

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

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

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

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 Because EPA’s Acting Administrator has withdrawn the challenged agency action and has stated that EPA will not repeat the action, this case is moot.

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

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

### **BACKGROUND**

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

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

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

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

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

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

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

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

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

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

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

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

*Id.*

### **ARGUMENT**

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

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

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

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

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

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

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

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

## CONCLUSION

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

Dated: July 30, 2018

Respectfully submitted,

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

CERTIFICATE OF SERVICE

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

/s/ Daniel R. Dertke  
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