

IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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ENVIRONMENTAL DEFENSE FUND,	)	)	
et al.,	)	)	
	)	)	
Petitioners,	)	)	No. 18-1190, consolidated with
	)	)	No. 18-1192
v.	)	)	
	)	)	
ENVIRONMENTAL PROTECTION	)	)	
AGENCY,	)	)	
	)	)	
Respondent.	)	)	
<hr/>		)	

RESPONDENTS’ MOTION TO DISMISS AND  
OPPOSITION TO PETITIONERS’ MOTIONS FOR STAY  
OR SUMMARY DISPOSITION

Respondents United States Environmental Protection Agency and Andrew K. Wheeler, Acting Administrator (collectively “EPA”) move for dismissal of these consolidated petitions for review on grounds of mootness. Because EPA’s Acting Administrator has withdrawn the challenged agency action and has stated that EPA will not repeat the action, this case is moot.

This filing also constitutes EPA’s Opposition to Environmental Petitioners’ Motion for Stay or Summary Disposition in No. 18-1190 (ECF No. 1740848), and to State Petitioners’ Motion for Summary Vacatur or in the Alternative for Stay Pending Judicial Review in No. 18-1192 (ECF No. 1741540). Undersigned

counsel for EPA conferred with Petitioners; Environmental Petitioners oppose this relief, and State Petitioners take no position at this time and reserve their right to oppose this motion.

### **BACKGROUND**

These cases are petitions for review of an EPA memorandum exercising enforcement discretion regarding small manufacturers of glider vehicles and their suppliers. Conditional No Action Assurance Regarding Small Manufacturers of Glider Vehicles (“No Action Assurance”). *See* Appendix to Environmental Petitioners’ emergency motion (“Env’t Pet. App.”) at A2. Glider vehicles are heavy-duty diesel trucks that combine a new truck body (a glider kit) with a previously-owned engine and transmission (and usually the rear axle). In 2016, EPA stated that new glider vehicles are “new motor vehicles” and glider engines are “new motor vehicle engines” under the Clean Air Act, and thus must meet the same emission standards applicable to any new vehicle for the year of manufacture, except where interim or other provisions applied. 81 Fed. Reg. 73,478, 73,945-46 (Oct. 25, 2016) (Env’t Pet. App. at A408-A409); *see also* 40 C.F.R. §§ 1037.150(t), 1037.635.

Interim provisions allow manufacturers to produce some glider vehicles that do not meet the new engine emission standards. For 2017, any glider manufacturer

could produce up to its highest annual production for any year from 2010 to 2014, without meeting emissions standards for 2017 engines. Beginning in 2018, the interim provisions allow only qualifying small manufacturers to produce gliders with engines meeting pre-2010 emissions standards, and limited them to a cap of either 300 glider vehicles or their highest annual production for any year from 2010 to 2014, whichever is fewer.<sup>1</sup> 81 Fed. Reg. at 73,946/2-3 (Env't Pet. App. at A409); *see also* 40 C.F.R. §§ 1037.150(t)(3) (limit for 2017 only); 1037.150(t)(1)(ii) (limit beginning in 2018).

In November 2017, EPA proposed to reconsider the part of the 2016 rule that applies to gliders. 82 Fed. Reg. 53,442 (Nov. 16, 2017) (Env't Pet. App. at A49). EPA's reconsideration notice primarily proposed a new interpretation of the Clean Air Act, under which glider vehicles and glider engines do not meet the statutory definitions of "new motor vehicles" and "new motor vehicle engines." This would repeal the provisions of the 2016 rule that require glider vehicles, engines, and kits to meet applicable standards for new motor vehicles and engines. 82 Fed. Reg. at 53,446-47 (Env't Pet. App. at A53-A54). EPA has not taken final action regarding that proposal.

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<sup>1</sup> Beginning in 2021, gliders vehicles will be subject to additional standards. *See* 40 C.F.R. § 1037.150(t)(1).

On July 6, 2018, the Assistant Administrator of EPA's Office of Air and Radiation requested EPA's Office of Enforcement and Compliance Assurance to exercise enforcement discretion through a no action assurance with respect to small manufacturers and suppliers of glider vehicles and kits, to preserve the status quo for those companies as it was at the time of the November 2017 proposed rule until such time as the EPA was able to take final action on regulatory revisions. Env't Pet. App. at A5.

On the same date, the Assistant Administrator of EPA's Office of Enforcement and Compliance Assurance issued the No Action Assurance for small manufacturers of glider vehicles and their suppliers. Env't Pet. App. at A2. The No Action Assurance explained that EPA would exercise its enforcement discretion to provide relief to small manufacturers while EPA continued its reconsideration of the 2016 rule. EPA stated that it would take no action against small manufacturers that produced in either 2018 or 2019 no more than the number of glider vehicles those small manufacturers could have produced pursuant to section 1037.150(t)(3), the cap for 2017. EPA similarly stated it would take no action against suppliers of glider kits acting within the scope of the No Action Assurance. The No Action Assurance would remain in effect for one year, or until EPA completed its regulatory revision, whichever was earlier.

Environmental Petitioners wrote EPA on July 10, requesting administrative action to either immediately withdraw or administratively stay the No Action Assurance, Env't Pet. App. at A253, and on July 17 filed an emergency motion to stay or to summarily vacate the No Action Assurance. Several states wrote EPA on July 13, making the same requests, Env't Pet. App. at A259, and State Petitioners filed their emergency motion on July 19.<sup>2</sup>

On July 26, 2018, the Acting Administrator issued a memorandum withdrawing the No Action Assurance and responding to Petitioners' requests to withdraw or administratively stay the No Action Assurance. *See* "Withdrawal of Conditional No Action Assurance Regarding Small Manufacturers of Glider Vehicles" ("Withdrawal Notice") (Attachment 1). At the same time, the Acting Administrator signed letters to each Petitioner stating that, after consideration of the requests and other information before him, he had decided to withdraw the No Action Assurance for the reasons detailed in that memorandum. Letters regarding Withdrawal and Administrative Stay Requests (Attachment 2). In the memorandum, EPA noted that long-standing EPA guidance limits the circumstances under which EPA will consider issuing no action assurances. Withdrawal Notice at 1. After further consideration, EPA "concluded that the

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<sup>2</sup> On July 18, 2018, the Court issued an administrative stay of the No Action Assurance and set a briefing schedule.

application of current regulations to the glider industry do not represent the kind of extremely unusual circumstances that support the EPA's exercise of enforcement discretion." *Id.* EPA thus withdrew the No Action Assurance, and determined that:

EPA will not offer any other no action assurance to any party with respect to the currently applicable requirements for glider manufacturers and their suppliers. Instead, [the Office of Air and Radiation] shall continue to move as expeditiously as possible on a regulatory revision regarding the requirements that apply to the introduction of glider vehicles into commerce to the extent consistent with statutory requirements and due consideration of air quality impacts.

*Id.*

### **ARGUMENT**

#### **EPA'S WITHDRAWAL OF THE CHALLENGED MEMO HAS RENDERED THIS CASE MOOT AND IT SHOULD THEREFORE BE DISMISSED**

Because the agency action that is the subject of the petitions for review has been withdrawn, there is no longer anything for the Court to review, and these cases are moot. As this Court has noted, "[t]he mootness doctrine, deriving from Article III, limits federal courts to deciding actual, ongoing controversies." *American Bar Ass'n v. FTC*, 636 F.3d 641, 645 (D.C. Cir. 2011), quoting *Clarke v. United States*, 915 F.2d 699, 700-01 (D.C. Cir. 1990) (en banc). Accordingly, if an event occurs during the pendency of a case that makes it impossible for the court to

grant any effectual relief, the case must be dismissed. *Church of Scientology v. United States*, 506 U.S. 9, 12 (1992); *Anderson v. Carter*, 802 F.3d 4, 10 (D.C. Cir. 2015), *cert. denied*, 137 S. Ct. 65 (2016); *Transwestern Pipeline Co. v. FERC*, 897 F.2d 570, 575 (D.C. Cir. 1990).

Petitioners in this case seek to have the Court stay or vacate the No Action Assurance, but the Acting Administrator's withdrawal of the No Action Assurance has already done exactly that. EPA granted Petitioners' requests, and there is no additional remedy that the Court can grant. Thus, any decision by the Court would necessarily constitute an impermissible advisory opinion. *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975) (federal court has no power to issue advisory opinions); *see also, e.g., El Paso Natural Gas Co. v. United States*, 750 F.3d 863, 883 (D.C. Cir. 2014) (noting that mootness doctrine is constitutional and that "[b]ecause the exercise of judicial power under Article III depends upon the existence of a case or controversy, a federal court may not render advisory opinions or decide questions that do not affect the rights of parties properly before it.").

Although the "voluntary cessation" of an allegedly illegal action does not automatically moot a case, this Court has recognized that the withdrawal of a challenged agency action does moot a challenge to that action if "there is no reasonable expectation that the violation will recur, and interim relief or

intervening events have completely eradicated the effects of the alleged violation.”

*Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Comm’n*, 680 F.2d 810, 814 n.8 (D.C. Cir. 1982) (no reasonable expectation that the agency will issue a similar rule without notice and comment). *See also Cierco v. Mnuchin*, 857 F.3d 407, 414-15 (D.C. Cir. 2017) (agency’s withdrawal “completely vitiated” disputed notices). Here, as described in the Withdrawal Notice, EPA “will not offer any other no action assurance to any party with respect to the currently applicable requirements for glider manufacturers and their suppliers.” EPA has thus explicitly committed that it will not repeat the same agency action that Petitioners challenge. The Acting Administrator also directed EPA to “continue to move as expeditiously as possible on a regulatory revision” regarding glider vehicles, which further demonstrates that EPA’s intent is to address glider vehicles through notice and comment rulemaking, not through the exercise of the agency’s enforcement discretion. The Withdrawal Notice not only “completely vitiate[s]” the No Action Assurance, it also demonstrates that Petitioners are not “likely to suffer the same injury in the future.” *Cierco*, 857 F.3d at 415.<sup>3</sup>

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<sup>3</sup> Nor is this case capable of repetition yet evading review. Even if the duration of the No Action Assurance were “too short to be fully litigated prior to [its] cessation or expiration,” the “capable of repetition” exception to the mootness doctrine also



## CONCLUSION

For all the foregoing reasons, the petitions for review should be dismissed, and Petitioners' motions should be denied as moot.

Dated: July 30, 2018

Respectfully submitted,

JEFFREY H. WOOD  
Acting Assistant Attorney General

JONATHAN D. BRIGHTBILL  
Deputy Assistant Attorney General

/s/ Daniel R. Dertke  
DANIEL R. DERTKE, Sr. Attorney  
U.S. Department of Justice  
Environment & Natural Resources Div.  
Environmental Defense Section  
P.O. Box 7611  
Washington, D.C. 20044--7611  
(202) 514-0994

OF COUNSEL:

ANDREA CARRILLO  
Office of General Counsel, U.S. EPA  
1200 Pennsylvania Ave., N.W.  
Washington, D.C. 20460

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requires a "reasonable expectation that the same complaining party will be subject to the same action again," which is missing here. *Cierco*, 857 F.3d at 415.

CERTIFICATE OF SERVICE

I certify that on this 30th day of July, 2018, the foregoing RESPONDENTS' MOTION TO DISMISS AND OPPOSITION TO PETITIONERS' MOTION FOR STAY OR SUMMARY DISPOSITION was served electronically via the Court's CM/ECF system upon counsel of record.

/s/ Daniel R. Dertke  
DANIEL R. DERTKE




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

July 26, 2018

OFFICE OF  
THE ADMINISTRATOR

**MEMORANDUM**

**SUBJECT:** Withdrawal of Conditional No Action Assurance Regarding Small Manufacturers of Glider Vehicles

**FROM:** Andrew R. Wheeler   
Acting Administrator

**TO:** Susan Parker Bodine  
Assistant Administrator, Office of Enforcement and Compliance Assurance

William L. Wehrum  
Assistant Administrator, Office of Air and Radiation

After review of the “Conditional No Action Assurance Regarding Small Manufacturers of Glider Vehicles” (No Action Assurance), signed on July 6, 2018 (attached), and upon further consideration as explained below, I am today withdrawing this No Action Assurance.

On July 6, 2018, the Office of Air and Radiation requested that the Office of Enforcement and Compliance Assurance exercise enforcement discretion through a no action assurance with respect to: 1) those small manufacturers to which 40 C.F.R. § 1037.150(1) applies that either are manufacturing or that have manufactured glider vehicles in calendar year 2018 (Small Manufacturers), and 2) those companies to which 40 C.F.R. § 1037.150(t)(1)(vii) applies that sell glider kits to such small manufacturers (Suppliers). OAR explained in this request that in November 2017 the EPA had proposed reconsideration of provisions applicable to glider vehicles in the 2016 HD Phase 2 Rule<sup>1</sup> and was working toward a final action, but needed additional time to evaluate matters before taking final action. In the interim, industry compliance with the glider requirements of the HD Phase 2 Rule was resulting in the loss of jobs and threatening the viability of Small Manufacturers. Thus, OAR requested a No Action Assurance to preserve the status quo for Small Manufacturers and Suppliers as it was at the time of the November 2017 proposed rule reconsidering the HD Phase 2 Rule until such time as the EPA was able to take final action on, among other possible regulatory revisions, a rule extending the applicable compliance date for glider vehicles.

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<sup>1</sup> Greenhouse Gas Emissions and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles-Phase 2, *see* 81 Fed. Reg. 73,478 (Oct. 25, 2016) (the HD Phase 2 Rule).

On July 6, 2018, OECA issued a No Action Assurance pursuant to this request, stating that the EPA intends to exercise its enforcement discretion through July 6, 2019, or the effective date of a final rule extending the compliance date applicable to Small Manufacturers, whichever is earlier, with respect to the applicability of 40 C.F.R. § 1037.635 to Small Manufacturers that in 2018 and 2019 produce for each of those two years up to the level of their Interim Allowances as was available to them in calendar year 2017 under 40 C.F.R. § 1037.150(1)(3), and that the EPA also will exercise its enforcement discretion during the same period with respect to Suppliers that sell glider kits to those Small Manufacturers to which the No Action Assurance applied. The No Action Assurance explained that this use of enforcement discretion was in the public interest to avoid profound disruptions to small businesses while the EPA completes its reconsideration of the HD Phase 2 Rule. The No Action Assurance also explained that EPA reserves its right to revoke or modify this no action assurance.

Three environmental groups<sup>2</sup> and a coalition of states<sup>3</sup> filed several separate administrative requests for the EPA to either immediately withdraw or administratively stay the No Action Assurance. On July 17, 2018, the environmental groups petitioned for review of the No Action Assurance in the D.C. Circuit and filed an emergency motion for stay or summary vacatur in the D.C. Circuit, and a request for an administrative stay during the court's consideration of the emergency motion. On July 18, the court issued an administrative stay of the No Action Assurance for the duration of time the court considers the emergency motion. On July 19, 2018, the same coalition of states filed a similar petition and emergency motion for summary vacatur, or, in the alternative, for stay pending judicial review, in the same court.

OECA has a general guidance limiting the circumstances under which the agency will consider issuing no action assurances.<sup>4</sup> The 1995 restatement of that policy states that the principles against the issuance of a no action assurance are at "their most compelling in the context of rulemakings." OECA guidance is clear that a no action assurance should be issued only in an "extremely unusual" case when the no action assurance is necessary to serve the public interest and only when no other mechanism can adequately address that interest. Thus, historically OECA has issued no action assurances to address situations where the balance of the public interest supported the EPA temporarily and narrowly exercising its enforcement discretion.

After consultation with OAR, OECA and OGC, and after further consideration of the No Action Assurance and information before me, including the administrative and judicial petitions and motions, and the application of agency guidance regarding no action assurances to these particular facts, I have concluded that the application of current regulations to the glider industry does not represent the kind of extremely unusual circumstances that support the EPA's exercise of enforcement discretion. I am therefore withdrawing the July 6, 2018, No Action Assurance.

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<sup>2</sup> Environmental Defense Fund, Center for Biological Diversity, and Sierra Club.

<sup>3</sup> California, Connecticut, Delaware, Illinois, Maine, Maryland, Massachusetts, Minnesota, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Washington and the District of Columbia.

<sup>4</sup> Memorandum from Courtney M. Price, Assistant Administrator for Enforcement and Compliance Monitoring, to Assistant Administrators, Regional Administrators, General Counsel, and Inspector General, Policy Against "No Action" Assurance (Nov. 16, 1984); Memorandum from Steven A. Herman, Assistant Administrator for Enforcement and Compliance Assurance, to Assistant Administrators, Regional Administrators, General Counsel, and Inspector General, Processing Requests for Use of Enforcement Discretion (March 3, 1995).

Furthermore, the EPA will not offer any other no action assurance to any party with respect to the currently applicable requirements for glider manufacturers and their suppliers. Instead, OAR shall continue to move as expeditiously as possible on a regulatory revision regarding the requirements that apply to the introduction of glider vehicles into commerce to the extent consistent with statutory requirements and due consideration of air quality impacts.

Attachment



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

July 6, 2018

OFFICE OF  
ENFORCEMENT AND  
COMPLIANCE ASSURANCE

**MEMORANDUM**

**SUBJECT:** Conditional No Action Assurance Regarding Small Manufacturers of Glider Vehicles

**FROM:** Susan Parker Bodine *Susan Parker Bodine*  
Assistant Administrator  
Office of Enforcement and Compliance Assurance

**TO:** Bill Wehrum  
Assistant Administrator  
Office of Air and Radiation

Pursuant to your attached request of July 6, 2018, I am today providing a “no action assurance” relating to: (1) those small manufacturers to which 40 C.F.R. § 1037.150(t) applies that either are manufacturing or that have manufactured glider vehicles in calendar year 2018 (Small Manufacturers); and (2) to those companies to which 40 C.F.R. § 1037.150(t)(1)(vii) applies that sell glider kits to such Small Manufacturers (Suppliers).

As noted in your memorandum, in conjunction with EPA’s having promulgated in 2016 the final rule entitled Greenhouse Gas Emissions and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles—Phase 2, *see* 81 Fed. Reg. 73,478 (Oct. 25, 2016) (the HD Phase 2 Rule), the Agency specified that glider vehicles were “new motor vehicles” (and glider vehicle engines to be “new motor vehicle engines”) within the meaning of 42 U.S.C. § 7550(3). Effective January 1, 2017, Small Manufacturers were permitted to manufacture glider vehicles in 2017 in the amount of the greatest number produced in any one year during the period of 2010–2014 without having to meet the requirements of 40 C.F.R. § 1037.635 (Interim Allowance). After this transitional period, beginning on January 1, 2018, small manufacturers of glider vehicles have been precluded from manufacturing more than 300 glider vehicles (or fewer, if a particular manufacturer’s highest annual production volume between 2010 and 2014 had been below 300 vehicles), unless they use engines that comply with the emission standards applicable to the model year in which the glider vehicle is manufactured. On November 16, 2017, EPA published a notice of proposed rulemaking, proposing to repeal the emissions standards and other requirements of the HD Phase 2 Rule as they apply to glider vehicles, glider engines, and glider kits. *See* 82 Fed. Reg. 53,442 (Nov. 16, 2017) (November 16 NPRM).

We understand that after taking into consideration the public comments received, and following further engagement with stakeholders and other interested entities, the Office of Air and Radiation (OAR) has determined that additional evaluation of several matters is required before it can take final action on the November 16 NPRM. Consequently, OAR now recognizes that finalizing the November 16 NPRM will require more time than it had previously anticipated. In the meantime, Small Manufacturers who, in reliance on the November 16 NPRM, have reached their calendar year 2018 annual allocation under the HD Phase 2 Rule must cease production for the remainder of calendar year 2018 of additional glider vehicles, resulting in the loss of jobs and threatening the viability of these Small Manufacturers.

As noted in your memorandum, OAR now intends to move as expeditiously as possible to undertake rulemaking in which it will consider extending the compliance date applicable to Small Manufacturers to December 31, 2019.

Consistent with the intent and purpose of OAR's planned course of action, this no action assurance provides that EPA will exercise its enforcement discretion with respect to the applicability of 40 C.F.R. § 1037.635 to Small Manufacturers that in 2018 and 2019 produce for each of those two years up to the level of their Interim Allowances as was available to them in calendar year 2017 under 40 C.F.R. § 1037.150(t)(3). This no action assurance further provides that EPA will exercise its enforcement discretion with respect to Suppliers that sell glider kits to those Small Manufacturers to which this no action assurance applies. This no action assurance will remain in effect until the earlier of: (1) 11:59 p.m. (EDT), July 6, 2019; or (2) the effective date of a final rule extending the compliance date applicable to small manufacturers of glider vehicles.

The issuance of this no action assurance is in the public interest to avoid profound disruptions to small businesses while EPA completes its reconsideration of the HD Phase 2 Rule. The EPA reserves its right to revoke or modify this no action assurance.

If you have further questions regarding this matter, please contact Rosemarie Kelley of my staff at (202) 564-4014, or [kelley.rosemarie@epa.gov](mailto:kelley.rosemarie@epa.gov).

Attachment

cc: Byron Bunker, OAR, OTAQ  
Rosemarie Kelley, OECA, OCE  
Phillip Brooks, OECA, OCE, AED

MEMORANDUM

SUBJECT: Enforcement Discretion Regarding Companies that Are Producing or that Have Produced Glider Vehicles in Calendar Year 2018

FROM: Bill Wehrum  
Assistant Administrator  
Office of Air and Radiation

TO: Susan Parker Bodine  
Assistant Administrator  
Office of Enforcement and Compliance Assurance

7-6-18

The Office of Air and Radiation (OAR) requests that the Office of Enforcement and Compliance Assurance (OECA) exercise enforcement discretion (No Action Assurance) with respect to both those small manufacturers to which 40 C.F.R. § 1037.150(t) applies that either are manufacturing or that have manufactured glider vehicles in calendar year 2018 (Small Manufacturers), and to those companies to which 40 C.F.R. § 1037.150(t)(1)(vii) applies that sell glider kits to such small manufacturers (Suppliers). Specifically, as a bridge to a rulemaking in which we will consider extending the deadline for Small Manufacturers to comply with 40 C.F.R. § 1037.635, OAR requests that OECA provide assurance that it will exercise enforcement discretion for up to one year with respect to the applicability to Small Manufacturers and their Suppliers of 40 C.F.R. § 1037.635. Further, OAR requests that OECA provide assurance that it will not take enforcement action against those Suppliers that elect to sell glider kits to those Small Manufacturers of glider vehicles to which this No Action Assurance applies.

In conjunction with EPA's having promulgated in 2016 the final rule entitled 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) (the HD Phase 2 Rule), the Agency clarified that glider vehicles were “new motor vehicles” (and glider vehicle engines to be “new motor vehicle engines”) within the meaning of 42 U.S.C. § 7550(3). EPA in the HD Phase 2 Rule also stated that glider kits constituted “incomplete motor vehicles.” Effective January 1, 2017, Small Manufacturers were permitted to manufacture glider vehicles in 2017 in the amount of the greatest number produced in any one year during the period 2010-2014 without meeting the requirements of 40 C.F.R. § 1037.635 (Interim Allowance). After this transitional period, beginning on January 1, 2018, small manufacturers of glider vehicles have been precluded from manufacturing more than 300 glider vehicles (or fewer, if a particular manufacturer's highest annual production volume from between 2010 and 2014 had been below 300 vehicles), unless they use engines that comply with the emission standards applicable to the model year in which the glider vehicle is manufactured.

On November 16, 2017, EPA published in the *Federal Register* a notice of proposed rulemaking, proposing to repeal the emissions standards and other requirements of the HD Phase 2 Rule as they apply to glider vehicles, glider engines, and glider kits. 82 Fed. Reg. 53,442 (Nov. 16, 2017) (November 16 NPRM). In the November 16 NPRM, EPA proposed an interpretation of the Clean Air Act (CAA) under which glider vehicles would be found not to constitute “new motor



vehicles” within the meaning of CAA section 216(3), glider engines would be found not to constitute “new motor vehicle engines” within the meaning of CAA section 216(3), and glider kits would not be treated as “incomplete” new motor vehicles. Under this proposed interpretation, EPA would lack authority to regulate glider vehicles, glider engines, and glider kits under CAA section 202(a)(1). EPA also sought comment on whether, were it not to promulgate this proposed interpretation of the CAA, the Agency should increase the interim provision’s allocation available to small manufacturers above the current applicable limits (*i.e.*, at most, 300 glider vehicles per year). 82 Fed. Reg. 53,447. Further, EPA solicited comment on whether the compliance date for glider vehicles and glider kits set forth at 40 C.F.R. § 1037.635 should be extended. *Id.*

After taking into consideration the public comments received, and following further engagement with stakeholders and other interested entities, OAR has determined that additional evaluation of a number of matters is required before it can take final action on the November 16 NPRM. As a consequence, OAR now recognizes that finalizing the November 16 NPRM will require more time than we had previously anticipated.

OAR intends to complete this rulemaking as expeditiously as possible under these circumstances, consistent with the Agency’s responsibility to ensure that whatever final action it may take conforms with the Clean Air Act and is based on reasoned decision making. In the meantime, while the emissions standards and other requirements of the 2016 Rule applicable to glider vehicles became effective on January 1, 2017, and the Interim Allowance for calendar year 2017 ceased to apply as of January 1, 2018. As a consequence, Small Manufacturers who, in reliance on the November 16 NPRM, have reached their calendar year 2018 interim annual allocation under the HD Phase 2 Rule must cease production for the remainder of 2018, resulting in the loss of jobs and threatening the viability of these Small Manufacturers.

In light of these circumstances, OAR now intends to move as expeditiously as possible to undertake rulemaking to consider extending the compliance date applicable to Small Manufacturers until December 31, 2019. Concurrently, we intend to continue to work towards expeditiously completing a final rule. OAR requests a No Action Assurance in order to preserve the status quo as it was at the time of the November 16 NPRM until such time as we are able to take final action on extending the applicable compliance date. Specifically, OAR requests that OECA exercise its enforcement discretion with respect to Small Manufacturers who in 2018 and 2019 produce for each of those two years up to the level of their Interim Allowance as was available to them in 2017 under 40 C.F.R. § 1037.150(t)(3). OAR requests that OECA leave this No Action Assurance in place for one year from the date of issuance, or until such time as EPA takes final action to extend the compliance date, whichever comes sooner.

I appreciate your prompt consideration of this request.



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

July 26, 2018

OFFICE OF  
THE ADMINISTRATOR

Mr. Max Kieley  
Manager, Environmental and Natural Resources Division  
Assistant Attorney General  
Office of the Attorney General  
445 Minnesota Street, Suite 900  
St. Paul, Minnesota 55101-2127

Dear Mr. Kieley:

Thank you for writing to request that the U.S. Environmental Protection Agency withdraw or administratively stay the EPA's conditional "no action assurance" regarding small manufacturers of glider vehicles.

After considering your request and other information before me, I have decided to withdraw the July 6, 2018, no action assurance for small manufacturers of glider vehicles and their suppliers, as detailed in the enclosed memorandum.

Sincerely,

A handwritten signature in black ink, appearing to read "Andrew R. Wheeler", with a long horizontal flourish extending to the right.

Andrew R. Wheeler  
Acting Administrator

Enclosure



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

July 26, 2018

OFFICE OF  
THE ADMINISTRATOR

Ms. Vickie Patton  
Ms. Martha Roberts  
Mr. Peter Zalzal  
Ms. Alice Henderson  
Environmental Defense Fund  
1875 Connecticut Avenue, N.W., Suite 600  
Washington, D.C. 20009

Dear Ms. Patton, Ms. Roberts, Mr. Zalzal and Ms. Henderson:

Thank you for writing to request that the U.S. Environmental Protection Agency withdraw or administratively stay the EPA's conditional "no action assurance" regarding small manufacturers of glider vehicles.

After considering your request and other information before me, I have decided to withdraw the July 6, 2018, no action assurance for small manufacturers of glider vehicles and their suppliers, as detailed in the enclosed memorandum.

Sincerely,

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Andrew R. Wheeler  
Acting Administrator

Enclosure



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

July 26, 2018

OFFICE OF  
THE ADMINISTRATOR

The Honorable Peter F. Kilmartin  
The Attorney General of Rhode Island  
Department of Attorney General  
150 South Main Street  
Providence, Rhode Island 02903

Dear Mr. Attorney General:

Thank you for writing to request that the U.S. Environmental Protection Agency withdraw or administratively stay the EPA's conditional "no action assurance" regarding small manufacturers of glider vehicles.

After considering your request and other information before me, I have decided to withdraw the July 6, 2018, no action assurance for small manufacturers of glider vehicles and their suppliers, as detailed in the enclosed memorandum.

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Andrew R. Wheeler  
Acting Administrator

Enclosure



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

July 26, 2018

OFFICE OF THE  
ADMINISTRATOR

The Honorable Matthew P. Denn  
The Attorney General of Delaware  
Department of Justice  
102 West Water Street  
Dover, Delaware 19904

Dear Mr. Attorney General:

Thank you for writing to request that the U.S. Environmental Protection Agency withdraw or administratively stay the EPA's conditional "no action assurance" regarding small manufacturers of glider vehicles.

After considering your request and other information before me, I have decided to withdraw the July 6, 2018, no action assurance for small manufacturers of glider vehicles and their suppliers, as detailed in the enclosed memorandum.

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Andrew R. Wheeler  
Acting Administrator

Enclosure



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

July 26, 2018

OFFICE OF  
THE ADMINISTRATOR

The Honorable Karl A. Racine  
The Attorney General of the District of Columbia  
Office of the Attorney General  
441 Fourth Street, NW, Suite 1100S  
Washington, D.C. 20001

Dear Mr. Attorney General:

Thank you for writing to request that the U.S. Environmental Protection Agency withdraw or administratively stay the EPA's conditional "no action assurance" regarding small manufacturers of glider vehicles.

After considering your request and other information before me, I have decided to withdraw the July 6, 2018, no action assurance for small manufacturers of glider vehicles and their suppliers, as detailed in the enclosed memorandum.

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Andrew R. Wheeler  
Acting Administrator

Enclosure



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

July 26, 2018

OFFICE OF  
THE ADMINISTRATOR

The Honorable Xavier Becerra  
The Attorney General of California  
California Department of Justice  
1515 Clay Street, Suite 2000  
Oakland, California 94612

Dear Mr. Attorney General:

Thank you for writing to request that the U.S. Environmental Protection Agency withdraw or administratively stay the EPA's conditional "no action assurance" regarding small manufacturers of glider vehicles.

After considering your request and other information before me, I have decided to withdraw the July 6, 2018, no action assurance for small manufacturers of glider vehicles and their suppliers, as detailed in the enclosed memorandum.

Sincerely,

A handwritten signature in black ink, appearing to read "Andrew Wheeler", with a long horizontal flourish extending to the right.

Andrew R. Wheeler  
Acting Administrator

Enclosure



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

July 26, 2018

OFFICE OF  
THE ADMINISTRATOR

Mr. Richard W. Corey  
Executive Officer  
California Air Resources Board  
1001 I Street  
Sacramento, California 95814

Dear Mr. Corey:

Thank you for writing to request that the U.S. Environmental Protection Agency withdraw or administratively stay the EPA's conditional "no action assurance" regarding small manufacturers of glider vehicles.

After considering your request and other information before me, I have decided to withdraw the July 6, 2018, no action assurance for small manufacturers of glider vehicles and their suppliers, as detailed in the enclosed memorandum.

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Andrew R. Wheeler  
Acting Administrator

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

July 26, 2018

OFFICE OF  
THE ADMINISTRATOR

The Honorable George Jepsen  
The Attorney General of Connecticut  
Office of the Attorney General  
P.O. Box 120  
55 Elm Street  
Hartford, Connecticut 06141-0120

Dear Mr. Attorney General:

Thank you for writing to request that the U.S. Environmental Protection Agency withdraw or administratively stay the EPA's conditional "no action assurance" regarding small manufacturers of glider vehicles.

After considering your request and other information before me, I have decided to withdraw the July 6, 2018, no action assurance for small manufacturers of glider vehicles and their suppliers, as detailed in the enclosed memorandum.

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Andrew R. Wheeler  
Acting Administrator

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

July 26, 2018

OFFICE OF  
THE ADMINISTRATOR

The Honorable Lisa Madigan  
The Attorney General of Illinois  
Illinois Attorney General's Office  
69 West Washington Street, 18th Floor  
Chicago, Illinois 60602

Dear Madame Attorney General:

Thank you for writing to request that the U.S. Environmental Protection Agency withdraw or administratively stay the EPA's conditional "no action assurance" regarding small manufacturers of glider vehicles.

After considering your request and other information before me, I have decided to withdraw the July 6, 2018, no action assurance for small manufacturers of glider vehicles and their suppliers, as detailed in the enclosed memorandum.

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Andrew R. Wheeler  
Acting Administrator

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

July 26, 2018

OFFICE OF  
THE ADMINISTRATOR

The Honorable Janet T. Mills  
The Attorney General of Maine  
6 State House Station  
Augusta, Maine 04333-0006

Dear Madame Attorney General:

Thank you for writing to request that the U.S. Environmental Protection Agency withdraw or administratively stay the EPA's conditional "no action assurance" regarding small manufacturers of glider vehicles.

After considering your request and other information before me, I have decided to withdraw the July 6, 2018, no action assurance for small manufacturers of glider vehicles and their suppliers, as detailed in the enclosed memorandum.

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Acting Administrator

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

July 26, 2018

OFFICE OF  
THE ADMINISTRATOR

The Honorable Gurbir S. Grewal  
The Attorney General of New Jersey  
Office of the Attorney General  
25 Market Street  
P.O. Box 093  
Trenton, New Jersey 08625-0093

Dear Mr. Attorney General:

Thank you for writing to request that the U.S. Environmental Protection Agency withdraw or administratively stay the EPA's conditional "no action assurance" regarding small manufacturers of glider vehicles.

After considering your request and other information before me, I have decided to withdraw the July 6, 2018, no action assurance for small manufacturers of glider vehicles and their suppliers, as detailed in the enclosed memorandum.

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Andrew R. Wheeler  
Acting Administrator

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

July 26, 2018

OFFICE OF  
THE ADMINISTRATOR

The Honorable Brian E. Frosh  
The Attorney General of Maryland  
200 St. Paul Place, 20th Floor  
Baltimore, Maryland 21202

Dear Mr. Attorney General:

Thank you for writing to request that the U.S. Environmental Protection Agency withdraw or administratively stay the EPA's conditional "no action assurance" regarding small manufacturers of glider vehicles.

After considering your request and other information before me, I have decided to withdraw the July 6, 2018, no action assurance for small manufacturers of glider vehicles and their suppliers, as detailed in the enclosed memorandum.

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Andrew R. Wheeler  
Acting Administrator

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

July 26, 2018

OFFICE OF  
THE ADMINISTRATOR

The Honorable Barbara D. Underwood  
The Attorney General of New York  
120 Broadway, 26th Floor  
New York, New York 10271

Dear Madame Attorney General:

Thank you for writing to request that the U.S. Environmental Protection Agency withdraw or administratively stay the EPA's conditional "no action assurance" regarding small manufacturers of glider vehicles.

After considering your request and other information before me, I have decided to withdraw the July 6, 2018, no action assurance for small manufacturers of glider vehicles and their suppliers, as detailed in the enclosed memorandum.

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Acting Administrator

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

July 26, 2018

OFFICE OF  
THE ADMINISTRATOR

The Honorable Maura Healey  
The Attorney General of Massachusetts  
One Ashburton Place, 18th Floor  
Boston, Massachusetts 2108

Dear Madame Attorney General:

Thank you for writing to request that the U.S. Environmental Protection Agency withdraw or administratively stay the EPA's conditional "no action assurance" regarding small manufacturers of glider vehicles.

After considering your request and other information before me, I have decided to withdraw the July 6, 2018, no action assurance for small manufacturers of glider vehicles and their suppliers, as detailed in the enclosed memorandum.

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Acting Administrator

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

July 26, 2018

OFFICE OF  
THE ADMINISTRATOR

The Honorable Joshua H. Stein  
The Attorney General of North Carolina  
North Carolina Department of Justice  
P.O. Box 629  
Raleigh, North Carolina 27602

Dear Mr. Attorney General:

Thank you for writing to request that the U.S. Environmental Protection Agency withdraw or administratively stay the EPA's conditional "no action assurance" regarding small manufacturers of glider vehicles.

After considering your request and other information before me, I have decided to withdraw the July 6, 2018, no action assurance for small manufacturers of glider vehicles and their suppliers, as detailed in the enclosed memorandum.

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Acting Administrator

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

July 26, 2018

OFFICE OF THE  
ADMINISTRATOR

The Honorable Josh Shapiro  
The Attorney General of Pennsylvania  
Pennsylvania Office of Attorney General  
Strawberry Square  
Harrisburg, Pennsylvania 17120

Dear Mr. Attorney General:

Thank you for writing to request that the U.S. Environmental Protection Agency withdraw or administratively stay the EPA's conditional "no action assurance" regarding small manufacturers of glider vehicles.

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Acting Administrator

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

July 26, 2018

OFFICE OF THE  
ADMINISTRATOR

The Honorable Ellen F. Rosenblum  
The Attorney General of Oregon  
Oregon Department of Justice  
1162 Court Street NE  
Salem, Oregon 97301-4096

Dear Madame Attorney General:

Thank you for writing to request that the U.S. Environmental Protection Agency withdraw or administratively stay the EPA's conditional "no action assurance" regarding small manufacturers of glider vehicles.

After considering your request and other information before me, I have decided to withdraw the July 6, 2018, no action assurance for small manufacturers of glider vehicles and their suppliers, as detailed in the enclosed memorandum.

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Acting Administrator

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

July 26, 2018

OFFICE OF THE  
ADMINISTRATOR

The Honorable Thomas J. Donovan, Jr.  
The Attorney General of Vermont  
Office of the Attorney General  
109 State Street  
Montpelier, Vermont 5609

Dear Mr. Attorney General:

Thank you for writing to request that the U.S. Environmental Protection Agency withdraw or administratively stay the EPA's conditional "no action assurance" regarding small manufacturers of glider vehicles.

After considering your request and other information before me, I have decided to withdraw the July 6, 2018, no action assurance for small manufacturers of glider vehicles and their suppliers, as detailed in the enclosed memorandum.

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

July 26, 2018

OFFICE OF THE  
ADMINISTRATOR

The Honorable Robert W. Ferguson  
The Attorney General of Washington  
Office of the Attorney General  
P.O. Box 40117  
Olympia, Washington 98504-0117

Dear Mr. Attorney General:

Thank you for writing to request that the U.S. Environmental Protection Agency withdraw or administratively stay the EPA's conditional "no action assurance" regarding small manufacturers of glider vehicles.

After considering your request and other information before me, I have decided to withdraw the July 6, 2018, no action assurance for small manufacturers of glider vehicles and their suppliers, as detailed in the enclosed memorandum.

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Acting Administrator

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**RESPONDENTS' CERTIFICATE AS TO PARTIES,  
RULINGS, AND RELATED CASES**

**A. Parties and *Amici***

All parties appearing in this Court are accurately identified in the Environmental Petitioners' Motion for Stay or Summary Disposition in No. 18-1190 (ECF No. 1740848), and in State Petitioners' Motion for Summary Vacatur or in the Alternative for Stay Pending Judicial Review in No. 18-1192 (ECF No. 1741540). The Chesapeake Bay Foundation, Inc., has moved to intervene but only if this case proceeds to the merits. *See* ECF No. 1742142.

**B. Rulings Under Review**

Petitioners seek review of an action taken by EPA on July 6, 2018, entitled "Conditional No Action Assurance Regarding Small Manufacturers of Glider Vehicles."

**C. Related Cases**

These consolidated cases were not previously before this Court or any other court.

Respectfully submitted,

/s/ Daniel R. Dertke  
DANIEL R. DERTKE, Attorney  
Environmental Defense Section  
U.S. Department of Justice

July 30, 2018