decree while at the same time reducing production of three-wheel ATVs and increasing the number of four-wheel machines made. The court approved a negotiated consent decree between the CPSC and industry that included the following major elements: 1) Manufacturers would cease production of any new three-wheel ATVs – an action they had largely taken by the time the decree was approved; 2) Manufacturers would recommend that ATVs with engine sizes greater than 70cc be sold only for children 12 and older and that “adult-size” ATVs, with engines greater than 90 cc, be sold only for individuals 16 and older; 3) ATVs would be labeled to warn purchasers that children should not ride adult-size ATVs; 4) Manufacturers would use their best efforts to ensure that dealers complied with the age recommendations and communicated them to prospective purchasers; and 5) Manufacturers would launch a public awareness campaign designed to alert consumers to the hazards associated with ATVs.⁸

The final decree did not include some of the most important elements of the original CPSC lawsuit, including the requirement that manufacturers offer financial incentives to encourage owners of three-wheel ATVs to return them to dealers. This guaranteed that the dangerous “three-wheelers” would remain in use nationwide.

The decree covered a ten-year period. As it neared expiration, the CPSC initiated a series of comprehensive usage, injury and risk studies designed to determine whether or not the decree should be extended. The major findings of the usage and injury studies include:

- 95 percent of injured riders under sixteen rode adult-size machines.⁹
- Children under sixteen accounted for nearly half of all injured ATV riders during the study period.¹⁰
- Children under sixteen were injured more frequently on four-wheel ATVs than the total population of ATV riders. Overall, 73 percent of the ATVs involved in all incidents were 4-wheel machines. However, four-wheel ATVs were ridden in 87 percent of incidents involving children twelve to fifteen years old.¹¹

Other research using CPSC data concludes that drivers injured in ATV incidents required hospitalization four times more frequently (nearly 16 percent compared to 4 percent) than the average for users of all other consumer products.¹²

These findings and others demonstrate that the consent decree was ineffective in many respects. While it successfully barred the production of new three-wheel ATVs, almost every injured child rode adult-size ATVs, children under sixteen continued to suffer a disproportionate share of all ATV-related injuries and injuries caused by ATVs continued to be much more severe when compared with other products.

When the consent decree expired in 1998, the Commission and the major manufacturers entered into voluntary, company-specific agreements, known generally as ATV Action Plans, which embody many of the decree's main tenets (outlined above). These agreements continue to recommend that children under sixteen not ride adult-size ATVs, require warning labels, describe

⁸ United States of America v. U.S. v. Polaris Industries, L.P., 1987 WL 33507 (D.D.C., 1987); United States of America v. American Honda Motor Co. Inc., et al., 143 F.R.D. 1 (1992).

⁹ U. S. Consumer Product Safety Commission, *All-Terrain Vehicle Exposure, Injury, Death and Risk Studies*, April 1998, p. 3.

¹⁰ *Id.*

¹¹ *Id.* at 46.

¹² Rodgers GB, Prowpit A. *Risk Factors for All-Terrain Vehicle Injuries: A National Case-Control Study.* *American Journal of Epidemiology*, 2001; 153(11): 1112-1118.

in great detail information that will be included in owner's manuals and reiterate that the industry will make formal training available to purchasers of new ATVs.¹³

The Action Plans have proven inadequate to curb the rising rates of death and injuries to children from ATV incidents. Unlike the consent decrees before them, they are not enforceable by the Commission: the companies can pull out at any time provided they give the Commission 60 days notice; the provision that companies recommend against the sale of adult-size ATVs for use by children under sixteen is implemented at the discretion of the manufacturers; and manufacturers instruct their dealers to implement this policy and then sample some segment of dealers annually to gauge compliance.

The Action Plans are limited to covering only the specific companies (Honda, Polaris, Suzuki, Yamaha, Kawasaki, and Arctic Cat) that executed them with the Commission. They do not apply to other entities that manufacture, sell or import ATVs in the United States. Since the plans were adopted, there has been an increase in the number of companies selling ATVs in this country. Most of these firms or individuals import ATVs from Taiwan, Hong Kong, Korea, Italy and other countries around the world and sell them under a range of names, including Monsoon, Predator, Monster Joe, and Xtreme Machine. These companies are not covered by the Action Plans. Therefore, they are free to sell vehicles of any size to any individual, they do not have to offer training, and they are completely exempt from even the minimal oversight that the major ATV makers exercise over their dealer networks.

Events since 1998 have demonstrated that this approach has been ineffective and that the Commission must re-examine this product and its previous decision in light of additional deaths and injuries and new information identified in this petition.

B. More Children are Killed and Injured on Four- Wheel ATVs Each Year

Death and injury rates to children riding ATVs have been increasing since 1993. Between 1993 and 2001, the Commission estimates that the number of injuries caused by ATV-incidents that required emergency room treatment nearly doubled to 111,700.¹⁴ During this same time period, the number of injuries caused by four-wheel ATVs increased by 211% to 99,600.¹⁵ The number of deaths caused by incidents involving *four-wheel ATVs exclusively increased from 7% in 1985 to about 86% in 2001.*¹⁶

The Commission concluded that there was a "statistically significant" increase in the number of injuries "for the years 1997-98, 1998-99, 1999-2000, and 2000-2001."¹⁷ According to the Commission, the risk of injury for riders of *four-wheel ATVs only* increased from 164.7 injuries per 10,000 ATVs in 1993 to 261.8 injuries per 10,000 in 2001.¹⁸ This injury rate is nearly as high as when three-wheel ATVs were banned in 1988 (275.8 injuries per 10,000).¹⁹

Nearly 15 years after the industry agreed to improve safety, ATV-related incidents, especially those involving children continue to rise.

¹³ U.S. Consumer Product Safety Commission, *All-Terrain Vehicles: Commission Resolution*, Federal Register 63 (236), December 9, 1998, page 67861.

¹⁴ U.S. Consumer Product Safety Commission, *Annual Report: 2001 All-terrain Vehicle (ATV)-related Deaths and Injuries*, August 2002; Helmkamp JC. Injuries and deaths and the use of all-terrain vehicles. *New England Journal of Medicine*, 2000; 343(23):1733-1734.

¹⁵ U.S. Consumer Product Safety Commission, *Annual Report: 2001 All-terrain Vehicle (ATV)-related Deaths and Injuries*, August 2002, at 8.

¹⁶ *Id.* at 4.

¹⁷ *Id.* at 1, and U.S. CPSC 2000 Annual Report: *All-terrain Vehicle (ATV)-related Deaths and Injuries* at 7.

¹⁸ U.S. Consumer Product Safety Commission *Annual Report: 2001 All-terrain Vehicle (ATV)-related Deaths and Injuries*, August 2002, at 8.

¹⁹ *Id.*

- The Commission estimates that 14 percent of all ATV riders are children under the age of sixteen.²⁰ However, these children disproportionately suffered approximately 37 percent of all injuries and 38 percent of total fatalities between 1985 and 2001.²¹
- Between 1982 and 2001, 1,714 children under the age of sixteen – or 38 percent of the total number of fatalities – were killed by ATVs.²² Of those, 799 children were under age 12.²³
- The estimated number of children injured in ATV-related incidents increased 94 percent between 1993 and 2001 to 34,800.²⁴
- Children under sixteen suffer the highest number of injuries of any age group except those between sixteen and twenty-four.

Furthermore, the risk of injury and death for children under sixteen is significantly greater than for older riders. According to the Commission, “for riders under sixteen years of age, there is a 1 in 3 chance of having an ATV-related injury during the lifespan of the ATV.”²⁵ Research concludes that ATV operators under the age of sixteen are 4.5 times more likely than older operators to receive injuries requiring emergency room treatment.²⁶

C. Inherent Hazards to Children Driving ATVs

The Commission, as well as experts in child health, have concluded, over the years, that ATVs are inherently difficult to operate for adults and beyond the development capability of children to control.

Driving an ATV requires the rider to make instantaneous decisions and adjustments. According to CPSC, drivers of ATVs must make complex split-second decisions:

If the ATV hits a bump, the driver has to determine almost instantaneously, the throttle setting, steering angle, and position of his/her body on the ATV. Such information can only be processed so fast and if the occurrence of the circumstances exceeds the ability of the driver to react appropriately, an incident will likely occur.²⁷

Children do not have the physical or mental abilities to make these complex, split-second decisions.

Medical researchers also challenge the safety records of four-wheel ATVs. One set of doctors conclude that “[D]ata are available stating both types lack appropriate lateral stability . . .

²⁰ U.S. Consumer Product Safety Commission, *All-Terrain Vehicle Exposure, Injury, Death and Risk Studies*, April 1998.

²¹ U.S. Consumer Product Safety Commission *Annual Report: 2001 All-terrain Vehicle (ATV)-related Deaths and Injuries*, August 2002, at 1, 4.

²² *Id.* at 4.

²³ *Id.*

²⁴ *Id.* at 6.

²⁵ U.S. Consumer Product Safety Commission, *Safety Commission Reissues Warning: Young People Under the Age of 16 Should Not Ride Adult-Size ATVs*, Safety Alert, March 1992.

²⁶ U.S. Consumer Product Safety Commission, *All-Terrain Vehicle Exposure, Injury, Death and Risk Studies*, April 1998, p. 73.

²⁷ U.S. Consumer Product Safety Commission, *Briefing Package on All-Terrain Vehicles*, March 1991, p. 19.

our data reveal that these vehicles [four-wheel ATVs] may be extraordinarily difficult to control even with smaller engines and age-specific engine recommendations."²⁸

A 1998 study of neurological injuries associated with ATVs reached a similar conclusion. "Although manufacturers have touted the four-wheel vehicles as being safer than the three-wheel variety, the relative increase in safety is negligible Injuries sustained in accidents involving four-wheel ATVs are just as severe as those incurred with three-wheel ATVs."²⁹ This study further questioned whether the safety had actually improved under the consent decree based on the fact that four-wheel ATVs were involved in 74 percent of fatal ATV accidents. By 2000, four-wheel ATVs were involved in more than 90 percent of fatalities. The authors conclude their analysis as follows: "To use a familiar phrase, ATVs are unsafe at any speed for children and adolescents."³⁰

A recent review of adolescent deaths resulting from ATV crashes in West Virginia suggests that, "young, immature ATV drivers exacerbate the inherent danger associated with ATVs through poor judgment and risk taking. Children often do not possess the physical size, strength, coordination and maturity to properly operate an ATV, particularly adult- size ATVs."³¹

The American Academy of Pediatrics (AAP), which represents 57,000 primary care pediatricians, pediatric specialists and surgeons, issued its first formal policy concerning use of ATVs by children in 1987. In June 2000, the AAP updated and strengthened its recommendation that children younger than sixteen not be allowed to operate ATVs regardless of size. In making this recommendation, the Academy concludes: "[O]ff-road vehicles are particularly dangerous to children younger than 16 years who may have immature judgment and motor skills An automobile driver's license, and preferably some additional certification in ATV use, should be required to operate an ATV. The safe use of ATVs requires the same or greater skill, judgment and experience as needed to operate an automobile."³²

The American Academy of Orthopaedic Surgeons (AAOS), the world's largest medical association for musculoskeletal specialists, has also issued a formal Position Statement on ATVs. The Association states "[I]n light of statistics that show an inordinate number of injuries and deaths resulting from the use of ATVs, the American Academy of Orthopaedic Surgeons considers ATVs to be a significant public health risk."³³ The Academy highlights the multitude of factors that make ATVs particularly unsafe for children: "Children under age 12 generally possess neither the body size or strength, nor the motor skills or coordination necessary for the safe handling of an ATV. Children under age 16 generally have not developed the perceptual abilities or judgment required for the safe use of highly powerful vehicles."³⁴

Doctors at Children's Hospital Medical Center in Cincinnati, who studied ATV-related injuries to children for nearly a decade, state:

It is unfathomable that it is illegal for children to drive automobiles until they are 16 years of age, pass a driver's training class, and obtain a valid driver's license, yet we permit

²⁸ Lynch JM, Gardner MJ, Worsley J, *The Continuing Problem of All-Terrain Vehicle Injuries in Children*, *Journal of Pediatric Surgery*, 1998, 33(2): 331.

²⁹ Russell A, Boop FA, Cherny WB, Ligon BL, *Neurological injuries associated with all-terrain vehicles and recommendations for protective measures for the pediatric population*, *Pediatric Emergency Care*. 1998; 14(1): 31-35.

³⁰ *Id.* at 35.

³¹ Helmkamp JC. Adolescent all-terrain vehicle deaths in West Virginia, 1990-1998, *West Virginia Medical Journal*, 2000(96):361-363.

³² American Academy of Pediatrics, *All-Terrain Vehicle Injury Prevention: Two-, Three-, and Four-Wheeled Unlicensed Motor Vehicles*. *Pediatrics*, 2000; 105(6): 1352-1354.

³³ American Academy of Orthopedic Surgeons, *Position Statement; All-Terrain Vehicles*, 1999.

³⁴ *Id.*

even younger children to ride ATVs without helmets, safety gear, formal training, parental supervision, or licenses. ATVs are in fact more dangerous than automobiles since the rider's body is fully exposed and not protected by the car's frame and body.³⁵

D. ATVs Are More Dangerous Than in the 1980s

ATV engine sizes, speed and power are being increased by the industry every year. Many ATVs can travel as fast as 75 miles per hour,³⁶ as compared to 50 miles per hour when the Commission looked at this issue in the 1980s.

The Commission found that the number of ATVs with large engines increased three-fold between 1989 and 1997.³⁷ One article in an enthusiast magazine explains that only a few years ago Suzuki's largest ATV had a 300 cc engine.³⁸ However, it continues: "But that was before the displacement wars when Polaris and others were just beginning to explore displacement bigger than 400 cc finally culminating this year in the 650-700 cc twins."³⁹ The Spring 2002 edition of *ATV Test Guide* describes the industry's approach to speed: "[T]he resurgence of the sport segment following the end of government restrictions has caused a few manufacturers to take off the gloves and go back to what we really enjoy: enthusiastic machines."⁴⁰ (emphasis added)

IV.

No Feasible Standard Exists to Address the Risks to Children Associated with ATVs

A. ANSI Voluntary Standard, ATV/SVI 1-2001

Under section 8 of the Consumer Product Safety Act, CPSC may ban a product when "no feasible consumer product safety standard under the [Consumer Product Safety Act] would adequately protect the public from the unreasonable risk of injury associated with such product."⁴¹ CPSC has not promulgated a mandatory standard for ATVs, however there is a voluntary standard, which even if made mandatory, would be inadequate.

The American National Standards Institute, Inc (ANSI) voluntary standard was approved for Four Wheel All-Terrain Vehicles on February 15, 2001. The voluntary standard fails to include any sections concerning the limitation of access to adult size ATVs by children. The standard includes a section dedicated to youth-size ATVs, which requires that youth-size ATVs contain an adjustable speed limiter, which can be removed, and a requirement that the maximum unrestricted speed capability be limited.⁴² This standard is inadequate, however, since the majority of children injured or killed in ATV-related incidents occurs on adult-size ATVs. The

³⁵ Brown R, Koepplinger M, Mehlman C, Gittelman M, Garcia V, *All-Terrain Vehicle and Bicycle Crashes in Children: Epidemiology and Comparison of Injury Severity*, *Journal of Pediatric Surgery* 2002; 37(3): 375-380.

³⁶ The CSN National Children's Center for Rural and Agricultural Health and Safety, Fact Sheet: Youth ATV Injuries, October 2001.

³⁷ U.S. Consumer Product Safety Commission, *All-Terrain Vehicle Exposure, Injury, Death and Risk Studies*, April 1998.

³⁸ *ATV Test Guide*, "Suzuki Eiger 400 4x4 Automatic: Another Lofty Peak Conquered," Spring 2002. p. 52.

³⁹ *Id.* at 52.

⁴⁰ *ATV Test Guide*, "Kawasaki Lakota Sport: Instant Sport! Just Drop Racks," Spring 2002, p. 74.

⁴¹ Consumer Product Safety Act, section 8(2), 15 U.S.C. 2057.

⁴² ANSI/SVIA - 1 - 2001, *American National Standard for Four Wheel All-Terrain Vehicles- Equipment, Configuration, and Performance Requirements*, February 15, 2001.

voluntary standard does not include any sections concerning warning labels about potential injury or ATV rider training. Therefore, concerns over the adequacy of this standard continue.

Even if this standard were made mandatory and even if changes were made to the standard to address the above and any other concerns, we do not believe that the risk of death and injury to children would be eliminated or substantially reduced.

V. Refunds

Consumer Federation of America requests that CPSC, under section 15 of the Consumer Product Safety Act, 15 U.S.C. section 2064, promulgate a rule requiring refunds to the purchasers of all three-wheel ATVs, whether purchased for adults or children, and all adult-size four-wheel ATVs purchased for use by children under sixteen.

Consumer Federation of America requests that the final rule:

- require the manufacturers and distributors of ATVs to notify purchasers of ATVs of the availability of the refund for all three-wheel vehicles and all adult-size four-wheel vehicles purchased for use by children under sixteen;
- prescribe the procedure for the return of three-wheel ATVs and adult-size four-wheel ATVs used by children under the age of sixteen for purposes of receiving the refund;
- prescribe the procedure for determining a reasonable amount of money to be refunded by the manufacturer; and
- apply to owners of three-wheel ATVs regardless of when the vehicle was purchased; and apply to owners of adult-size four wheel ATVs purchased for use by children under sixteen until such time as these products are banned by the Commission (as requested above in this petition).

By providing refunds to owners of such ATVs, CPSC can reduce the substantial product hazard posed by these machines by effectively removing them from consumer use. No other remedy will ensure that consumers who presently own these vehicles will be adequately protected. Unfortunately, the history of three-wheel ATVs has shown that a ban without a refund to consumers is insufficient to effectively reduce the hazard of death and injury.

VI.

Action Requested

For the reasons enumerated above, the Petitioners request that the Consumer Product Safety Commission ban the use of adult-size ATVs for use by children under sixteen years old under section 8 of the Consumer Product Safety Act (CPSA), 15 U.S.C. section 2057, finding that new and used four-wheel adult size ATVs as used by and/or sold for children under sixteen and three-wheel ATVs in use and/or available through commercial resale present an unreasonable risk of injury, that no feasible consumer product safety standard would adequately protect children from the unreasonable risk of injury associated with all three-wheel ATVs and four-wheel adult-size all-terrain vehicles, and, therefore, that all three-wheel ATVs and adult-size four-wheel ATVs used by children under age sixteen are a banned hazardous product. The Petitioners also request that the Consumer Product Safety Commission exercise its authority under section 15 of the CPSA, 15 U.S.C. section 2064, to require manufacturers to offer a refund for all three-wheel ATVs and for adult-size four-wheel ATVs purchased for use by children under sixteen.

Specifically, the Petitioners request that CPSC issue a rule that states:

Under the authority of section 8 of the Consumer Product Safety Act the Commission has determined that all three-wheel ATVs and adult-size four-wheel ATVs used by children under sixteen present an unreasonable risk of injury and therefore are banned under section 8 of the Act. Under the authority of section 15 of the Consumer Product Safety Act, the Commission will require manufacturers to offer a refund for all three-wheel ATVs, whether purchased for adults or children, and for adult-size four-wheel ATVs purchased for use by children under sixteen.

Respectfully submitted,

Rachel M. Weintraub
Attorney for Petitioner
Consumer Federation of America
1424 16th St., NW
Suite 604
Washington, DC 20036
(202) 387-6121
direct dial: (202) 939-1012

dated: August 19, 2002

Attachment
CPSC Staff Letter to Petitioner
(CP 02-4/HP 02-1)



U.S. CONSUMER PRODUCT SAFETY COMMISSION
WASHINGTON, DC 20207

OFFICE OF THE GENERAL COUNSEL

Stephen Lemberg
Assistant General Counsel
Tel: 301-504-0980 ext. 2218
E-Mail: slemberg@cpsc.gov

September 25, 2002

Rachel M. Weintraub, Esq.
Consumer Federation of America
1424 16th Street, N.W.
Washington, D.C. 20036

Dear Ms. Weintraub:

Your submission on behalf of Consumer Federation of America ("CFA"), the American Academy of Pediatrics, the American College of Emergency Physicians, Bluewater Network, the Center for Injury Research and Policy, the Danny Foundation for Crib and Child Product Safety, Kids in Danger, National Association of Orthopaedic Nurses, and U.S. PIRG requesting that the U.S. Consumer Product Safety Commission ("Commission") take certain action concerning all-terrain vehicles ("ATVs") has been forwarded to the Office of the General Counsel pursuant to the Commission's petition regulations for a determination of whether your request should be docketed as a petition for rulemaking. 16 C.F. R. Part 1051. You requested that the Commission begin a proceeding under section 8 of the Consumer Product Safety Act ("CPSA") to ban adult size four-wheel ATVs "which may be used by and /or sold for children under age sixteen" and "all three wheel ATVs in use or available for resale." You also requested that the Commission use its authority under section 15 of the CPSA to require manufacturers to offer refunds for all three-wheel ATVs and adult size four-wheel ATVs "purchased for use by children under sixteen." As explained below, to the extent your submission requests a rule banning adult-size four-wheel ATVs sold for the use of children under 16, we will docket that request as a petition. Your other requests for action do not meet the Commission's requirements for petitions as set forth in 16 C.F.R. Part 1051. (A copy of these regulations is enclosed.)¹

¹ We note that your submission repeats three of the four requests that CFA and U.S. PIRG submitted to the Commission in 1990. At that time, we declined to docket your requests as a petition because the Commission had published an advance notice of proposed rulemaking ("ANPR") that encompassed the actions you requested and because requiring refunds under section 15 cannot be done through rulemaking (see letter enclosed). Because the Commission has withdrawn the ANPR, we are considering your requests anew.

The Commission has the authority to issue standards for consumer products and, in some cases, ban the sale of certain consumer products. However, the Commission has no authority to regulate the use of consumer products. It cannot prohibit a child from riding an ATV. To the extent that your submission asks the Commission to ban the use of ATVs by children under 16, we cannot docket that request as a petition. An ATV cannot become a banned product the moment that a child climbs on it. However, the Commission would have the authority to ban the sale of adult-size ATVs where, at the time the ATV is sold, it is intended to be used by a person under the age of 16. See 56 FR 47166, 47172 (1991). That portion of your request is being docketed under the CPSA and the Federal Hazardous Substances Act ("FHSA"). You requested action under section 8 of the CPSA. However, we believe that the FHSA may also provide authority for such a proceeding. The FHSA was the authority for a limited ban on lawn darts sold for the use of children. See *R.B. Jarts, Inc. v. Richardson*, 438 F.2d 846 (2d Cir. 1971). Because you requested a rulemaking under the CPSA, and because many previous discussions about a ban on the sale of ATVs intended for the use of children under 16 years old have referred to the CPSA as the authority for such a ban, we will docket your request under both statutes.

As for your request that the Commission require manufacturers to provide refunds, the Commission may only docket as petitions requests for action that it is authorized to take through the issuance, amendment, or revocation of rules. 16 C.F.R. § 1051.2(a). Although the Commission does have the authority under section 15 of the CPSA to order recalls, 15 U.S.C. § 2064(c), it does not do so through rulemaking. Therefore, your request that the Commission require manufacturers to offer a refund for all three-wheel ATVs and for adult-size four-wheel ATVs purchased for use of children under 16 cannot be docketed as a petition. However, we are forwarding your request for recall to the Office of Compliance for any appropriate action.

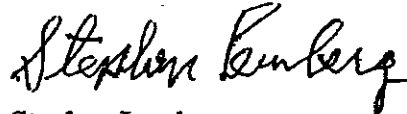
You also request that the Commission ban all three-wheel ATVs. We cannot docket this request for two reasons. First, for the Commission to ban a consumer product under section 8 of the CPSA it must find that the product is being, or will be, distributed in interstate commerce. 15 U.S.C. § 2057(1). As you know, three-wheel ATVs are no longer being manufactured. They are still being used by consumers, but, as discussed above, the Commission cannot regulate use of a product. We believe that for the Commission to consider a proceeding under section 8 it must have evidence that the product is being or will be sold in interstate commerce (not simply from one purchaser to another) more than occasionally. Your submission does not present any such evidence.

Second, the Commission's petition regulations require that a petition "set forth facts which establish the claim that the issuance ... of the rule is necessary." 16 C.F.R. § 1051.5(a)(4). You ask the Commission to ban all three-wheel ATVs, not just those purchased for the use of children under 16. However, your submission does not set forth facts specifically concerning three-wheel ATVs. The bulk of your submission discusses the hazards of children riding ATVs, primarily adult-size four-wheel ATVs. We note your submission seems to suggest that the evidence may indicate that four-wheel ATVs may be as hazardous as three-wheel ATVs.

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As explained above, we are docketing your request for a rule banning the purchase of adult-size four-wheel ATVs for the use of children under sixteen years of age as a petition. The Commission staff will be preparing information on the petition to forward to the Commission. However, we are not docketing your other requests for the reasons discussed above. If you have information concerning three-wheel ATVs that indicates they are sold in interstate commerce and that a ban is necessary you may provide the Commission with that information.

Sincerely,

A handwritten signature in black ink that reads "Stephen Lemberg". The signature is written in a cursive style with a large, prominent "S" at the beginning.

Stephen Lemberg
Assistant General Counsel

Enclosure

**PART 1051—PROCEDURE FOR
PETITIONING FOR RULEMAKING**

Sec.

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- 1051.2 General.
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- 1051.9 Factors the Commission considers in granting or denying petitions.
- 1051.10 Granting petitions.
- 1051.11 Denial of petitions.

AUTHORITY: 5 U.S.C. 553(e), 5 U.S.C. 555(e).

SOURCE: 48 FR 57123, Dec. 23, 1983, unless otherwise noted.

§ 1051.1 Scope.

(a) This part establishes procedures for the submission and disposition of petitions for the issuance, amendment or revocation of rules under the Consumer Product Safety Act (CPSA) (15 U.S.C. 2051 *et seq.*) or other statutes administered by the Consumer Product Safety Commission.

(b) Persons filing petitions for rulemaking shall follow as closely as possible the requirements and are encouraged to follow as closely as possible the recommendations for filing petitions under section 1051.5.

(c) Petitions regarding products regulated under the Federal Hazardous Substances Act (FHSA) (15 U.S.C. 1261 *et seq.*) are governed by existing Commission procedures at 16 CFR 1500.82, 16 CFR 1500.201, and 21 CFR 2.65. Petitions regarding the exemption of products regulated under the Poison Prevention Packaging Act of 1970 (PPPA) (15 U.S.C. 1471 *et seq.*) are governed by existing Commission procedures at 16 CFR 1702. In addition, however, persons filing such petitions shall follow the requirements and are encouraged to follow the recommendations for filing petitions as set forth in § 1051.5.

§ 1051.2 General.

(a) Any person may file with the Commission a petition requesting the Commission to begin a proceeding to issue, amend or revoke a regulation under any of the statutes it administers.

(b) A petition which addresses a risk of injury associated with a product which could be eliminated or reduced to a sufficient extent by action taken under the Federal Hazardous Substances Act, the Poison Prevention Packaging Act of 1970, or the Flammable Fabrics Act may be considered by the Commission under those Acts. However, if the Commission finds by rule, in accordance with section 30(d) of the CPSA, as amended by Pub. L. 94-284, that it is in the public interest to regulate such risk of injury under the CPSA, it may do so. Upon determination by the Office of the General Counsel that a petition should be considered under one of these acts rather than the CPSA, the Office of the Secretary shall docket and process the petition under the appropriate act and inform the petitioner of this determination. Such docketing, however, shall not preclude the Commission from proceeding to regulate the product under the CPSA after making the necessary findings.

§ 1051.3 Place of filing.

A petition should be mailed to Office of the Secretary, Consumer Product Safety Commission, Washington, D.C. 20207. Persons wishing to file a petition in person may do so in the Office of the Secretary, at either, 5401 Westbard Avenue, (third floor) Bethesda, Maryland or 1111 18th Street, NW, (eighth floor), Washington, D.C.

§ 1051.4 Time of filing.

For purposes of computing time periods under this part, a petition shall be considered filed when time-date stamped by the Office of the Secretary. A document is time-date stamped when it is received in the Office of the Secretary.

§ 1051.5 Requirements and recommendations for petitions.

(a) *Requirements.* To be considered a petition under this part, any request to issue, amend or revoke a rule shall meet the requirements of this paragraph (a). A petition shall:

- (1) Be written in the English language;
- (2) Contain the name and address of the petitioner;
- (3) Indicate the product (or products) regulated under the Consumer Product Safety Act or other statute the Commission administers for which a rule is sought or for which there is an existing rule sought to be modified or revoked. (If the petition regards a procedural or other rule not involving a specific product, the type of rule involved must be indicated.)

(4) Set forth facts which establish the claim that the issuance, amendment, or revocation of the rule is necessary (for example, such facts may include personal experience, medical, engineering or injury data, or a research study); and

(5) Contain an explicit request to initiate Commission rulemaking and set forth a brief description of the substance of the proposed rule or amendment or revocation thereof which it is claimed should be issued by the Commission. (A general request for regulatory action which does not reasonably specify the type of action requested shall not be sufficient for purposes of this subsection.)

(b) *Recommendations.* The Commission encourages the submission of as much information as possible related to the petition. Thus, to assist the Commission in its evaluation of a petition, to the extent the information is known and available to the petitioner, the petitioner is encouraged to supply the following information or any other information relating to the petition. The petition will be considered by the Commission even if the petitioner is unable to supply the information recommended in this paragraph (b). However, as applicable, and to the extent possible, the petitioner is encouraged to:

- (1) Describe the specific risk(s) of injury to which the petition is addressed, including the degree (severi-

ty) and the nature of the risk(s) of injury associated with the product and possible reasons for the existence of the risk of injury (for example, product defect, poor design, faulty workmanship, or intentional or unintentional misuse);

(2) State why a consumer product safety standard would not be feasible if the petition requests the issuance of a rule declaring the product to be a banned hazardous product; and

(3) Supply or reference any known documentation, engineering studies, technical studies, reports of injuries, medical findings, legal analyses, economic analyses and environmental impact analyses relating to the petition.

(c) *Procedural recommendations.* The following are procedural recommendations to help the Commission in its consideration of petitions. The Commission requests, but does not require, that a petition filed under this part:

- (1) Be typewritten,
- (2) Include the word "petition" in a heading preceding the text,
- (3) Specify what section of the statute administered by the Commission authorizes the requested rulemaking,
- (4) Include the telephone number of the petitioner and
- (5) Be accompanied by at least five (5) copies of the petition.

§ 1051.6 Documents not considered petitions.

(a) A document filed with the Commission which addresses a topic or involves a product outside the jurisdiction of the Commission will not be considered to be a petition. After consultation with the Office of the General Counsel, the Office of the Secretary, if appropriate, will forward to the appropriate agency documents which address products or topics within the jurisdiction of other agencies. The Office of the Secretary shall notify the sender of the document that it has been forwarded to the appropriate agency.

(b) Any other documents filed with the Office of the Secretary that are determined by the Office of the General Counsel not to be petitions shall

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be evaluated for possible staff action. The Office of the General Counsel shall notify the writer of the manner in which the Commission staff is treating the document. If the writer has indicated an intention to petition the Commission, the Office of the General Counsel shall inform the writer of the procedure to be followed for petitioning.

§ 1051.7 Statement in support of or in opposition to petitions; Duty of petitioners to remain apprised of developments regarding petitions.

(a) Any person may file a statement with the Office of the Secretary in support of or in opposition to a petition prior to Commission action on the petition. Persons submitting statements in opposition to a petition are encouraged to provide copies of such statements to the petitioner.

(b) It is the duty of the petitioner, or any person submitting a statement in support of or in opposition to a petition, to keep himself or herself apprised of developments regarding the petition. Information regarding the status of petitions is available from the Office of the Secretary of the Commission.

(c) The Office of the Secretary shall send to the petitioner a copy of the staff briefing package on his or her petition at the same time the package is transmitted to the Commissioners for decision.

§ 1051.8 Public hearings on petitions.

(a) The Commission may hold a public hearing or may conduct such investigation or proceeding, including a public meeting, as it deems appropriate to determine whether a petition should be granted.

(b) If the Commission decides that a public hearing on a petition, or any portion thereof, would contribute to its determination of whether to grant or deny the petition, it shall publish in the FEDERAL REGISTER a notice of a hearing on the petition and invite interested persons to submit their views through an oral or written presentation or both. The hearings shall be informal, nonadversary, legislative-type proceedings in accordance with 16 CFR Part 1052.

§ 1051.9 Factors the Commission considers in granting or denying petitions.

(a) The major factors the Commission considers in deciding whether to grant or deny a petition regarding a product include the following items:

(1) Whether the product involved presents an unreasonable risk of injury.

(2) Whether a rule is reasonably necessary to eliminate or reduce the risk of injury.

(3) Whether failure of the Commission to initiate the rulemaking proceeding requested would unreasonably expose the petitioner or other consumers to the risk of injury which the petitioner alleges is presented by the product.

(4) Whether, in the case of a petition to declare a consumer product a "banned hazardous product" under section 8 of the CPSA, the product is being or will be distributed in commerce and whether a feasible consumer product safety standard would adequately protect the public from the unreasonable risk of injury associated with such product.

(b) In considering these factors, the Commission will treat as an important component of each one the relative priority of the risk of injury associated with the product about which the petition has been filed and the Commission's resources available for rulemaking activities with respect to that risk of injury. The CPSC Policy on Establishing Priorities for Commission Action, 16 CFR 1009.8, sets forth the criteria upon which Commission priorities are based.

§ 1051.10 Granting petitions.

(a) The Commission shall either grant or deny a petition within a reasonable time after it is filed, taking into account the resources available for processing the petition. The Commission may also grant a petition in part or deny it in part. If the Commission grants a petition, it shall begin proceedings to issue, amend or revoke the rule under the appropriate provisions of the statutes under its administration. Beginning a proceeding means taking the first step in the rulemaking process (issuance of an advance notice

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of proposed rulemaking or a notice of proposed rulemaking, whichever is applicable).

(b) Granting a petition and beginning a proceeding does not necessarily mean that the Commission will issue, amend or revoke the rule as requested in the petition. The Commission must make a final decision as to the issuance, amendment, or revocation of a rule on the basis of all available relevant information developed in the course of the rulemaking proceeding. Should later information indicate that the action is unwarranted or not necessary, the Commission may terminate the proceeding.

§ 1051.11 Denial of petitions.

(a) If the Commission denies a petition it shall promptly notify the petitioner in writing of its reasons for such denial as required by the Administrative Procedure Act, 5 U.S.C. 555(e).

(b) If the Commission denies a petition, the petitioner (or another party) can refile the petition if the party can demonstrate that new or changed circumstances or additional information justify reconsideration by the Commission.

(c) A Commission denial of a petition shall not preclude the Commission from continuing to consider matters raised in the petition.