

July 10, 2018

Andrew K. Wheeler
Acting Administrator, United States
Environmental Protection Agency
Office of the Administrator Code 1101A
1200 Pennsylvania Ave NW
Washington, D.C. 20460

RE: Request For Immediate Withdrawal Or Administrative Stay Of Unlawful Decision To Cease Enforcement Of Regulatory Limits On Pollution From Super-Polluting “Glider” Diesel Freight Trucks

Dear Acting Administrator Wheeler:

The Environmental Defense Fund, Center for Biological Diversity, and Sierra Club respectfully request that you immediately withdraw or stay EPA’s attached decision to **cease enforcing** certain air-pollutant-emission limits that the Clean Air Act and EPA’s own duly promulgated regulations impose on heavy-duty “glider” diesel freight trucks.¹ This blatant and “extreme ... abdication of [your agency’s] statutory responsibilities” is not only illegal,² it is extraordinarily harmful to public health (as EPA’s own data show) and to the vast majority of truck manufacturers, who must comply with the emission limitations that the agency is unlawfully not enforcing for their competitors.

As you know, a “glider” is a heavy-duty diesel truck assembled by installing a used engine and powertrain in a new truck body, known as a “glider kit.” But even the “used” engine is a freshly-remanufactured part. Prior to assembly, a glider engine is wholly rebuilt to “significantly increase [its] service life.”³ Unsurprisingly, then, gliders are “marketed and sold as ‘brand new’ trucks” and compete in the same market as heavy-duty trucks with brand-new parts.⁴ Finally, and most importantly for present purposes, gliders are “new motor vehicles,” as that term is defined in the Clean Air Act.⁵ This means that a newly manufactured glider is properly subject to the same air-pollution regulations as any other heavy-duty truck that enters the American marketplace.

Gliders must meet modern emission standards for new heavy-duty trucks in order to safeguard public health. Left unregulated, a glider engine emits orders of magnitude more harmful pollution than a heavy-duty truck engine designed to comply with those standards.⁶ EPA’s own estimates from 2016 indicate that, as compared to a world where all new heavy-duty trucks meet the standards that apply to other new heavy-duty trucks, every model year of glider production at

¹ See 5 U.S.C. § 705.

² *Heckler v. Chaney*, 470 U.S. 821, 833 n.4 (1985).

³ 40 C.F.R. § 1068.120(b). See also EPA, *Greenhouse Gas Emissions and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles—Phase 2*, 81 Fed. Reg. 73478, 73518 n.93 (Oct. 25, 2016) (Phase 2 Rule) (“[A]ll of the donor engines installed in glider vehicles are rebuilt.”).

⁴ Phase 2 Rule, 81 Fed. Reg. at 73514.

⁵ 42 U.S.C. § 7550(3).

⁶ Phase 2 Rule, 81 Fed. Reg. at 73943.

then-current production rates would increase pollution of nitrogen oxides (NO_x) and fine particulate matter (PM_{2.5}) by 415,000 tons and 6,800 tons, respectively.⁷ Those are *huge* numbers, and EPA concluded that if production continued on pace, glider vehicles would account for about one third of total NO_x and PM emissions from the heavy duty truck sector by 2025, even though gliders would constitute only 5% of heavy-duty trucks on the road.⁸ And those pollution estimates are almost certainly too low, as indicated by more recent tests of glider vehicles conducted by EPA in 2017.⁹ Even using the agency’s conservative 2016 estimates, every year of unregulated glider production can be expected to cause 700 to 1600 premature deaths from PM_{2.5} pollution alone, not to mention cancers, respiratory ailments, and other serious health problems, through the life of those vehicles.¹⁰ It is virtually impossible to avoid those consequences once heavy-duty glider trucks are sold because the Act regulates vehicles almost exclusively at the point of manufacture. Even a brief period of unregulated glider production, then, will have substantial and irreparable consequences. To put it bluntly but accurately: EPA’s avowed decision to stop enforcing these critical air-pollution protections will kill and sicken Americans on a large scale.

Importantly, EPA’s *existing* regulations already allow each small manufacturer to produce 300 heavy-duty glider vehicles per year that are exempt from current pollution control requirements applicable to all other newly sold heavy-duty trucks (in addition to allowing unlimited production of glider vehicles that *do* satisfy those requirements), in order to accommodate the historical but extremely limited role of gliders as a means to salvage engines from wrecked vehicles.¹¹ These regulations were validly promulgated and never challenged in court by any glider manufacturer.

This state of affairs was apparently unsatisfactory to ex-Administrator E. Scott Pruitt, who proposed last November to reinterpret the statutory term “new motor vehicle” to exclude gliders completely—ignoring the plain language of the Clean Air Act, and conceding that its legislative history lacks evidence to support the proposal, but basing his proposal on a *possible* construction of an entirely different law enacted for an entirely different purpose.¹² The agency appears to have realized that its proposal was irredeemably flawed after receiving comments of the undersigned organizations and a host of other entities, including States, NGOs, modern engine manufacturers, and trucking-industry stakeholders, who saw the proposed rule for what it was: an illegal effort to codify a competitive advantage for a small cadre of favored manufacturers to the detriment of literally everyone else. The agency’s ill-advised proposal did not hold up for other reasons as well, most notably a public renunciation of the sole “study” on which EPA had rested its tentative but still indefensible suggestion that heavy-duty glider trucks might not

⁷ See *ibid.*; EPA & NHTSA, *Response to Comments for Joint Rulemaking, Greenhouse Gas Emissions and Fuel Efficiency Standards for Medium- and Heavy-Duty Engines and Vehicles – Phase 2*, at 1965 (Aug. 2016) (“Response to Comments”).

⁸ See Phase 2 Rule, *supra* n.6.

⁹ EPA, “Chassis Dynamometer Testing of Two Recent Model Year Heavy-Duty On-Highway Diesel Glider Vehicles,” Nov. 20, 2017, Docket No. EPA-HQ-OAR-2014-0827-2417.

¹⁰ Response to Comments at 1881; see also Phase 2 Rule at 73836, 73943.

¹¹ 40 C.F.R. § 1037.105(t)(1)(ii). This exemption expires in 2021, *ibid.*, but EPA also created permanent exemptions for gliders with engines that are less traveled or more modern. See *id.* §§ 1037.150(t)(2)(vii)(2) and 1037.635(c)(1).

¹² EPA, *Repeal of Emission Requirements for Glider Vehicles, Glider Engines, and Glider Kits*, 82 Fed. Reg. 53442, 53444–46 (Nov. 16, 2017) (“Proposed Repeal”).

actually pollute more than heavy-duty trucks powered by modern engines with the latest emission-control technologies.¹³ If that were so, of course, there would be no need for the agency to revisit its glider-specific regulations because heavy-duty glider trucks could simply comply with the standards applicable to all other heavy-duty trucks.

EPA initially seemed in a rush to finalize the proposed rule, denying requests for an extension of the comment period that were filed by EDF and other interested parties concerned about the lack of information disclosed by the agency and its untenable legal, scientific and factual conclusions. But once the comment period closed, the proposal sat for six months with no action by EPA.

Until last Friday, the effective date of Mr. Pruitt's resignation as Administrator. Late that night, without meeting even the barest standard of transparency, EPA announced that it was "exercising its enforcement discretion in 2018 and 2019,"¹⁴ and inviting companies to violate the annual cap of 300 exempted gliders per year per manufacturer during that period while the agency attempts to develop a defensible rationale for lifting that cap.

The following Monday, on the first day of your tenure as Acting Administrator, EPA published to its website a letter memorializing the blanket nonenforcement decision previously announced. That letter, attached here for your reference, is styled a "Conditional No Action Assurance," but there is nothing "conditional" about it. Assistant Administrator Susan Parker Bodine states in no uncertain terms that "I am today providing a 'no action assurance'" to all "Small Manufacturers" of heavy-duty glider trucks and all "Suppliers" of heavy-duty glider kits.¹⁵ The letter provides that its "no action assurance will remain in effect" for a full calendar year (and apply to two full years of unlawful glider production), unless EPA finalizes a "rule extending the compliance date applicable to small manufacturers of glider vehicles."¹⁶

By way of explanation, EPA states only that it has "determined that additional evaluation of several [unnamed] matters is required before it can take final action on the" rule it proposed eight months ago. The letter also alludes to unnamed glider manufacturers who allegedly "reli[ed] on" the agency's proposed rule—instead of relying on EPA's actual standards on the books—that "have reached the[]" 2018 annual limit of 300 super-polluting glider trucks and now wish to violate existing law by producing more. The letter states that EPA is "exercis[ing] its enforcement discretion with respect to the applicability of 40 C.F.R. § 1037.635" for all affected manufacturers and suppliers, inviting them to engage in the illegal production of glider vehicles up to the "highest annual production of glider kits and glider vehicles for any year from 2010 to

¹³ See Letter of Philip B. Oldham, President, Tennessee Tech University, to E. Scott Pruitt (Feb. 19, 2018), at <https://www.edf.org/sites/default/files/content/EDF%20Second%20Supplemental%20Comment%20re%20TTU%20Study%202.27.18%20Final2.pdf> (explaining that "knowledgeable experts within the University have questioned the methodology and accuracy of the report," and that TTU is "investigating an allegation of research misconduct related to the study"); Proposed Repeal, 82 Fed. Reg. at 53444.

¹⁴ See Eric Lipton, *On Last Day for its Chief, E.P.A. Grants a Loophole*, New York Times, July 7, 2018, page A12 (quoting EPA Press Secretary Molly Block).

¹⁵ Environmental Protection Agency, *Conditional No Action Assurance Regarding Small Manufacturers of Glider Vehicles* (July 6, 2018), available at <https://www.epa.gov/enforcement/conditional-no-action-assurance-regarding-small-manufacturers-glider-vehicles>. (emphasis added).

¹⁶ *Id.* (emphasis added).

2014.” The result of this action will be an enormous increase in harmful pollution from what is permitted under the current regulations.¹⁷

One struggles to imagine a more blatant flouting of the rule of law. Finding itself unable to justify a change to a validly promulgated regulation, EPA has announced that it will not enforce that regulation for at least a year (and with respect to two full vehicle model years), by which time EPA hopes to have divined a reason to make the change. In effect, EPA has substituted a sweeping, general non-enforcement decision for what otherwise would have been a deeply flawed final rule. The agency’s decision not to enforce an entire regulation, full stop, “represents [its] final ... position on this issue, has the status of law, and has an immediate and direct effect” on glider manufacturers and suppliers, their industry competitors, and (most importantly) the public at large.¹⁸ The agency has offered essentially no explanation, let alone a “reasoned” one, for its decision to ignore existing law.¹⁹

It is telling that this indefensible decision to stop enforcing this vital regulation took place under cloak of administrative darkness, during the final night of Mr. Pruitt’s tenure. This decision mocks basic norms of transparency and accountability, as well as the rule of law, and it severely and needlessly harms the public that EPA is entrusted to serve.²⁰

The agency’s definitive refusal to enforce vital health protections is flagrantly unlawful and must be reversed. At a minimum, to prevent irreparable harm to our members and to the public at large, and pursuant to Federal Rule of Appellate Procedure 18(a)(1), the undersigned request that you issue a stay of this unlawful and injurious decision immediately.

Respectfully submitted,

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¹⁷ 40 C.F.R. § 1037.150(t)(3).

¹⁸ *Clean Air Council v. Pruitt*, 862 F.3d 1, 6 (D.C. Cir. 2017) (quoting *Int’l Union, United Mine Workers of America v. Mine Safety & Health Admin.*, 823 F.2d 608, 615 (D.C. Cir. 1987)).

¹⁹ *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016).

²⁰ *See, e.g.*, 42 U.S.C. § 7401(b)(1).

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