Attorneys General of California, Connecticut, Illinois, Maine, Maryland, Massachusetts, New Jersey, New York, North Carolina, Oregon, Pennsylvania, Vermont, and Washington and the Pennsylvania Department of Environmental Protection and the California Air Resources Board

July 13, 2018

VIA EMAIL AND OVERNIGHT MAIL

Andrew K. Wheeler
Acting Administrator, United States
Environmental Protection Agency
William Jefferson Clinton Building
1200 Pennsylvania Ave N.W.
Washington, D.C. 20004

Re: *Request for Withdrawal or Administrative Stay of United States Environmental Protection Agency's "Conditional No Action Assurance Regarding Small Manufacturers of Glider Vehicles"*

Dear Acting Administrator Wheeler:

The Attorneys General of California, Connecticut, Illinois, Maine, Maryland, Massachusetts, New Jersey, New York, North Carolina, Oregon, Pennsylvania, Vermont, and Washington, and the Pennsylvania Department of Environmental Protection and the California Air Resources Board (the "States") write to respectfully request that you immediately withdraw or issue an administrative stay of the United States Environmental Protection Agency's ("EPA's") unlawful de facto suspension of its duly promulgated regulation limiting the production of highly polluting glider vehicles and glider kits ("Glider Rule").[1] See Susan P. Bodine, Assistant Administrator, "Conditional No Action Assurance Regarding Small Manufacturers of Glider Vehicles" (July 6, 2018) ("de facto suspension" or "suspension").

As discussed below, EPA's de facto suspension of the Glider Rule is clearly unlawful. While framed as an exercise of enforcement discretion, EPA's action "amount[s] to an abdication of its statutory responsibility[y]"[2] to implement the Glider Rule and circumvents the substantive and procedural requirements that EPA must meet in order to modify a rule. Further, the action violates EPA's own longstanding policy against "no action assurances," and its practice of issuing such assurances only in narrow circumstances not applicable here, such as where there will not be an increase in environmental harm. Here, based on EPA's own data, the detrimental effect of EPA's suspension on public health and the environment will be dramatic. Therefore, absent quick action on your part to withdraw or stay EPA's de facto suspension, the States are prepared to take action in court.

[1] The Glider Rule is part of the Greenhouse Gas Emissions and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles—Phase 2 (81 Fed. Reg. 73, 478 (Oct. 25, 2016)).
[2] See *Heckler v. Chaney*, 470 U.S. 821, 833, fn. 4 (1985).

The Glider Rule, proposed in 2015 and adopted in 2016 as part of the Phase 2 heavy-duty vehicle fuel efficiency and greenhouse gas emissions standards rulemaking, struck a compromise between the interests of small businesses that salvage and refurbish engines from damaged trucks and the severe public health and environmental impacts from these old, highly polluting engines.[3] After a yearlong transition period, glider manufacturers are subject to limits on the use of *non-emissions compliant* engines, based on historic sales of gliders for their original purpose—to salvage relatively new engines from damaged trucks.[4] The de facto suspension perversely incentivizes the more recent "tenfold increase in glider kit production since the [model year] 2007 criteria pollutant emission standards took effect," an increase that "reflects an attempt to avoid these more stringent standards and (ultimately) the Clean Air Act."[5]

The facts demonstrate that EPA is using a "no action" assurance here because it recognizes it cannot lawfully support an amendment of the Glider Rule. EPA as much as admits that it cannot go forward with its Proposed Repeal without developing a new rationale and evidence to support it, due to concerns raised by public comment.[6] EPA also admits that it must undertake notice and comment rulemaking to alter a duly promulgated rule, such as the Glider Rule—not just issue a memorandum.[7] Further, it is well established that EPA must have statutory authority for any changes it proposes, and particularly for modification of effective dates or compliance dates of rules already in effect.[8]

EPA supplies no good reasons to support its action. EPA's de facto suspension of the Glider Rule from July 2018 through July 2019 will allow the manufacturers of *non-emission compliant* glider vehicles and glider kits to raise their production to many times the level that would otherwise be permissible[9] without fear of enforcement by EPA. Based on data EPA relied on in adopting the Glider Rule in 2015, adding this number of gliders to our nation's roads would lead to hundreds of premature deaths[10] and well over one hundred thousand tons of NOx and diesel particulate matter ("PM") pollution.[11] Without acknowledging the increased risk of premature deaths and other public health and environmental harms the de facto suspension will cause, EPA contends that it will prevent economic harms to manufacturers. However, in addition to the fact that such economic harms are speculative (given that these manufacturers could still

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[3] See, e.g., 81 FR at 73944-45; see also Response to Comments, Appendix A, EPA-426-R-16-901 (Aug. 2016) at 1963, Figures A-2 and A-3 (charting the difference in emissions between gliders and other new trucks) (Attachment A).

[4] See Response to Comments, Appendix A, EPA-426-R-16-901 (Aug. 2016) at 1961, Figure A-1 (Attachment B). The data from 2000-2009 reflects the historic number of engines salvaged from damaged trucks, while the numbers post-2009 reflect glider manufacturers expansion into use of non-emissions compliant engines sourced from trucks that had not been damaged in accidents. See 81 Fed. Reg. at 73,943.

[5] 81 Fed. Reg. at 73,943.

[6] De Facto Suspension at 2.

[7] *Id.*

[8] EPA should be well aware of these requirements, having been reminded of them recently by the Court of Appeals for the D.C. Circuit. See *Clean Air Council v. Pruitt*, 862 F.3d 1, 4 (D.C. Cir. 2017); see also *Natural Resources Defense Council v. National Highway Traffic Safety Administration*, -- F.3d --, 2018 WL 3819321 at *12 (2d Cir. June 29, 2018) (holding that an agency may not alter a rule without notice and comment, nor does an agency have any inherent authority to stay a final rule).

[9] See Response to Comments, Appendix A, EPA-426-R-16-901 (Aug. 2016) at 1964.

[10] *Id.* at 1877 (5,000-10,000 additional gliders would emit enough particulate matter pollution to cause 350 to 1,600 premature deaths).

[11] *Id.* at 1875-1876.

produce emission compliant trucks[12]), unsupported and unquantified, EPA failed to consider the far greater economic consequences of the health impacts of increased glider sales—consequences EPA itself estimated to be, on average, from $300,000 to $1,100,000 *for each non-emissions compliant additional glider sold*.[13]

Further, EPA has not met any of the procedural requirements for the suspension of a rule. No proposal was put to the public and no comment was sought. No data or analysis accompanied EPA's arbitrary suspension. Indeed, the memoranda constituting the action were not even released publicly until three days after their issuance. And, the dates of the memoranda indicate that this decision was made with less than a single day's consideration.

EPA cannot avoid these legal requirements by elevating form over substance and seeking to paint its action as an unreviewable exercise of enforcement discretion. EPA's decision not to apply the limitations to any gliders for the next twelve months is a sweeping "abdication of its statutory responsibilities," not an exercise of enforcement discretion. EPA's action also clearly violates its own longstanding "*Policy Against 'No Action' Assurances*," which dates to the Reagan Administration.[14] The 1984 policy expressly states that it "applies in all contexts, including assurances requested: …on the basis that revisions to the underlying legal requirement are being considered,"[15] as is the case with EPA's de facto suspension. The 1984 policy allows for exceptions only in narrow cases, for example, where necessary "to allow action to avoid extreme risks to public health and safety."[16] Here, EPA's action does not avoid such risks, but instead creates them.[17] In short, EPA's action is an unlawful rule suspension masquerading as an exercise of enforcement discretion.

[12] See 81 Fed. Reg. 73,518; 40 C.F.R. §§ 1037.150(t) and (t)(1)(vii).
[13] Response to Comments, Appendix A, EPA-426-R-16-901 (Aug. 2016) at 1965.
[14] Courtney M. Price, Assistant Administrator For Enforcement and Compliance Monitoring, Policy Against "No Action" Assurances, (Nov. 16, 1984) (Attachment C).
[15] *Id.* at 2. In reaffirming the 1984 policy against "no action assurances" eleven years later, EPA called the policy "a necessary and critically important element of the wise exercise of the Agency's enforcement discretion…." Steven A. Herman, Assistant Administrator, Processing Requests for Use of Enforcement Discretion (Mar. 3, 1995) (Attachment D).
[16] *Id.* at 2.
[17] EPA's present "no action assurance" differs substantially from those that came before it, either because in prior examples EPA has expressly found that the no action assurance will not increase environmental harm, or because EPA has identified technical barriers, or because EPA needed additional time to respond to a court order.

Given the absence of any rational or lawful basis to maintain EPA's de facto suspension, and in light of the imminent threat posed to public health and the environment, we respectfully request, pursuant to Federal Rule of Appellate Procedure 18(a)(1), that EPA immediately withdraw or administratively stay its action.

Yours Sincerely,

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cc: Susan Parker Bodine, Assistant Administrator, Office of Enforcement and Compliance Assurance, EPA (via email)
Bill Wehrum, Assistant Administrator, Office of Air and Radiation, EPA (via email)

Encl.

ATTACHMENT A

Figure A-2: Annual Per-Vehicle NOx Emissions (tons/year)
For Model Year 2017 Glider Vehicles and Other New Vehicles

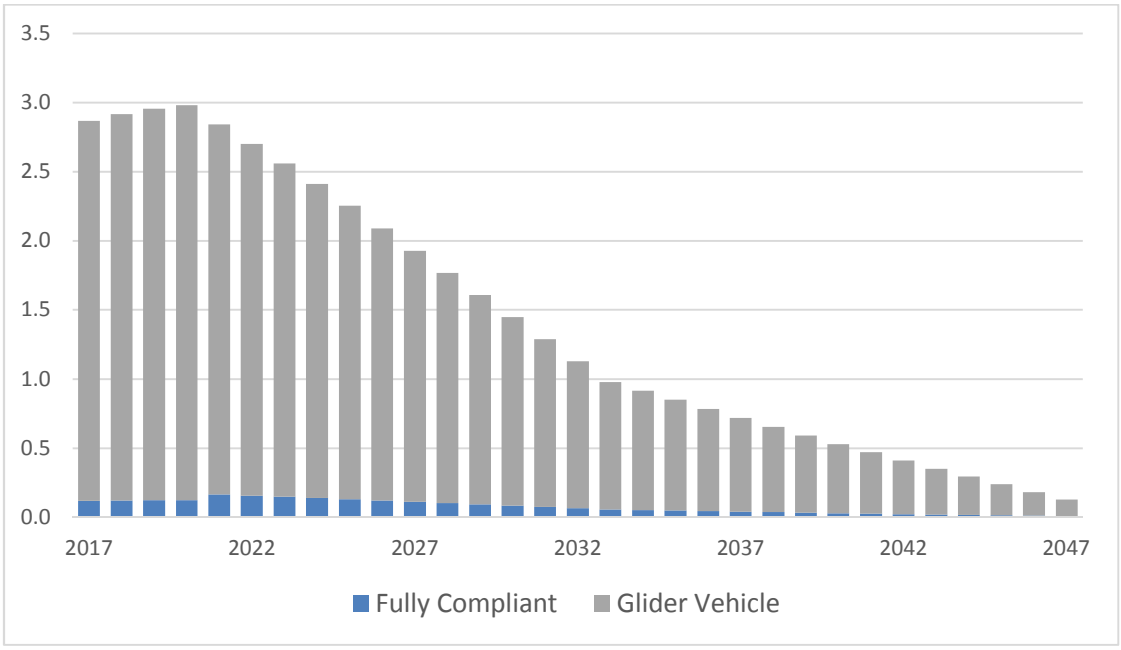
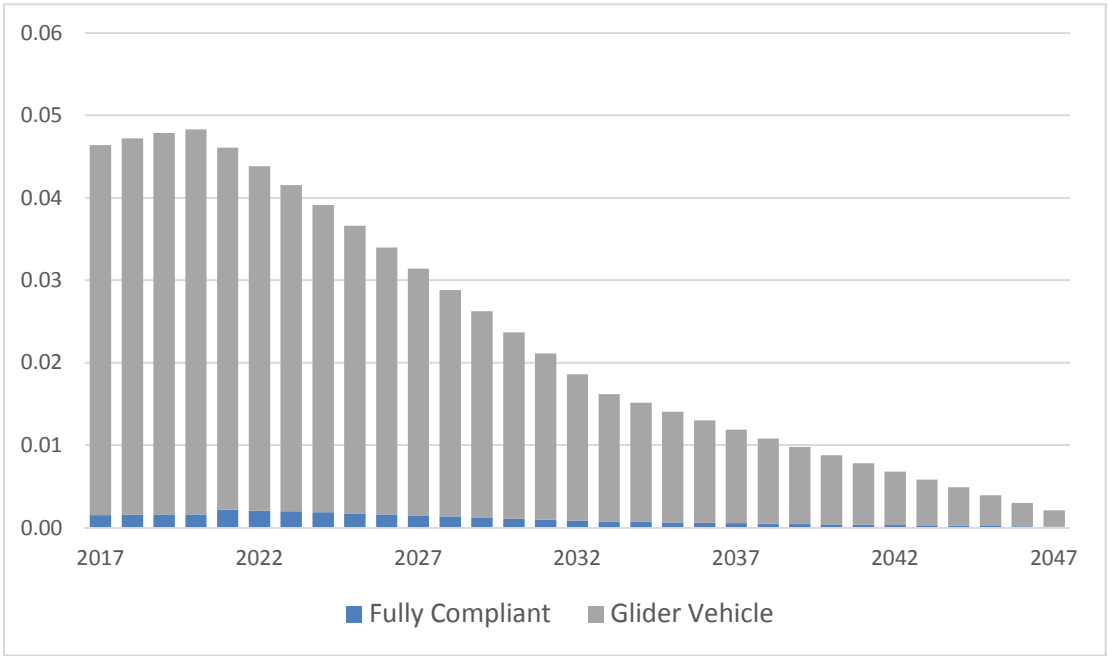


Figure A-3: Annual Per-Vehicle PM Emissions (tons/year)
For Model Year 2017 Glider Vehicles and Other New Vehicles

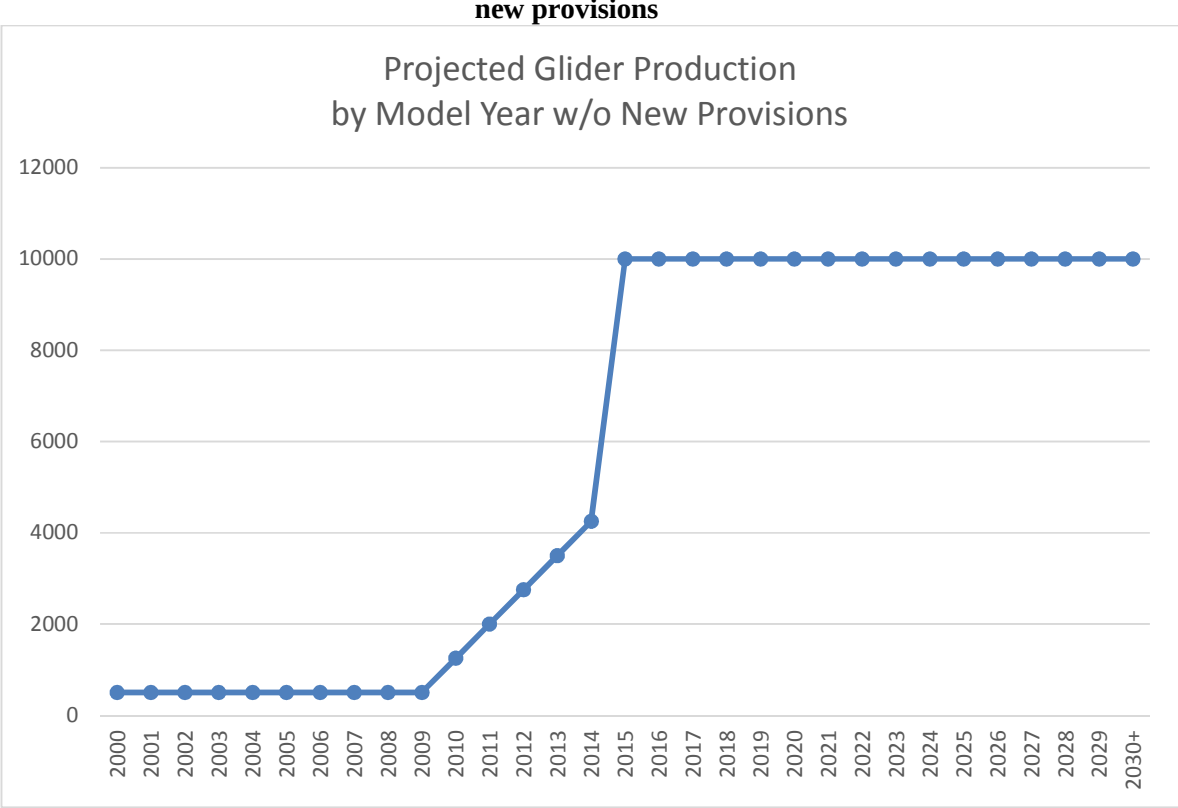


ATTACHMENT B

Fleetwide Emission Projections

Based on public comments, EPA is estimating that approximately 10,000 gliders will be produced in 2016. Consistent with this, the modeling of gliders discussed here assumed annual glider sales of 10,000 for 2015 and later. As noted above, the modeling assumed that these gliders emit at the level equivalent to the engines meeting the MY 1998-2001 standards without miscalibration.

Figure A- 1: Glider vehicle production projected for fleetwide analysis without new provisions



We modeled impacts on NOx and PM inventories with and without restrictions for two calendar years: 2025 and 2040. The restrictions were modeled as limiting sales in 2018 and later to 1,000 new gliders each year. This control case roughly approximates the restrictions being adopted for 2018 and later, and is consistent with the proposed requirements. The total number of vehicles was held constant by increasing the number of fully compliant vehicles (i.e., vehicles with engines meeting 2017 and later standards for NOx and PM) by 9,000 for each model year after 2017. However, we recognize that the actual number of gliders produced annually under the control case may vary by year and/or be higher or lower than 1,000. The results are shown below. This control scenario does not reflect the restrictions being adopted for 2017. See the model year analysis below for the impacts of model year 2017 glider vehicles.

ATTACHMENT C

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

GM #34
SE. 1-5

NOV 16 1984

OFFICE OF
ENFORCEMENT AND
COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Policy Against "No Action" Assurances

FROM: Courtney M. Price
Assistant Administrator for Enforcement
and Compliance Monitoring

TO: Assistant Administrators
Regional Administrators
General Counsel
Inspector General

This memorandum reaffirms EPA policy against giving definitive assurances (written or oral) outside the context of a formal enforcement proceeding that EPA will not proceed with an enforcement response for a specific individual violation of an environmental protection statute, regulation, or other legal requirement.

"No action" promises may erode the credibility of EPA's enforcement program by creating real or perceived inequities in the Agency's treatment of the regulated community. This credibility is vital as a continuing incentive for regulated parties to comply with environmental protection requirements.

In addition, any commitment not to enforce a legal requirement against a particular regulated party may severely hamper later enforcement efforts against that party, who may claim good-faith reliance on that assurance, or against other parties who claim to be similarly situated.

This policy against definitive no action promises to parties outside the Agency applies in all contexts, including assurances requested:

- both prior to and after a violation has been committed;
- on the basis that a State or local government is responding to the violation;

- on the basis that revisions to the underlying legal requirement are being considered;

- on the basis that the Agency has determined that the party is not liable or has a valid defense;

- on the basis that the violation already has been corrected (or that a party has promised that it will correct the violation); or

- on the basis that the violation is not of sufficient priority to merit Agency action.

The Agency particularly must avoid no action promises relating either to violations of judicial orders, for which a court has independent enforcement authority, or to potential criminal violations, for which prosecutorial discretion rests with the United States Attorney General.

As a general rule, exceptions to this policy are warranted only

- where expressly provided by applicable statute or regulation (e.g., certain upset or bypass situations)

- in extremely unusual cases in which a no action assurance is clearly neccessary to serve the public interest (e.g., to allow action to avoid extreme risks to public health or safety, or to obtain important information for research purposes) and which no other mechanism can address adequately.

Of course, any exceptions which EPA grants must be in an area in which EPA has discretion not to act under applicable law.

This policy in no way is intended to constrain the way in which EPA discusses and coordinates enforcement plans with state or local enforcement authorities consistent with normal working relationships. To the extent that a statement of EPA's enforcement intent is necessary to help support or conclude an effective state enforcement effort, EPA can employ language such as the following:

"EPA encourages State action to resolve violations of the _____ Act and supports the actions which (State) is taking to address the violations at issue. To the extent that the State action does not satisfactorily resolve the violations, EPA may pursue its own enforcement action."

I am requesting that any definitive written or oral no action commitment receive the advance concurrence of my office. This was a difficult decision to reach in light of the valid concerns raised in comments on this policy statement; nevertheless, we concluded that Headquarters concurrence is important because the precedential implications of providing no action commitments can extend beyond a single Region. We will attempt to consult with the relevant program office and respond to any formal request for concurrence within 10 working days from the date we receive the request. Naturally, emergency situations can be handled orally on an expedited basis.

All instances in which an EPA official gives a no action promise must be documented in the appropriate case file. The documentation must include an explanation of the reasons justifying the no action assurance.

Finally, this policy against no action assurances does not preclude EPA from fully discussing internally the prosecutorial merit of individual cases or from exercising the discretion it has under applicable law to decide when and how to respond or not respond to a given violation, based on the Agency's normal enforcement priorities.

cc: Associate Enforcement Counsels
OECM Office Directors
Program Compliance Office Directors
Regional Enforcement Contacts

ATTACHMENT D

EC-P-1998-07

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

MAR 0 3 1995

MEMORANDUM

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

SUBJECT: Processing Requests for Use of Enforcement Discretion

FROM: Steven A. Herman
Assistant Administrator

TO: Assistant Administrators
Regional Administrators
General Counsel
Inspector General

In light of the reorganization and consolidation of the Agency's enforcement and compliance assurance resources activities at Headquarters, I believe that it is useful to recirculate the attached memorandum regarding "no action" assurances[1] as a reminder of both this policy and the procedure for handling such requests. The Agency has long adhered to a policy against giving definitive assurances outside the context of a formal enforcement proceeding that the government will not proceed with an enforcement response for a specific individual violation of an environmental protection statue, regulation, or legal requirement. This policy, a necessary and critically important element of the wise exercise of the Agency's enforcement discretion, and which has been a consistent feature of the enforcement program, was formalized in 1984 following Agency-wide review and comment. Please note that OECA is reviewing the applicability of this policy to the CERCLA enforcement program, and will issue additional guidance on this subject.

A "no action" assurance includes, but is not limited to: specific or general requests for the Agency to exercise its enforcement discretion in a particular manner or in a given set of circumstances (i.e., that it will or will not take an enforcement action); the development of policies or other statements purporting to bind the Agency and which relate to or would affect the Agency's enforcement of the Federal environmental laws and regulations; and other similar requests

[1] Courtney M. Price, Assistant Administrator for Enforcement and Compliance Monitoring, Policy Against "No Action" Assurances (Nov. 16, 1984) (copy attached).

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for forbearance or action involving enforcement-related activities. The procedure established by this Policy requires that any such written or oral assurances have the advance written concurrence of the Assistant Administrator for Enforcement and Compliance Assurance.

The 1984 reaffirmation of this policy articulated well the dangers of providing "no action" assurances. Such assurances erode the credibility of the enforcement program by creating real or perceived inequities in the Agency's treatment of the regulated community. Given limited Agency resources, this credibility is a vital incentive for the regulated community to comply with existing requirements. In addition, a commitment not to enforce a legal requirement may severely hamper later, necessary enforcement efforts to protect public health and the environment, regardless of whether the action is against the recipient of the assurances or against others who claim to be similarly situated.

Moreover, these principles are their most compelling in the context of rulemakings: good public policy counsels that blanket statements of enforcement discretion are not always a particularly appropriate alternative to the public notice-and-comment rulemaking process. Where the Agency determines that it is appropriate to alter or modify its approach in specific, well-defined circumstances, in my view we must consider carefully whether the objective is best achieved through an open and public process (especially where the underlying requirement was established by rule under the Administrative Procedures Act), or through piecemeal expressions of our enforcement discretion.

We have recognized two general situations in which a no action assurance may be appropriate: where it is expressly provided for by an applicable statute, and in extremely unusual circumstances where an assurance is clearly necessary to serve the public interest *and* which no other mechanism can address adequately. In light of the profound policy implications of granting no action assurances, the 1984 Policy requires the advance concurrence of the Assistant Administrator for this office. Over the years, this approach has resulted in the reasonably consistent and appropriate exercise of EPA's enforcement discretion, and in a manner which both preserves the integrity of the Agency and meets the legitimate needs served by a mitigated enforcement response.

There may be situations where the general prohibition on no action assurances should not apply under CERCLA (or the Underground Storage Tanks or RCRA corrective action programs). For example, at many Superfund sites there is no violation of law. OECA is evaluating the applicability of no action assurances under CERCLA and RCRA and will issue additional guidance on the subject.

Lastly, an element of the 1984 Policy which I want to highlight is that it does not and should not preclude the Agency from discussing fully and completely the merits of a particular action, policy, or other request to exercise the Agency's enforcement discretion in a particular manner. I welcome a free and frank exchange of ideas on how best to respond to violations, mindful of the Agency's overarching goals, statutory directives, and enforcement and compliance priorities. I do, however, want to ensure that all such requests are handled in a consistent and coordinated manner.

Attachment

cc: OECA Office Directors
Regional Counsels
Regional Program Directors