Case No. 18-1192,
consolidated with No. **18-1190**

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 CONNECTICUT, 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 MEXICO, STATE OF NEW YORK, 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.

AMENDED 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, the State of California, by and through its Attorney General and the California Air Resources Board; the States of Connecticut, 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 Mexico, New York, North Carolina, Oregon, Rhode Island, Vermont, and Washington; the Commonwealth of Massachusetts; 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 24, 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
Email: David.Zonana@doj.ca.gov

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

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
Email: Jung.Kim@law.njoag.gov

Attorneys for Petitioner State of New Jersey

GEORGE JEPSEN
Attorney General of the
State of Connecticut

By: /s/ Scott N. Koschwitz
SCOTT N. KOSCHWITZ
MATTHEW I. LEVINE
Assistant Attorneys General
Office of the Attorney General
P.O. Box 120, 55 Elm Street
Hartford, CT 06141-0120
Tel.: (860) 808-5250
Email: Scott.Koschwitz@ct.gov

Attorneys for Petitioner the State of Connecticut

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
Email: Valerie.Edge@state.de.us

Attorneys for Petitioner State of Delaware

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
Email: DRottenberg@atg.state.il.us

Attorneys for Petitioner State of Illinois

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
Email: Jerry.Reid@maine.gov

Attorneys for Petitioner State of Maine

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
Email: Roberta.James@maryland.gov

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

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
Email: Carol.Iancu@state.ma.us

Attorneys for Petitioner Commonwealth of Massachusetts

LORI SWANSON
Attorney General of the
State of Minnesota

By: /s/ Max Kieley
MAX KIELEY
Assistant Attorney General
445 Minnesota Street, Suite 900
St. Paul, MN 55101-2127
Tel.: (651) 757-1244
Email: Max.Kieley@ag.state.mn.us

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

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

By: /s/ William Grantham
WILLIAM GRANTHAM
BRIAN E. MCMATH
Assistant Attorneys General
201 Third St. NW, Suite 300
Albuquerque, NM 87102
Tel.: (505) 717-3531
Email: wgrantham@nmag.gov

Attorneys for Petitioner State of New Mexico

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, 26th Floor
New York, NY 10271
Tel.: (212) 416-8441
Email: Danielle.Fidler@ag.ny.gov

Attorneys for Petitioner State of New York

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
Email: Paul.Garrahan@doj.state.or.us

Attorneys for Petitioner State of Oregon

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

By: /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
Email: aspiller@ncdoj.gov

Attorneys for Petitioner State of North Carolina

JOSH SHAPIRO
Attorney General of the
Commonwealth of Pennsylvania

By: /s/ Michael J. Fischer
MICHAEL J. FISCHER
Chief Deputy Attorney General
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
Email: mfischer@attorneygeneral.gov
kfurlan@pa.gov

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

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

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

Attorney for Petitioner State of Rhode Island

ROBERT W. FERGUSON
Attorney General for the
State of Washington

By: /s/ Katharine 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
Email: KayS1@atg.wa.gov

Attorneys for Petitioner State of Washington

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
Email: Loren.AliKhan@dc.gov

Attorneys for Petitioner District of Columbia

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

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

Attorneys for Petitioner the State of Vermont

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
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

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.

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

CERTIFICATE OF SERVICE

I hereby certify that on July 24, 2018, this Amended Petition for Review was electronically served on all parties through the appellate electronic case filing system.

By: /s/ Melinda Pilling

MELINDA PILLING
Deputy Attorney General