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U.S. Department of Transportation
Docket Operations, M-30
West Building Ground Floor
Room W12-140
1200 New Jersey Avenue, SE
Washington, DC 20590-0001

RE: Airworthiness Directives; Continental Motors, Inc. Reciprocating Engines
Supplemental Notice of Proposed Rulemaking
Docket No. FAA-2012-0002; Directorate Identifier 2011-NE-42-AD

The Aeronautical Repair Station Association (ARSA) respectfully submits the following comments to the above-referenced supplemental notice of proposed rulemaking (SNPRM). It requests that the Federal Aviation Administration (FAA or "the agency") comply with its obligations under the Data Quality Act before continuing the rulemaking or withdraw the proposal.

Due to the heavily regulated nature of the aviation industry, ARSA members are negatively impacted when government agencies fail to abide by the rulemaking procedures prescribed by the Administrative Procedure Act (APA)[1] and the agency's own internal guidelines for ensuring it satisfies its statutory duties. When small business entities are involved, the repercussions from improper government action are even greater. Although ARSA represents a wide cross-section of the aviation industry, the vast majority of its members are small proprietorships.[2] Nearly three quarters employ fewer than 50 people, well under the established limit, and almost half of the businesses are owned by a single individual or family.

In this instance, the FAA disregarded the most basic requirements for promulgating a rule, let alone an airworthiness directive (AD). The agency failed to comply with mandates contained in the APA, Regulatory Flexibility Act (RFA)[3] (as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA))[4], and the FAA's own internal guidance and policies. For the reasons stated herein, issuance of the rule would violate the APA.[5]

(1) Issuance of a Rule Would Be Arbitrary and Capricious and the Proposal Must Be Withdrawn.

The agency's failure to provide a factual basis for the underlying rulemaking does not comport with even the most basic requirements of the APA. In addition, the issuance of a final rule would raise fundamental questions of due process. The proposal does not apply equally to articles that

[1] 5 U.S.C. § 551 *et seq*.
[2] 13 C.F.R. § 121.201 (identifying Small Business Administration (SBA) size standard of not more than 1,000 employees for contractors that rebuild and overhaul aircraft).
[3] 5 U.S.C. § 601 *et seq*.
[4] Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. § 601 *et. seq.*).
[5] *See* 5 U.S.C. § 706(2)(A).

suffer from the same allegedly unsafe condition, but which are instead manufactured by the Original Equipment Manufacturer (OEM). As such, the proposal must be withdrawn.

(a) The Administrative Record is Devoid of any Factual Basis Supporting the Issuance of a Rule.

Before the agency can issue an AD it must establish that an "unsafe condition" exists with respect to a specific product.[6] The agency has failed to properly identify the data on which it relies for the conclusion that the affected cylinders present an unsafe condition.

The APA requires federal agencies to allow meaningful public participation in the rulemaking process and provide a "statement of basis and purpose" justifying a rule's issuance.[7] A rule will be set aside as being arbitrary and capricious where the agency fails to "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"[8] The agency has an affirmative obligation to demonstrate a sound factual basis for the issuance of a rule by specifically disclosing to interested parties the material upon which a prospective rule would be fashioned.[9] Any failure to notify interested parties of the research or data on which the agency relies impedes the presentation of constructive comments to the docket. The effect of such a failure would inevitably be a judicial finding that the rule's issuance was arbitrary and capricious on the grounds that the agency failed to establish or consider all relevant factors during the rulemaking process.[10]

The agency summarily concludes that an unsafe condition exists because there were "multiple" reports[11] of cylinder failures; however, it fails to identify the origin or content of those reports. When pressed on the issue in comments to the NPRM, the agency responded by adding various documents to the docket, including the AD worksheet.[12] The worksheet states that the AD resulted from reports from the FAA's Service Difficulty Reporting Database, FAA Flight Standard District Offices, and individual owners and operators.[13] While the AD worksheet purportedly identifies the origins of the reports, the agency has failed to meet its obligation of providing the public with those reports or providing a rational connection for why those reports

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[6] 14 C.F.R. § 39.5.
[7] 5 U.S.C. § 553(c).
[8] *Motor Vehicle Manufacturers Ass'n of the United States, Inc. v. State Farm Mutual Automobile Insurance*, 463 U.S. 29, 103 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)); *see also Bowen v. American Hospital Ass'n*, 476 U.S. 610, 626-27 (1986) (stating it is an "axiom of administrative law" that an agency's explanation of the basis for its decision must include a rational connection between the facts in the administrative record and the choice made, but cautioning that the "mere fact that there is some rational basis within the knowledge or experience of regulators under which they *might have concluded* that the regulation was necessary to discharge their statutorily authorized mission *will not suffice* to validate agency decision making") (internal citations omitted) (emphases added).
[9] *U.S. v. Nova Scotia Food Products Corp.*, 568 F.2d 240, 251 (2nd Cir. 1977); *see also Portland Cement Ass'n v. Ruckelhaus*, 486 F.2d 375, 393 (D.C. Cir. 1973) ("It is not consonant with the purpose of a rulemaking proceeding to promulgate rules on the basis of inadequate data, or on data that (in) critical degree, is known only to the agency.").
[10] *Nova Scotia Food Prods.*, 568 F.2d at 251.
[11] 80 Fed. Reg. 5, 1008, 1012 (Jan. 8, 2015).
[12] Informational Documents from U.S. Dept. of Transp./FAA, FAA Docket No. ID FAA-2012-0002-0430 (Sept. 20, 2013).
[13] FAA Airworthiness Directive Worksheet, Item 10, Doc No. 1, FAA Docket No. ID FAA-2012-0002-0430.

indicate that the cylinder assemblies are an unsafe condition. Without furnishing these reports—or, for that matter, any other data upon which the agency relied—the presentation of relevant comments is almost impossible. Commenters are left to speculate as to the agency's justifications and to provide every reasonable explanation of why the rule should not be issued. The agency's fundamental failure establishes that it has not considered all relevant information available, and, by extension, is incapable of reaching a well-reasoned conclusion regarding the condition of the affected cylinder assemblies. On these facts alone, the issuance of a final rule would be arbitrary, capricious, and invalid.

Presentation of relevant comments is further stymied by the agency's conclusory and unsupported responses to the NPRM submissions. For instance, the agency stated that it was irrelevant that the root cause of the cylinder failures is unknown and that it "disagreed" that pilot error was a factor.[14] Both statements reflect the agency's unwillingness to consider other relevant information that may be the source of the alleged unsafe condition and it fails to provide any rationale supporting such a conclusion. The D.C. Circuit has noted that an agency's failure to address public comments, or "address them in a conclusory manner, is fatal" to a rulemaking.[15] Federal agencies are "expected to identify relevant factual evidence, to explain the logic and the policies underlying any legislative choice, to state candidly any assumptions on which it relies, and to present its reasons for rejecting significant contrary evidence and argument."[16] Even in instances where the agency relies on its own expertise in a subject area, reliance on such expertise does not absolve the agency from providing a reasoned explanation for its decision. Indeed, a well-reasoned explanation based on experience requires the agency to describe not only its experience, but also "how [that experience] informed the [agency's] determination."[17]

Here, the administrative record is replete with instances where the agency simply states that it "disagrees" with the commenters.[18] In doing so it purports to rely on its own aviation experience and cites the "multiple secondary effects" of a cylinder failure as a justification.[19] However, such a conclusory statement of experience is insufficient because it has failed to demonstrate precisely how that past experience (i.e., objective evidence of cylinder failure causing secondary effects) informs its present decision. It is not sufficient to simply state that the FAA believes the AD is necessary to promote aviation safety; rather, the agency must point to specific objective evidence explaining that decision.[20] This is yet another example of how the agency has failed to properly present, explain and consider all relevant information in this rulemaking. Without thoughtful consideration of additional evidence, the issuance of an AD would be deemed arbitrary and capricious for want of an adequate factual basis.

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[14] 80 Fed. Reg. 5, 1009 (Jan. 8, 2015).
[15] *Int'l Union, United Mine Workers of Am. v. Mine Safety and Health Admin.*, 626 F.3d 84, 393 (D.C. Cir. 2010) (finding conclusory factual statements insufficient).
[16] *Int'l Union, United Auto, Aerospace and Agr. Implement Workers of Am., UAW v. Pendergrass*, 878 F.2d 389 (D.C. Cir. 1989) (quoting *Bldg. & Constr. Trades Dept., AFL-CIO v. Brock*, 838 F.2d 1258, 1264 (D.C. Cir. 1988)).
[17] *United Mine Workers of Am.*, 626 F.3d at 394.
[18] *See, e.g.*, 80 Fed. Reg. 5, 1009, 1010 (Jan. 8, 2015).
[19] 80 Fed. Reg. 5, 1009 (Jan. 8, 2015).
[20] *Cf. Natural Resources Defense Council, Inc. v. E.P.A.*, 824 F.2d 1258 (1st Cir. 1987) (finding EPA's statement that the agency "believed" contested provisions of a rule were "necessary and adequate" to protect sources of drinking water insufficient to explain why the rule did not encompass all Class I ground waters; the record did not point to any evidence that would support such a "bald assertion" that the agency "believed" the rule was necessary).

(b) The Agency Arbitrarily Deviates from Internal Guidance Documents Prescribing Its Duties Under the APA.

ARSA[21] and IPL Group[22] have commented extensively on the agency's deviation—if not wholesale departure—from internal guidance documents that outline the agency's duties when formulating the substantive basis for determining an unsafe condition justifying an AD.[23] The agency's guidance documents are the means by which it fulfills its statutory duties under the APA. The intended effect of these guidance documents is to confer a benefit upon all persons who will be directly affected by an AD's issuance, or, more specifically, to provide all interested parties with a comprehensive factual basis for the unsafe condition and to present meaningful comments to the docket that will help guide rulemaking process. The agency cannot arbitrarily confer or deny those important benefits to individuals affected by an unsafe condition determination without articulating a reason for departing from its rulemaking procedures. Any claim to the contrary "would draw into question the most elementary principles of due process."[24] Before this rulemaking can go forward, the agency must justify why it has chosen to abandon its rulemaking duties under the APA.

(c) A Final Rule Would be Arbitrary and Capricious Because it Discriminates in Favor of Identical "OEM" Cylinder Assemblies.

Perhaps most problematic is the blatant discriminatory nature of the proposed rule. The agency concludes—again without factual support—that the Airmotive/ECi cylinder assemblies have a higher failure rate than that of the "OEM"[25] cylinder assemblies. This problematic failure rate forms the basis for the agency's conclusion that an unsafe condition exists. The conclusion represents a fundamental misunderstanding of the process by which an unsafe condition is determined and would allow an allegedly unsafe condition to persist in similar articles produced by the type certificate (TC) holder. If an unsafe condition did exist, the failure to apply the corrective actions in the proposed AD equally to TC cylinder assemblies would raise fundamental issues of due process.

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[21] ARSA's Comments to NPRM, FAA Docket No. ID FAA-2012-0002-0565 (Dec. 12, 2013).
[22] Dr. Michael J. Dreikorn, President, The Integrated Performance Leadership Group, Comments to FAA Docket No. FAA-2012-0002 (Feb. 20, 2015).
[23] *See, e.g.*, Airworthiness Directives Manual (FAA-IR-M-8040.1C) (May 17, 2012) (requiring the agency to provide facts, data and reports supporting AD action); Engine and Propeller Directorate, Continued Airworthiness Assessment Process Handbook, Rev. 0, ¶ 7.1.2 (Sept. 23, 2010) (stating that the "underlying assumptions, data, and analytical techniques" used in the risk assessment process "should be identified and justified to ensure that the conclusions of the analysis are valid").
[24] *See Administrator v. Randall*, 3 N.T.S.B. 3624 (1981) (rejecting on due process grounds the FAA's refusal to comply with general, internal agency guidance); *Administrator v. Brasher*, 5 N.T.S.B. 2116 (1987) (same); *White Case: U.S. v. Robert P. White*, No. 4:89CV307, 23 CCH Av. L. Rep. 18 (E.D. Tex. 1992) (same); *Vitarelli v. Seaton*, 359 U.S. 535 (1959) (disapproving an agency's noncompliance with its procedural rules even where the only beneficiaries of such rules were the agency's own employees, and even though the adoption of the rules was a purely discretionary exercise of authority).
[25] The agency actually means the type certificate holder since the term original equipment manufacturer (OEM) has no meaning under 14 CFR—the aviation safety regulations. It is merely another example of the unprofessional manner in which this rulemaking is being handled.

Before an unsafe condition can be found, the agency must determine noncompliance with 14 CFR part 21 for designing or manufacturing an airworthy article in compliance with the applicable portions of 14 CFR part 33. Compliance with these aviation safety requirements and standards makes an article, by definition, airworthy. An airworthy article cannot be in an unsafe condition. In the event that an objective violation of the airworthiness standard can be shown, the agency must then determine whether such a violation constitutes an unsafe condition requiring the issuance of an AD.

At no time has the agency provided objective evidence that either the TC holder or Airmotive violated any airworthiness standard. In the absence of such evidence, all of Airmotive's cylinders that would be affected by the proposed rule are by definition airworthy. At the same time no objective evidence has been provided that the TC holder has violated any airworthiness standard for its affected cylinder assemblies. Both Airmotive and the TC holder's cylinders fail from time to time; however, only Airmotive's cylinders assemblies are adjudged to be an unsafe condition. The agency's selective enforcement of its airworthiness standards is discriminatory; failing to impose similar burdens on identical articles is arbitrary, capricious, and a violation of due process.[26]

The proposal must be withdrawn because the agency's factual findings and conclusions are unsubstantiated and without merit. As such, issuance of a final rule would be arbitrary, capricious, or otherwise not in accordance with law, and therefore is invalid under the APA.[27]

(2) OMB Data Quality Act Request

ARSA hereby submits a formal request for correction of the data and information provided by the agency in this rulemaking under the Department of Transportation's (DOT) Information Dissemination Quality Guidelines for implementing the Data Quality Act.[28]

The purpose of DOT's guidelines is to ensure the FAA uses reliable data sources and sound data techniques. DOT specifically states that the Department's policies "favor sufficient transparency about [its analytical] methods to allow independent reanalysis by qualified members of the public."[29] These guidelines apply when the FAA seeks public comment on a document and the information in it (e.g., a NPRM, studies cited in an NPRM, a regulatory evaluation or cost-benefit analysis pertaining to the NPRM, or a request for comments on an information collection subject to the Paperwork Reduction Act). While a request for correction of the information contained in a rulemaking would usually be incorporated in the next rulemaking document, the FAA's inadequate response to public comments and requests eliminates that

[26] *See Commander Aircraft Co. v. F.A.A.*, 21 F. App'x 3, 3 (D.C. Cir. 2001) (implying that issuance of an AD would be invalid because of a lack of evidence establishing the existence of an unsafe condition where the petitioner could demonstrate that the "FAA failed to consider evidence in the record that indicated the presence of the same failures on other aircraft").
[27] 5 U.S.C. § 706(2)(A).
[28] Consolidated Appropriations Act of 2001 § 515, Pub. L. No. 106-554, 114 Stat. 2763 (codified at 44 U.S.C. § 3516) (2000).
[29] Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility and Integrity of Information Disseminated by the Dept. of Transp. V(b) (available at http://www.rita.dot.gov/bts/sites/rita.dot.gov.bts/files/subject_areas/statistical_policy_and_research/data_quality_guidelines/html/guidelines.html).

avenue. In this case, the FAA should respond immediately because affected parties will suffer actual harm before the final action is issued; such is the case here. Airmotive, ECi, and hundreds of small businesses will lose millions of dollars in revenue from grounded aircraft and unnecessary maintenance expenses if the agency delays responding to this request. As such, the FAA must respond before continuing this rulemaking.

To correct the instant rulemaking's factual deficiencies, the FAA must:

- Identify the data upon which the agency relies and why that data supports a conclusion that an unsafe condition exists;
- Conduct an independent investigation of the reports to rule out other factors that could have caused the cylinder failure (e.g., pilot error);
- Conduct independent laboratory analyses of failed cylinders; and
- Consider laboratory analyses and industry literature indicating improper cylinder break-in and certain operating envelopes caused the cylinder failure.

Only by addressing the points above and making all the reports and information available in the docket will the public be in a position to conduct its independent analysis of the FAA's findings.

Conclusion

The FAA has failed to provide sufficient data and transparency in its analytical process to allow for meaningful public comment. The lack of a justification for the agency's conclusion, or even an explanation of how the factually deficient record might support that conclusion, is indicative of the agency's overarching failure to provide and consider all relevant evidence during the rulemaking process. As such, the agency must comply with its obligations under the APA and the Data Quality Act before continuing the rulemaking. Any failure to do so makes the issuance of the proposed rule proposed arbitrary, capricious, and not in accordance with law.

Sincerely,

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cc: U. S. Department of Transportation, Office of Dockets and Media Management
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