




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

July 26, 2018

OFFICE OF
THE ADMINISTRATOR

MEMORANDUM

SUBJECT: Withdrawal of Conditional No Action Assurance Regarding Small Manufacturers of Glider Vehicles

FROM: Andrew R. Wheeler 
Acting Administrator

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

William L. Wehrum
Assistant Administrator, Office of Air and Radiation

After review of the “Conditional No Action Assurance Regarding Small Manufacturers of Glider Vehicles” (No Action Assurance), signed on July 6, 2018 (attached), and upon further consideration as explained below, I am today withdrawing this No Action Assurance.

On July 6, 2018, the Office of Air and Radiation requested that the Office of Enforcement and Compliance Assurance exercise enforcement discretion through a no action assurance with respect to: 1) those small manufacturers to which 40 C.F.R. § 1037.150(1) applies that either are manufacturing or that have manufactured glider vehicles in calendar year 2018 (Small Manufacturers), and 2) those companies to which 40 C.F.R. § 1037.150(t)(1)(vii) applies that sell glider kits to such small manufacturers (Suppliers). OAR explained in this request that in November 2017 the EPA had proposed reconsideration of provisions applicable to glider vehicles in the 2016 HD Phase 2 Rule¹ and was working toward a final action, but needed additional time to evaluate matters before taking final action. In the interim, industry compliance with the glider requirements of the HD Phase 2 Rule was resulting in the loss of jobs and threatening the viability of Small Manufacturers. Thus, OAR requested a No Action Assurance to preserve the status quo for Small Manufacturers and Suppliers as it was at the time of the November 2017 proposed rule reconsidering the HD Phase 2 Rule until such time as the EPA was able to take final action on, among other possible regulatory revisions, a rule extending the applicable compliance date for glider vehicles.

¹ 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).

On July 6, 2018, OECA issued a No Action Assurance pursuant to this request, stating that the EPA intends to exercise its enforcement discretion through July 6, 2019, or the effective date of a final rule extending the compliance date applicable to Small Manufacturers, whichever is earlier, 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(1)(3), and that the EPA also will exercise its enforcement discretion during the same period with respect to Suppliers that sell glider kits to those Small Manufacturers to which the No Action Assurance applied. The No Action Assurance explained that this use of enforcement discretion was in the public interest to avoid profound disruptions to small businesses while the EPA completes its reconsideration of the HD Phase 2 Rule. The No Action Assurance also explained that EPA reserves its right to revoke or modify this no action assurance.

Three environmental groups² and a coalition of states³ filed several separate administrative requests for the EPA to either immediately withdraw or administratively stay the No Action Assurance. On July 17, 2018, the environmental groups petitioned for review of the No Action Assurance in the D.C. Circuit and filed an emergency motion for stay or summary vacatur in the D.C. Circuit, and a request for an administrative stay during the court's consideration of the emergency motion. On July 18, the court issued an administrative stay of the No Action Assurance for the duration of time the court considers the emergency motion. On July 19, 2018, the same coalition of states filed a similar petition and emergency motion for summary vacatur, or, in the alternative, for stay pending judicial review, in the same court.

OECA has a general guidance limiting the circumstances under which the agency will consider issuing no action assurances.⁴ The 1995 restatement of that policy states that the principles against the issuance of a no action assurance are at "their most compelling in the context of rulemakings." OECA guidance is clear that a no action assurance should be issued only in an "extremely unusual" case when the no action assurance is necessary to serve the public interest and only when no other mechanism can adequately address that interest. Thus, historically OECA has issued no action assurances to address situations where the balance of the public interest supported the EPA temporarily and narrowly exercising its enforcement discretion.

After consultation with OAR, OECA and OGC, and after further consideration of the No Action Assurance and information before me, including the administrative and judicial petitions and motions, and the application of agency guidance regarding no action assurances to these particular facts, I have concluded that the application of current regulations to the glider industry does not represent the kind of extremely unusual circumstances that support the EPA's exercise of enforcement discretion. I am therefore withdrawing the July 6, 2018, No Action Assurance.

² Environmental Defense Fund, Center for Biological Diversity, and Sierra Club.

³ California, Connecticut, Delaware, Illinois, Maine, Maryland, Massachusetts, Minnesota, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Washington and the District of Columbia.

⁴ Memorandum from Courtney M. Price, Assistant Administrator for Enforcement and Compliance Monitoring, to Assistant Administrators, Regional Administrators, General Counsel, and Inspector General, Policy Against "No Action" Assurance (Nov. 16, 1984); Memorandum from Steven A. Herman, Assistant Administrator for Enforcement and Compliance Assurance, to Assistant Administrators, Regional Administrators, General Counsel, and Inspector General, Processing Requests for Use of Enforcement Discretion (March 3, 1995).

Furthermore, the 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, OAR 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.

Attachment



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.

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.