No. 18-1190

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

ENVIRONMENTAL DEFENSE FUND, CENTER FOR BIOLOGICAL DIVERSITY, and SIERRA CLUB,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

EMERGENCY MOTION FOR STAY OR SUMMARY DISPOSITION AND REQUEST FOR ADMINISTRATIVE STAY

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CERTIFICATE AS TO PARTIES, RULING, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), petitioners certify as follows:

A. Parties and Amici

Petitioners are the Environmental Defense Fund, Center for Biological Diversity, and Sierra Club. Respondent is the United States Environmental Protection Agency (EPA). No parties have moved for leave to intervene at present. There are no *amici curiae* at present.

B. Ruling Under Review

Petitioners seek review of a final action taken by EPA on July 6, 2018, styled as a "Conditional No Action Assurance Regarding Small Manufacturers of Glider Vehicles," and reproduced in an Addendum to this motion.

C. Related Cases

Petitioners are not aware of any related cases within the meaning of Circuit Rule 28(a)(1)(C).

/s/ Matthew Littleton
Matthew Littleton

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, Petitioners Environmental Defense Fund, Center for Biological Diversity, and Sierra Club make the following disclosures:

Environmental Defense Fund

Parent Corporations: None.

Publicly Held Company that Owns 10% or More of Party's Stock: None.

Party's General Nature and Purpose: Environmental Defense Fund, a corporation organized and existing under the laws of the State of New York, is a national non-profit organization that links science, economics, and law to create innovative, equitable, and cost-effective solutions to society's most urgent environmental problems.

Center for Biological Diversity

Parent Corporations: None.

Publicly Held Company that Owns 10% or More of Party's Stock: None.

Party's General Nature and Purpose: The Center for Biological Diversity is a non-profit corporation organized and existing under the laws of the State of California that works through science, law, and advocacy to secure a future for all species, great and small, hovering on the brink of extinction, with a focus on protecting the lands, waters, and climate that species need to survive.

Sierra Club

Parent Corporations: None.

Publicly Held Company that Owns 10% or More of Party's Stock: None.

Party's General Nature and Purpose: Sierra Club, a corporation organized and existing under the laws of the State of California, is a national non-profit organization dedicated to the protection and enjoyment of the environment.

/s/ Matthew Littleton
Matthew Littleton

CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 18(a)(1)

The undersigned certifies that this Emergency Motion for Stay or Summary Disposition and Request for Administrative Stay complies with Circuit Rule 18(a).

Movants previously requested relief from respondent U.S. Environmental Protection Agency (EPA). The final action under review is dated July 6, 2018, but EPA did not release it until July 9, 2018. Movants sent a certified letter and e-mail to the Acting Administrator and other agency officials on July 10, 2018. *See* Appendix 253–57. Movants' letter objected to the challenged action and requested that it be immediately withdrawn or stayed. After receiving no response from EPA or its Acting Administrator, movants filed this petition for review and motion for emergency relief on July 17, 2018.

On July 16, 2018, the undersigned provided notice of this filing by e-mail to Eric Hostetler, Environmental Defense Section, Environment and Natural Resources Division, United States Department of Justice.

/s/ *Matthew Littleton*
Matthew Littleton

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GLOSSARY

EPA	United States Environmental Protection Agency
NO_x	Nitrogen oxides
$PM_{2.5}$	Fine particulate matter

INTRODUCTION

Petitioners challenge a final decision by the Environmental Protection Agency (EPA) that encourages the production and sale of thousands of super-polluting, heavy-duty diesel freight trucks in violation of the agency's own Clean Air Act regulations. EPA's decision not to enforce those regulations nationwide paves the way for immediate production and sale of these "gliders," which will operate for decades and emit orders of magnitude more pollutants than trucks compliant with current pollution-control standards. The agency's refusal to implement its own regulations will result in premature mortality on a massive scale, and it threatens to undermine decades of progress in combating diesel-exhaust pollution. Hastily requested and finalized on the last night of then-Administrator E. Scott Pruitt's tenure without any input from the public, this extraordinary decision rewards a handful of manufacturers that lobbied him for a Clean Air Act loophole at the expense of the health and welfare of the American people, not to mention competing firms who follow the law.

EPA anticipates that, each day that this decision remains in effect, glider manufacturers will produce and sell more noncompliant freight trucks in contravention of existing law and in derogation of human health. Because the Clean Air Act regulates vehicles principally at the point of manufacture, it will be virtually impossible to claw them back once they are sold. These super-polluters thus are poised to spend their lifetimes emitting many times more smog-forming nitrogen oxides (NO_x),

lung-damaging particulate matter ($PM_{2.5}$), and cancer-causing toxics than lawfully built heavy-duty trucks. Relief is urgently needed from EPA's unlawful action in order to avert substantial and irreparable public-health consequences.

The goal and anticipated effect of EPA's decision is that glider companies will illegally manufacture and sell noncompliant vehicles without the agency needing to meet Congress's detailed requirements for staying or revising the Clean Air Act regulations meant to keep those vehicles off the road. Although EPA labeled its action a "decision not to enforce" the Act and its implementing regulations, this nationwide action is nothing like the sort of case-by-case enforcement decisions for which agencies are granted considerable discretion. Instead, EPA's decision sets up a shadow regulatory regime that prescribes standards and timelines for what every manufacturer nationwide may do without fear of federal enforcement, separate and apart from what the law requires. This is a transparent effort by EPA to evade clear statutory restraints on its authority to suspend or revise regulations.

EPA's action is also arbitrary and capricious on its own terms. The agency failed even to acknowledge its earlier factual finding—memorialized in a final regulation—that allowing these vast numbers of super-polluting trucks to be produced and sold will endanger human health and welfare. Nor could EPA justify its action based on any finding that those harms are now outweighed by its desire to grant favors to glider companies. A decision by this Court permitting this gambit to stand

would open the door for every federal agency simply to ignore whichever laws do not conform to its current policy preferences.

This Court should either summarily declare EPA's decision unlawful and vacate it, or else stay its effect pending review on the merits. Furthermore, because the harm is so severe and the timing so urgent, and because EPA's open and notorious abdication of its enforcement responsibility is so corrosive to the rule of law, petitioners respectfully request that this Court administratively stay the decision while it considers this motion.

BACKGROUND

A "glider" is a heavy-duty diesel freight truck that combines a brand-new truck body (a "glider kit") with a previously used engine and transmission. Gliders "are typically marketed and sold as 'brand new' trucks, Appendix (A) at 332, and for good reason. Before assembling a glider, the manufacturer rebuilds the engine to "significantly increase [its] service life," 40 C.F.R. 1068.120(b); A205–06, so that the glider may compete in the marketplace with other heavy-duty diesel freight trucks assembled solely from brand-new parts. *See* A147–49. But there is a significant difference between gliders and the other new trucks with which they compete: Glider trucks emit far more diesel pollution thanks to their failure to incorporate pollution controls.

Air pollution from gliders garnered little attention before the twenty-first century, for two reasons. First, gliders historically were manufactured only in very small numbers as a means to salvage usable engines from wrecked trucks. Second, differences in emissions between late-model engines and the earlier models installed in gliders tended to be modest. *See* A208–09.

That changed in recent decades, when air-pollution concerns and major advances in emissions-control technology prompted EPA to tighten standards and require that new heavy-duty diesel engines reduce NO_x and $PM_{2.5}$ emissions by 95 percent and 90 percent, respectively, over earlier models. A209–12, 226. Glider manufacturing went from being an isolated way to salvage usable engines from wrecked trucks to (for some) a business model predicated on circumventing the new emissions standards. Glider sales increased by at least an order of magnitude beginning in 2004. A119, 607. While still accounting for a relatively small portion (roughly 5 percent) of the overall freight-truck market in terms of sales volume, gliders accounted for half of NO_x and $PM_{2.5}$ emissions from *new* heavy-duty freight trucks, and if trends continued, were expected to account for one-third of such emissions from *all* heavy-duty freight trucks by 2025. A406. Untreated diesel exhaust from gliders had become a major public-health problem, especially in the Nation's "truck bottlenecks" where traffic congestion is worst. *See* A198.

EPA responded to that problem in 2016 with a rule clarifying that new glider vehicles are subject to the same emission standards as comparable "new motor vehicles" that are entering the domestic consumer market for the first time. 42 U.S.C. 7521(a)(1). *See* 40 C.F.R. 1037.635(a) (2017). The agency explained in the 2016 Rule that "it is both consistent with the plain language of the [Clean Air Act] and reasonable and equitable for the engines in 'new trucks' to meet the emission standards for all other engines installed in new trucks." A336.

At the same time, EPA acknowledged the historical role of gliders as a means to recover usable engines from a small number of wrecked trucks. The 2016 Rule granted transitional exemptions for manufacturers with fewer than 1,500 employees who "sold one or more glider vehicles in 2014." 40 C.F.R. 1037.150(t)(1)(i). *See also* 13 C.F.R. 121.201. For calendar year 2017, the 2016 Rule allowed those manufacturers to produce noncompliant glider vehicles up to their "highest annual production of glider kits and glider vehicles for any year from 2010 to 2014." 40 C.F.R. 1037.150(t)(3). For calendar years 2018–21, the same restriction applies for manufacturers that did not produce more than 300 glider kits or vehicles in any year from 2010 to 2014; but, for manufacturers that produced more than 300 glider kits or vehicles during one of those years, the 2016 Rule caps production of noncompliant gliders at 300 per year. 40 C.F.R. 1037.150(t)(1)(ii). Both during and after this

transition period, glider manufacturers may produce an unlimited number of vehicles that are compliant with current emission standards.

Glider manufacturers did not challenge the 2016 Rule in court. But the Nation's largest glider manufacturer and dealer, Fitzgerald Glider Kits (Fitzgerald), met directly with Administrator Pruitt in May 2017. A75. Two months later, Fitzgerald and two other glider companies petitioned him to repeal the provisions of the 2016 Rule that apply to glider vehicles and kits. A60–66. The petition relied heavily on a finding of a "study recently conducted by Tennessee Tech[nological University]" that emissions of NO_x and $PM_{2.5}$ from rebuilt glider engines were no higher than comparable emissions from newly built engines. A64. *See also* A68–71. Administrator Pruitt promptly granted the petition and began a rulemaking to examine "the EPA's authority under the Clean Air Act to regulate gliders" and "the soundness of the EPA's [2016] technical analysis" that had unambiguously identified much higher NO_x and $PM_{2.5}$ emissions from old glider engines. A58.

In November 2017, Administrator Pruitt published in the Federal Register a proposed repeal of "emission standards and other requirements for heavy-duty glider vehicles, glider engines, and glider kits." A49. The basis for the proposed repeal was his "proposed [re]interpretation" of the Clean Air Act to exclude all newly assembled gliders from regulation as new motor vehicles. A50. *See* 42 U.S.C. 7521(a)(1). Administrator Pruitt admitted that a glider meets the literal terms of the statutory

definition of a "new motor vehicle": one whose "equitable or legal title … has never been transferred to an ultimate purchaser." 42 U.S.C. 7550(3). *See* A51. But he nonetheless proposed special treatment for gliders because, in his view, Congress did not have the "specific intent to include within the statutory definition such a thing as a glider vehicle." A52. The proposed rule relied primarily on the Automobile Information Disclosure Act, 15 U.S.C. 1231 *et seq.*, an "otherwise unrelated" statute not mentioned in the Clean Air Act or its legislative history. A52. EPA speculated that Congress must have been thinking about a possible reading of the Automobile Information Disclosure Act when it defined the term "new motor vehicle" in the Clean Air Act. A52–53

The proposed rule also referenced the emissions study cited in the glider companies' petition. A54. The proposal did not disclose, however, that EPA had already unearthed methodological concerns with that study. A299–302. After the comment period closed, it also came to light that Fitzgerald had funded the Tennessee Tech study, hosted the study at one of its facilities, and then bankrolled a new research institute for the university. A284, 300. Concerns about the lack of integrity of the study led Tennessee Tech's President to ask the Administrator not to "use or reference" it for any purpose until the study had been peer reviewed and the university had conducted an investigation of "research misconduct." A15. That investigation remains ongoing.

Administrator Pruitt initially appeared in a rush to finalize his proposed rule, denying multiple requests for extensions of the comment period. A17, 19. But, after the comment period closed in January 2018, EPA did not finalize the rule or update the public on its status for six months. Meanwhile, in May 2018, the agency's Science Advisory Board voted to review the proposed rule based on "'uncertainty about what scientific work, if any, would support' this action." A10.

In the face of these serious concerns, EPA did not finalize its proposed rule or any variant of it. Instead, without advance notice to the public, and on the final day of Administrator Pruitt's tenure at the agency (July 6, 2018), an urgent memorandum issued from the Assistant Administrator of the Office of Air and Radiation, William J. Wehrum, to his counterpart in the Office of Enforcement and Compliance Assurance, Susan Parker Bodine. A5–6.

Mr. Wehrum's memorandum requested that, "as a bridge to a rulemaking" that "will require more time than [EPA] previously anticipated," and "in order to preserve the status quo as it was" before the 2018 cap on glider production took effect, the Enforcement Office issue a "No Action Assurance" committing EPA not to "take enforcement action" against any manufacturer or supplier that "in 2018 or 2019" produces noncompliant gliders and kits "up to the level of their" more lenient 2017 cap. A5–6. Mr. Wehrum indicated that glider manufacturers that had "reli[ed] on" EPA's proposed rule—rather than existing law—had "reached their calendar

year 2018" limit of 300 noncompliant gliders and now would have to "cease production for the remainder of 2018" absent EPA intervention. A6. Because the agency had been unable "to ensure that whatever final action it may take conforms with the Clean Air Act and is based on reasoned decision making," Mr. Wehrum requested that EPA refrain entirely from enforcing the current limits on production of noncompliant gliders "for one year … or until such time as EPA takes final action to extend the compliance date" for such limits. A6.

Ms. Bodine responded that same day—again, Administrator Pruitt's last at the agency—by "providing a 'no action assurance'" (Glider Decision) to all glider manufacturers and their suppliers across the country, effective immediately. A2. Ms. Bodine committed EPA to refrain from enforcing the calendar year 2018 and 2019 cap of 300 noncompliant glider vehicles per manufacturer, "[c]onsistent with the intent and purpose of [Mr. Wehrum's] planned course of action" to extend the date for compliance with the cap via rulemaking. A3. Ms. Bodine anticipated that this blanket no-action assurance would "avoid profound disruption" to glider manufacturers and suppliers by permitting them to violate existing law without fear of triggering EPA enforcement action. A3. Ms. Bodine stated summarily that her action was "in the public interest," A3, without mentioning the quantities of dangerous pollution that thousands more noncompliant gliders would produce, and without

addressing any interest other than that of glider manufacturers and suppliers that are barred by current law from producing more than 300 noncompliant gliders per year.

Although the memos of Mr. Wehrum and Ms. Bodine were both signed on July 6, 2018, they were not released until July 9, 2018. On July 10, 2018, petitioners asked Acting Administrator Andrew Wheeler to rescind the memos or stay their effect to allow for orderly judicial review. A253–57. Mr. Wheeler did not respond to that request or a like request filed by thirteen States on July 13, 2018. A259–64. This petition followed.

JURISDICTION AND REVIEWABILITY

This Court has exclusive jurisdiction to review a "nationally applicable … final action taken" by EPA pursuant to the Clean Air Act. 42 U.S.C. 7607(b)(1). The Glider Decision is subject to review under that provision because it is nationally applicable; it is final action; and it is not committed to agency discretion by law.

First, the Glider Decision is nationally applicable. It unambiguously governs every small manufacturer of glider freight trucks and their suppliers.[1] *See* A2.

Second, the Glider Decision is final action. It both "consummat[es]" EPA's decisionmaking process and "determine[s]" "rights or obligations." *Bennett v. Spear*, 520 U.S. 154, 178 (1997). *See also Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S.

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[1] "[A] clear majority of the companies assembling glider vehicles" qualify as "small manufacturers." A685.

457, 478 (2001). The decision plainly states that, effective immediately, EPA "will" not enforce the regulation prohibiting production of more than 300 noncompliant glider vehicles per manufacturer per year. A3. *See* 40 C.F.R. 1037.150(t)(1)(ii); *Cmty. Nutrition Inst. v. Young*, 818 F.2d 943, 946 (D.C. Cir. 1987) ("[U]se of 'will' indicates [a] statement is in fact a binding norm."). The Glider Decision *obligates* EPA to withhold its authority to enforce the law—and, conversely, it grants glider manufacturers and their suppliers the *right* to violate existing law without triggering EPA "[a]ctions to restrain such violations." 42 U.S.C. 7523(b).

EPA's boilerplate about "reserv[ing] its right to revoke or modify" the Glider Decision does not render the decision nonfinal. A3. *See Sackett v. EPA*, 566 U.S. 120, 127 (2012) ("The mere possibility that an agency might reconsider … does not suffice to make an otherwise final agency action nonfinal."). Nor is the decision made nonfinal by EPA's ongoing and elongated reconsideration of the regulation that it refuses to enforce. *See Clean Air Council v. Pruitt*, 862 F.3d 1, 7 (D.C. Cir. 2017) ("[T]he applicable test [for finality] is not whether there are further administrative proceedings available, but rather whether the impact of the order is sufficiently final to warrant review in the context of the particular case.").

Third, the Glider Decision is not "immune from judicial review" simply because EPA styled it a "decision not to take enforcement action." *Heckler v. Chaney*, 470 U.S. 821, 832 (1985). The Glider Decision is not "a '*single-shot* nonenforcement

decision.'" *OSG Bulk Ships, Inc. v. United States*, 132 F.3d 808, 812 (D.C. Cir. 1998) (citation omitted). EPA here "'consciously and expressly adopted a general policy' that is so extreme as to amount to an abdication of its statutory responsibilit[y]" to uphold and implement a validly issued regulation. *Heckler*, 470 U.S. at 833 n.4. *See id.* at 839 (Brennan, J., concurring) (noting the importance of judicial review of an agency's "refus[al] to enforce a regulation lawfully promulgated and still in effect"). The Glider Decision expressly "delineat[es] the boundary between enforcement and non-enforcement and purport[s] to speak to a broad class of parties." *Crowley Caribbean Transp., Inc. v. Peña*, 37 F.3d 671, 677 (D.C. Cir. 1994). *See also OSG Bulk Ships*, 132 F.3d at 812 ("[A]n agency's adoption of a general enforcement policy is subject to review."). And the document announcing the decision "present[s] a clear[] (and … easily reviewable) statement of [EPA's] reasons" for its action. *Crowley*, 37 F.3d at 677. Those reasons are plainly invalid, as we now explain.

ARGUMENT

The Glider Decision is an unlawful attempt by EPA to circumvent the Clean Air Act's requirements and institute a shadow regulatory regime under the guise of exercising "enforcement discretion." A stay of the decision pending review is warranted because it is patently illegal; the irreparable harm to petitioners' members is certain and great; and the decision rewards only manufacturers that violate the law, at the expense of both public health and competitors that follow the law. Indeed, this

Court should summarily vacate the decision because its flaws are "so clear as to justify expedited action." *Walker v. Washington*, 627 F.2d 541, 545 (D.C. Cir. 1980).

I. The Glider Decision should be declared unlawful and vacated.

Petitioners should prevail on the merits of their claims that the Glider Decision is unlawful. First, the decision circumvents Congress's procedural and substantive directions in the Clean Air Act. Second, the decision is arbitrary and capricious on its own terms because it entirely ignores the rationale for the regulation it is designed to undercut.

A. The Glider Decision is an illegal effort to subvert the Clean Air Act.

"EPA is a federal agency—a creature of statute." *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001). And "Congress does not intend administrative agencies, agents of [its] own creation, to ignore clear … regulatory, [or] statutory … commands." *Heckler*, 470 U.S. at 839 (Brennan, J., concurring). "So long as [a] regulation remains in force the Executive Branch is bound by it, and indeed the United States as the sovereign composed of the three branches is bound to respect and enforce it." *United States v. Nixon*, 418 U.S. 683, 696 (1974). *See also Nat'l Family Planning & Reproductive Health Ass'n v. Sullivan*, 979 F.2d 227, 234 (D.C. Cir. 1992) ("[A]n agency issuing a legislative rule is itself bound by the rule until that rule is amended or revoked."). The grant of enforcement discretion in the Clean Air Act, *see* 42 U.S.C. 7523 and 7524(b), does not "set [EPA] free to disregard

legislative direction in the statutory scheme that the agency administers." *Heckler*, 470 U.S. at 833. EPA's Glider Decision is unlawful because it ignores Congress's straightforward directives in the Clean Air Act.

The Glider Decision disregards the instruction that EPA "enforce a lawfully issued final rule … while it reconsiders [that rule]," *Clean Air Council*, 862 F.3d at 9, except in "carefully defined" circumstances not present here. *Nat. Res. Def. Council, Inc. v. Reilly*, 976 F.2d 36, 40 (D.C. Cir. 1992). Congress understood that EPA, like any agency, "must consider … the wisdom of its policy on a continuing basis, for example, in response to changed factual circumstances, or a change in administrations." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (citation omitted). The Clean Air Act thus authorizes EPA to "revis[e]" its "regulations under section 7521" of Title 42 that set air-pollutant-emission standards for motor vehicles. 42 U.S.C. 7607(d)(1)(K). At the same time, however, Congress determined that "the effectiveness of" the existing regulation "shall not [be] postpone[d]" while the process of regulatory revision unfolds. 42 U.S.C. 7607(b)(1). *Accord* 42 U.S.C. 7607(d)(7)(B) (providing that a pending "proceeding for reconsideration of the rule … shall not postpone [its] effectiveness").

The purpose and intended effect of the Glider Decision is to blunt the effectiveness of the mandatory production limit of 300 noncompliant glider vehicles per manufacturer per year by inviting manufacturers to disregard it while EPA takes

"more time" to finalize a relaxation or elimination of that limit. A3. Or, as Mr. Wehrum artfully put it, the Glider Decision aims to "preserve the status quo *as it was*" in 2017, before manufacturers had to adhere to the *current* production limit, "until such time as [EPA finds itself] able to complete final action" delaying that limit. A6 (emphasis added). EPA candidly admits that it issued the Glider Decision for one reason only: To upend the status quo *as it is* by allowing glider manufacturers and suppliers to violate an existing regulation while EPA spends another year developing a new one. The decision anticipates that its own existence will mean that manufacturers that "have reached their calendar year 2018" production limit will not "cease production," as existing law requires, but instead will produce vehicles in violation of that limit "while EPA completes its reconsideration." A3. This gross abuse of enforcement discretion frustrates Congress's clear intent that Clean Air Act regulations remain "effective[]" pending their reconsideration by EPA. 42 U.S.C. 7607(b)(1).

The Glider Decision does not resemble in the least an exercise of case-by-case enforcement discretion. First, it was initiated by the office of EPA charged with promulgating legislative rules, not the enforcement office. Second, case-by-case enforcement decisions implicate questions like "whether a violation has occurred, … whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action …

best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all." *Heckler*, 470 U.S. at 831. None of those factors are mentioned in the Glider Decision, which was issued by the enforcement office on the same day the request was made, hardly enough time for a careful exercise of prosecutorial discretion. The decision has more of the hallmarks of an interim final rule—or, as EPA actually described it, "a bridge to a rulemaking," A5—instituted without requisite procedure or reasoned decisionmaking.

The Clean Air Act includes detailed prescriptions of the procedures EPA must follow in order to amend an agency rule. 42 U.S.C. 7607(d)(2)-(6). Any rulemaking to revise the existing production limit would, as the agency concedes, have to "conform[] with the Clean Air Act and [be] based on reasoned decision making." A6. The Glider Decision is EPA's attempt to blow past these requirements and promote the favored regime of a new Administration before conforming with the Clean Air Act and articulating a reasoned basis for decision. *Cf.* A270–71 (reciting longstanding EPA "policy against definitive no action promises" made "on the basis that revisions to the underlying legal requirement are being considered").

The Glider Decision lays out an alternative regulatory structure in detail: "[M]anufacturers to which 40 C.F.R. § 1037.150(t) applies that either are manufacturing or have manufactured glider vehicles in calendar year 2018" and "those companies to which 40 C.F.R. § 1037.150(t)(1)(vii) applies that sell glider kits to" those

manufacturers may now "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 calendar year 2017 under 40 C.F.R. § 1037.150(t)(3)." A2–3. And it covers a specific time period, "remain[ing] 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." A3. But EPA means to "extend the compliance date" immediately, without following the procedures that Congress commanded it to follow. *See* A2 (stating that the Glider Decision is "consistent with the intent and purpose of [the Air Office's] planned course of action"). *Cf. Clean Air Council*, 862 F.3d at 6 (explaining that "an order delaying the rule's effective date" is "tantamount to amending or revoking a rule").

The Glider Decision also violates Congress's substantive instructions to EPA. The Clean Air Act commands that EPA "shall by regulation prescribe … standards applicable to" pollution from "new motor vehicles or new motor vehicle engines" that "may reasonably be anticipated to endanger public health or welfare," 42 U.S.C. 7521(a)(1), and the statute also requires manufacturers and suppliers to comply with those standards, 42 U.S.C. 7522(a)(1). The 2016 Rule reflects a considered "judgment" by EPA, *ibid.*, that current controls on emissions from glider vehicles are necessary to avoid endangering public health and welfare. *See* A405–06; A595. The Glider Decision does not question that judgment or the factual findings upon which it is based; it ignores it. And yet, at the same time, EPA reverses course and invites

manufacturers and suppliers to put thousands more gliders on the roads, spewing enormous quantities of pollution into the air the public breathes. This is not just a dereliction of the specific statutory duty at issue in this case; it is a dereliction of EPA's overriding duty under the Clean Air Act "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare." 42 U.S.C. 7401(b)(1).

This Court should not permit an agency to so easily circumvent the clear procedural and substantive requirements of its governing statute merely by issuing blanket "nonenforcement decisions" in an effort to impose a new Administration's favored policy on a nationwide basis, without regard to whether that new policy is lawful or based upon reasoned decisionmaking and public engagement.

B. The Glider Decision is arbitrary and capricious.

The only rationale given for the Glider Decision is that "it is in the public interest to avoid profound disruptions to small businesses." A3. But it is the epitome of arbitrary and capricious action to elevate one factor and ignore all others, particularly where the agency completely disregards the factors expressly made relevant by the statute. *See Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015) ("[R]easonable regulation ordinarily requires paying attention to the advantages *and* the disadvantages of agency decisions.").

When EPA promulgated the 2016 Rule, it recognized that glider vehicles generally have nitrogen oxide and particulate matter emissions *20-40 times* higher than other new vehicles. A405–06. Each glider vehicle using an old engine thus "results in significantly higher in-use emissions of air pollutants associated with a host of adverse human health effects, including premature mortality." A406. EPA evaluated the environmental impact of continued glider sales at the then-current rate of 10,000 gliders per year: In 2025, gliders "would emit nearly 300,000 tons of NO_x and nearly 8,000 tons of PM annually," representing "about one third of all NOx and PM emissions from heavy-duty tractors." A406 (emphasis omitted). EPA found that "[b]y restricting the number of glider vehicles with high polluting engines on the road, these excess PM and NOx emissions will decrease dramatically, leading to substantial public health-related benefits." A406.

The Glider Decision nowhere acknowledges, much less considers, those factual findings or the profound effects the decision will have on public health and welfare as EPA encourages these super-polluting trucks to be manufactured and put on the public roads. When changing course, an agency cannot "disregard[] facts and circumstances that underlay … the prior policy," as EPA has done here. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515–16 (2009).

For the reasons stated above, this Court should declare the Glider Decision unlawful and order EPA to rescind it. At a minimum, this Court should order the

agency to put the decision on hold pending further review in order to avert irreparable harm to petitioners and the general public.

II. Petitioners will suffer irreparable injury absent a stay.

EPA issued the Glider Decision to immediately and substantially affect the primary conduct of glider manufacturers and suppliers by encouraging them to produce more super-polluting trucks in violation of existing law. EPA explained that manufacturers that "have reached" their 2018 production cap for super-polluting trucks were limited to producing emission-compliant trucks for the remainder of this calendar year. A3. The agency determined that this "disruption[]" in those manufacturers' operations was not "in the public interest," and it broadcast to those manufacturers and their suppliers that they may flout the law this year and next without threat of agency enforcement. A3. EPA's reason for doing all this now, as opposed to waiting for an actual rulemaking, was its understanding that manufacturers are *right now* able, willing, and ready to produce noncompliant gliders in excess of the legal limit but are precluded from doing so by existing law.

But the flip side of the Glider Decision's immediate effect on glider producers is immediate and substantial harm to petitioners and their members from greater—much greater—production of super-polluting diesel freight trucks in 2018 and 2019, all to occur before this Court ordinarily could be expected to decide the merits of this case. A114 (consultant's estimate of "at least 11,190 additional non-compliant

glider vehicles being produced and sold in 2018–19" due to Glider Decision). *Compare* A3 (Glider Decision stating that it expires no later than 12 months after issuance), *with* Administrative Office of the U.S. Courts, Federal Court Management Statistics of the Courts of Appeals (Mar. 2018) (reflecting median duration of 12.2 months for cases filed in this Court). A stay of the Glider Decision pending review thus is necessary both in aid of this Court's jurisdiction and to prevent irreparable harm to petitioners. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008) (explaining that movant for interlocutory relief must show likelihood of "suffer[ing] irreparable harm *before a decision on the merits can be rendered*" (emphasis added and citation omitted)).

The harm to petitioners will be "both certain and great, actual and not theoretical, beyond remediation, and of such *imminence* that there is a clear and present need for equitable relief to prevent irreparable harm." *Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 555 (D.C. Cir. 2015). An analysis based on EPA's own numbers and modeling methods, combined with 2017 glider registration data, reveals that "for the remainder of 2018, on average, [the Glider Decision] will likely result in 30 additional [noncompliant] glider sales per day." A123. The additional super-polluting trucks expected to be produced as a result of the glider decision will emit "more than 430,000 tons of excess NO_x and more than 7,300 tons of excess $PM_{2.5}$" over their lifetimes, causing "an estimated additional 760–1,746 premature

deaths" compared to an equivalent number of trucks compliant with current air-pollution standards. A114.

Many of these effects will be felt immediately, before this Court could be expected to resolve the merits—or even this motion—on a normal schedule. *See* A114 (estimate of additional emissions through 2019). Those emissions alone will cause petitioners irreparable harm, as stated below. But the proper metric to use in evaluating irreparable harm in this case is the *lifetime* emissions of glider trucks that will be produced and sold before the Court resolves this case. In considering irreparable injury from air pollution, the relevant question is not what emissions will actually occur in the period before the Court may be expected to provide relief on the merits, but what emissions will be "beyond remediation" by the time that relief arrives. *Mexichem*, 787 F.3d at 555. The Clean Air Act regulates emissions from new motor vehicles almost exclusively at the point of manufacture, *see* 42 U.S.C. 7522, and once a vehicle is produced and sold, "there is no ready means for [EPA]" or this Court "to 'claw back' the vehicle from the private purchaser." A231–32. *See* A117 ("In 2025 over 95 percent of these gliders will likely still be on the road and will still be emitting over 24,000 tons excess NO_x and over 400 tons excess PM per year."). Thus, a showing of irreparable harm in this context turns on the actual harm that

additional glider trucks will cause during their lifetime of service, not the harm the trucks will cause before the merits are resolved.[2]

"Diesel exhaust is one of the most dangerous and pervasive forms of air pollution." A171. Decades of epidemiological and toxicological studies "report associations between short-term and long-term diesel exhaust exposures and a range of chronic and acute adverse health impacts." A172. In particular, emissions of $PM_{2.5}$ from diesel exhaust will "aggravate[] respiratory illness" and "can lead to premature mortality," A175, 700; and emissions of NO_x from diesel exhaust will "contribut[e] to respiratory illness, cardiovascular disease, and premature death." A177. *See also* A697–99.

Diesel exhaust from super-polluting glider freight trucks affects certain populations and individuals especially, including petitioners' members. For example, the 5-year-old son of Shana Reidy has a rare genetic disorder that "makes him acutely sensitive to … respiratory infections" that are "potentially life-threatening." A161, 163. Both short-term and long-term exposure to diesel exhaust from heavy-

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[2] Even if the merits could be resolved on an expedited basis, a substantial part of the harm from the Glider Decision in 2018 will occur in the very near future given the "risk of massive pre-buys" while this Court reviews the policy. A463. Experience shows that sales of noncompliant gliders spike during periods of regulatory transition, *see, e.g.,* A148 (dealer citing spike in glider sales in January 2018), and given the legal vulnerability of the Glider Decision, manufacturers will rush to produce and sell a high volume of gliders as quickly as possible.

duty freight trucks "exacerbate his underlying health condition," and that exposure is unfortunately plentiful given the Reidy family's proximity to and frequent use of the congested I-5 corridor in Seattle, Washington. A163–65. *See also* A175–77, 198–99, 700–01. The family also spends several hours per month traveling on "a two-lane highway that is heavily trafficked by heavy-duty logging trucks." A165. *See also* A294 (comment of dealer that gliders "are making a strong foothold in the logging sector"). During those trips especially, Reidy's son can find himself "trapped behind a heavy-duty truck with particularly high diesel exhaust emissions"—*e.g.*, a noncompliant glider—that can trigger an acute and potentially life-threatening respiratory infection. A165. *See also* A173.

The more than 11,000 additional glider trucks to be produced as a direct result of the Glider Decision will enter a national market and inevitably "travel across the lower 48 [States]" in the ordinary course of business. A153. And heavy-duty freight traffic tends to congregate in certain corridors, *see* A137, 198–99, making it "likely," *Winter*, 555 U.S. at 20, that some of the thousands of additional super-polluting glider trucks prompted by the Glider Decision will worsen ground-level ozone and fine-particle pollution in Reidy's ambient environment and in particular on the roadways where she travels frequently with her son.

The Reidys are far from alone. *See* A175 ("[A]bout 19% of the U.S. population lives within 500 meters of high [traffic] volume roads."). Elizabeth Brandt and

her family live nearby the East-West Highway in Montgomery County, Maryland, "a major thoroughfare with significant freight truck traffic," A86; *see* A198, and her daughters (ages 2 and 5) frequently "swim[] in [an] outdoor pool" that is less than 50 meters from the I-495 Beltway. A86; *see* A198. Janet DietzKamei, who "suffer[s] from severe asthma," A91, lives near and travels on several major California freeways where she is "sometimes … stuck immediately behind heavy duty trucks," A94, whose diesel exhaust can precipitate a life-threatening asthma attack. *See* A698–99. DietzKamei "cannot leave the house without wearing a mask" when local $PM_{2.5}$ or ozone levels are elevated. A92. Peggy Evans lives "approximately 3 blocks from" I-40 in central Tennessee, the "only highway near" a glider-manufacturing facility a mere thirty minutes away. A99–101. *See also* A137. The short- and long-term health effects of diesel freight-truck pollution are most severe in these areas, which are in very close proximity to heavily trafficked roadways. A174, 178, 703.

In summary, if left unchecked, the Glider Decision will have its intended result of drastically increasing the number of super-polluting heavy duty freight trucks on American roadways, thus leading to severe and irreparable health harms to petitioners' members and the public at large.[3] A123 (consultant's estimate that "each *day's* worth of [additional noncompliant] glider sales" triggered by the Glider

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[3] These same injuries, caused by the Glider Decision and redressable by its rescission, suffice to establish petitioners' standing to challenge EPA's action.

Decision will "result in between 2.0 and 4.7 premature mortalities" (emphasis added)). *See also Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987) ("Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable."); *Beame v. Friends of the Earth*, 434 U.S. 1310, 1313-14 (1977) (Marshall, J., in chambers) (same for adverse impacts of "air pollution" on "those with respiratory ailments"). A stay pending review is therefore warranted.

III. The balance of equities tips sharply in favor of a stay.

The equities on the other side are virtually nonexistent. Neither EPA nor its favored group of manufacturers and suppliers has a valid interest in violating existing law. It is a bedrock principle of our legal system that no person has a legitimate interest in engaging in illegal activity. *See, e.g.*, *United States v. Williams*, 553 U.S. 285, 297 (2008) ("Offers to engage in illegal transactions are categorically excluded from First Amendment protection."); *Illinois v. Caballes*, 543 U.S. 405, 408-09 (2005) (explaining that the Fourth Amendment's privacy protections do not extend to an interest in possessing contraband). Yet unlawful activity is the only thing that the Glider Decision was designed to protect. *See* A3.

Even setting aside its illegality, the interest of glider manufacturers and their suppliers in producing and selling more noncompliant vehicles is more than offset by the *legitimate* interests of the manufacturers and suppliers of heavy-duty diesel

freight trucks that will compete directly with glider companies for the same market share.[4] *See* A145–50, 155–59. EPA's concern for "loss of jobs" and "the viability of" glider companies, A3, apparently does not extend to other trucking jobs and companies that are harmed by the unlevel playing field that the Glider Decision creates. *See* A144, 148–50, 153, 158–59. As between the two, the equities lie with those businesses that justifiably relied on *existing law* to make "important investments … in modern technology and safety features," A158; *see also* A213–15, rather than businesses that unjustifiably relied on a *proposed rule* to defer those investments.

IV. The public interest favors a stay.

"In exercising their sound discretion, courts of equity should pay particular regard for the public consequences" when deciding whether to issue an injunction. *Winter*, 555 U.S. at 24. The public consequences of condoning EPA's course of action in this case would be far-reaching and detrimental to the rule of law. The question for this Court is whether to permit an agency to bypass lawful procedures for amending a regulation with which it disagrees on policy grounds and simply announce to the world that the rule will not be enforced until such time as the agency

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[4] It is worth noting that Fitzgerald, the country's leading glider manufacturer, has indicated that it could "make a profit at 300 [noncompliant-glider vehicles produced] a year," as permitted by existing law. A600. There is thus good reason to question EPA's supposition that "the viability of" glider manufacturers is "threaten[ed]" by the application of existing law. A3.

divines a rationale for repealing it. This Court has rejected similar gambits by the same agency in the recent past, *see Clean Air Council*, 862 F.3d 1, and the public interest demands that the Court put the Glider Decision on hold rather than permit it to accomplish its destructive purpose before judicial review is had.

Moreover, "a court sitting in equity cannot 'ignore the judgment of Congress, deliberately expressed in legislation.'" *United States v. Oakland Cannabis Buyers' Co-Op.*, 532 U.S. 483, 497 (2001) (citation omitted). Congress has deliberately expressed a preference for "the greatest degree of [NO_x and $PM_{2.5}$] emission reduction achievable" by "heavy-duty vehicles and engines" "through the application of [available] technology," 42 U.S.C. 7521(a)(3)(A)(i), in order to avoid "endanger[ing] public health or welfare." 42 U.S.C. 7521(a)(1). The Glider Decision stands in direct opposition to that mandate, and a stay of its operation is in the public interest.

CONCLUSION AND REQUEST FOR IMMEDIATE RELIEF

For the foregoing reasons, this Court should either summarily vacate the Glider Decision or stay its effect pending judicial review.

In light of the ongoing, substantial, and irreparable harm caused by the EPA action under review—serious health harms that can be expected to worsen even in the days or weeks it takes this Court to decide this motion—and the lawless character of that action, petitioners respectfully request that this Court immediately enter an administrative stay of EPA's "No Action Assurance" until such time as it rules upon

this motion. *See, e.g.*, *In re Kellogg Brown & Root, Inc.*, 796 F.3d 137, 143 (D.C. Cir. 2015). If this Court declines to enter an administrative stay, petitioners respectfully request a decision on this motion before August 8, 2018.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing motion is printed in Times New Roman, a proportionally spaced 14-point font, and that, according to the word-count function in Microsoft Word 365, the motion contains 6,846 words, in compliance with Circuit Rule 8(b).

/s/ *Matthew Littleton*
Matthew Littleton

ADDENDUM

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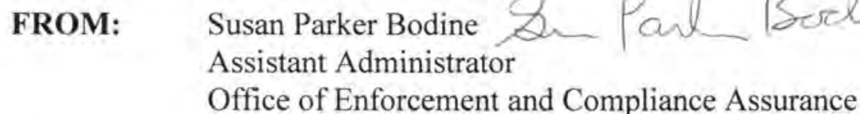
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

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

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.

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

7-6-18

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

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.

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of July, 2018, I served a copy of the foregoing document on respondent United States Environmental Protection Agency through this Court's CM/ECF System.

/s/ *Matthew Littleton*
Matthew Littleton