

Case No. 18- 18-1192

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

---

STATE OF CALIFORNIA, by and through XAVIER BECERRA,  
ATTORNEY GENERAL and CALIFORNIA AIR RESOURCES BOARD,  
STATE OF DELAWARE, STATE OF ILLINOIS, STATE OF MAINE, STATE  
OF MARYLAND, by and through BRIAN FROSH, ATTORNEY GENERAL  
and MARYLAND DEPARTMENT OF THE ENVIRONMENT,  
COMMONWEALTH OF MASSACHUSETTS, STATE OF MINNESOTA, by  
and through MINNESOTA POLLUTION CONTROL AGENCY, STATE OF  
NEW JERSEY, STATE OF NEW YORK, STATE OF NEW MEXICO, STATE  
OF NORTH CAROLINA, STATE OF OREGON, COMMONWEALTH OF  
PENNSYLVANIA, by and through JOSH SHAPIRO, ATTORNEY GENERAL  
and PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL  
PROTECTION, STATE OF RHODE ISLAND, STATE OF VERMONT,  
STATE OF WASHINGTON, and DISTRICT OF COLUMBIA

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, and  
ANDREW K. WHEELER, Acting Administrator, United States  
Environmental Protection Agency,

Respondents.

---

**PETITION FOR REVIEW**

Pursuant to Section 307(b)(1) of the Clean Air Act (42 U.S.C. § 7607(b)(1)), Rule 15 of the Federal Rules of Appellate Procedure, and D.C. Circuit Rule 15, State of California, by and through its Attorney General and the California Air Resources Board; the States, Delaware, Illinois, Maine, Maryland, by and through its Attorney General and Department of the Environment, Minnesota, by and through the Minnesota Pollution Control Agency, New Jersey, New York, New Mexico, North Carolina, Oregon, Rhode Island, Vermont, and Washington; the Commonwealth of Massachusetts, and the Commonwealth of Pennsylvania, by and through its Attorney General and the Pennsylvania Department of Environmental Protection, and the District of Columbia, hereby petition this Court for review of the final action of Respondent United States Environmental Protection Agency and former Administrator E. Scott Pruitt, titled “Conditional No Action Assurance Regarding Small Manufacturers of Glider Vehicles” (July 6, 2018) (Attachment 1).

Dated: July 19, 2018

Respectfully submitted,

XAVIER BECERRA  
Attorney General of the  
State of California

By: /s/ David A. Zonana  
DAVID A. ZONANA  
Supervising Deputy Attorney  
General  
MEGAN K. HEY  
M. ELAINE MECKENSTOCK  
MELINDA PILLING  
Deputy Attorneys General  
California Department of Justice  
1515 Clay Street, Suite 2000  
Oakland, CA 94612  
Tel: (510) 879-1248

*Attorneys for Petitioner State of  
California, by and through  
Xavier Becerra, Attorney General  
and California Air Resources Board*

MATTHEW P. DENN  
Attorney General of the  
State of Delaware

By: /s/ Valerie S. Edge  
VALERIE SATTERFIELD EDGE  
Deputy Attorney General  
Delaware Department of Justice  
102 W. Water Street  
Dover, DE 19904  
Tel.: (302) 257-3219

*Attorneys for Petitioner State of  
Delaware*

GURBIR S. GREWAL  
Attorney General of the  
State of New Jersey  
DAVID C. APY  
Assistant Attorney General

By: /s/ Jung W. Kim  
JUNG W. KIM  
Deputy Attorney General  
Office of the Attorney General  
R.J. Hughes Justice Complex  
25 Market St., P.O. Box 093  
Trenton, NJ 08625-0093  
Tel.: (609) 376-2804

*Attorneys for Petitioner State of New  
Jersey*

KARL A. RACINE  
Attorney General of the  
District of Columbia

By: /s/Loren L. Alikhan  
LOREN L. ALIKHAN  
Solicitor General  
Office of the Attorney General for  
the District of Columbia  
441 4th Street, NW, Suite 600 South  
Washington, D.C. 20001  
Tel: (202) 727-6287

*Attorneys for Petitioner District of  
Columbia*

LISA MADIGAN  
Attorney General of the  
State of Illinois  
MATTHEW J. DUNN  
Chief, Environmental Enforcement/  
Asbestos Litigation Division

By: /s/ Daniel I. Rottenberg  
DANIEL I. ROTTENBERG  
Assistant Attorney General  
Illinois Attorney General's Office  
69 W. Washington St., 18th Floor  
Chicago, IL 60602  
Tel. (312) 814-3816

*Attorneys for Petitioner State of  
Illinois*

BRIAN E. FROSH  
Attorney General of the  
State of Maryland

By: /s/ Roberta R. James  
ROBERTA R. JAMES  
Assistant Attorney General  
Office of the Attorney General  
Maryland Department of the  
Environment  
1800 Washington Blvd.  
Baltimore, MD 21230-1719  
Tel.: (410) 537-3748

*Attorneys for Petitioner State of  
Maryland by and through Brian Frosh,  
Attorney General and the Maryland  
Department of the Environment*

JANET T. MILLS  
Attorney General of the  
State of Maine

By: /s/ Gerald D. Reid  
GERALD D. REID  
Assistant Attorney General  
Chief, Natural Resources Division  
6 State House Station  
Augusta, ME 04333-0006  
Tel.: (207) 626-8545

*Attorneys for Petitioner State of  
Maine*

MAURA HEALEY  
Attorney General of the  
Commonwealth of Massachusetts

By: /s/ Carol Iancu  
CAROL IANCU  
Assistant Attorney General  
Environmental Protection Division  
One Ashburton Place, 18th Floor  
Boston, MA 02108  
Tel: (617) 963-2428

*Attorneys for Petitioner  
Commonwealth of Massachusetts*

LORI SWANSON  
Attorney General of the  
State of Minnesota

By: /s/ Max Kieley  
MAX KIELEY  
Assistant Attorney General  
D.C. Bar No. 54550  
445 Minnesota Street, Suite 900  
St. Paul, MN 55101-2127  
Telephone: (651) 757-1244  
Fax: (651) 297-4139  
max.kieley@ag.state.mn.us

*Attorneys for the State of Minnesota,  
by and through the Minnesota  
Pollution Control Agency*

JOSHUA H. STEIN  
Attorney General of the  
State of North Carolina

/s/ Asher P. Spiller  
ASHER P. SPILLER  
Assistant Attorney General  
North Carolina Department of Justice  
P.O. Box 629  
Raleigh, North Carolina 27602-0629  
Tel: (919) 716-6600

*Attorneys for Petitioner State of North  
Carolina*

BARBARA D. UNDERWOOD  
Attorney General of the  
State of New York

By: /s/ Danielle C. Fidler  
DANIELLE C. FIDLER  
Assistant Attorney General  
Environmental Protection Bureau  
120 Broadway, 26<sup>th</sup> Floor  
New York, NY 10271  
Tel.: (212) 416-8441

*Attorneys for Petitioner the State of  
New York*

HECTOR H. BALDERAS  
Attorney General of the  
State of New Mexico

/s/ William Grantham  
WILLIAM GRANTHAM  
NM Bar No. 15585  
BRIAN E. MCMATH  
NM Bar No. 148105  
Assistant Attorneys General  
201 Third St. NW, Suite 300  
Albuquerque, NM 87102  
Tel.: (505) 717-3531

*Attorneys for Petitioner State of New  
Mexico*

JOSH SHAPIRO  
Attorney General of the  
Commonwealth of Pennsylvania  
MICHAEL J. FISCHER  
Chief Deputy Attorney General

By: /s/ Kristen M Furlan  
KRISTEN M. FURLAN  
Assistant Director  
Bureau of Regulatory Counsel  
Pennsylvania Department of  
Environmental Protection  
Pennsylvania Office of Attorney General  
Strawberry Square  
Harrisburg, PA 17120  
Tel.: (215) 560-2171

*Attorneys for Petitioner Commonwealth  
of Pennsylvania by and through Josh  
Shapiro, Attorney General and  
Pennsylvania Department of  
Environmental Protection*

THOMAS J. DONOVAN, JR.  
Attorney General for the  
State of Vermont

By: /s/ Nicholas F. Persampei  
NICHOLAS F. PERSAMPIERI  
Assistant Attorney General  
Office of the Attorney General  
109 State Street  
Montpelier, VT 05609  
Tel.: (802) 828-3186

*Attorneys for Petitioner the State of  
Vermont*

ELLEN F. ROSENBLUM  
Attorney General of the  
State of Oregon

By: /s/ Paul Garrahan  
PAUL GARRAHAN  
Attorney-in-Charge  
Natural Resources Section  
Oregon Department of Justice  
1162 Court Street NE  
Salem, OR 97301-4096  
Tel.: (503) 947-4593

*Attorneys for Petitioner State of  
Oregon*

ROBERT W. FERGUSON  
Attorney General for the  
State of Washington

By: /s/ Katherine G. Shirey  
KATHARINE G. SHIREY  
Assistant Attorney General  
Office of the Attorney General  
P.O. Box 40117  
Olympia, WA 98504-0117  
Tel.: (360) 586-6769

*Attorneys for Petitioner State of  
Washington*

PETER F. KILMARTIN  
Attorney General for the  
State of Rhode Island

/s/ Gregory S. Schultz  
GREGORY S. SCHULTZ  
Special Assistant Attorney General  
Rhode Island Department of Attorney  
General  
150 South Main Street  
Providence, RI 02903  
(401) 274 4400  
gschultz@riag.ri.gov|

*Attorney for Petitioner State of Rhode  
Island*

**Attachment 1**

**“Conditional No Action Assurance Regarding Small Manufacturers of Glider Vehicles” (July 6, 2018)**





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.

## CERTIFICATE OF SERVICE

I hereby certify that I will cause to be served a true copy of the Petition for Review via U.S. mail and, where specified below by additional means, on July 19, 2018 upon the following:

The Honorable Andrew K. Wheeler  
Acting Administrator – Mail code 1101A  
U.S. Environmental Protection Agency  
William Jefferson Clinton Building  
1200 Pennsylvania Ave., NW  
Washington, D.C. 20460

Matthew Z. Leopold  
General Counsel  
Office of General Counsel – Mail code 2310A  
U.S. Environmental Protection Agency  
William Jefferson Clinton Building  
1200 Pennsylvania Ave., NW  
Washington, D.C. 20460

The Honorable Jefferson Beauregard Sessions, III  
Attorney General of the United States  
U.S. Department of Justice  
950 Pennsylvania Ave., NW  
Washington, D.C. 20530

Jeffrey H. Wood  
Acting Assistant Attorney General  
Environment and Natural Resources Division  
U.S. Department of Justice  
950 Pennsylvania Ave., NW  
Washington, D.C. 20530

**VIA EMAIL AND OVERNIGHT MAIL TO:**

Daniel Dertke  
Assistant Attorney General  
Environment and Natural Resources Division  
U.S. Department of Justice  
950 Pennsylvania Ave., NW  
Washington, D.C. 20530  
Daniel.dertke@usdoj.gov  
Efile\_eds.enrd@usdoj.gov

By: /s/ David A. Zonana

---

DAVID A. ZONANA  
Supervising Deputy Attorney General