Case No. 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 the MARYLAND DEPARTMENT OF THE ENVIRONMENT, COMMONWEALTH OF MASSACHUSETTS, STATE OF MINNESOTA, by and through the 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.

EMERGENCY MOTION FOR SUMMARY VACATUR, OR IN THE ALTERNATIVE, FOR STAY PENDING JUDICIAL REVIEW

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), Petitioners hereby certify as follows:

(A) Parties and Amici

Petitioners: The states of California, by and through its Attorney General and the California Air Resources Board, Delaware, Illinois, Maine, Maryland, by and through its Attorney General and Department of the Environment, Massachusetts, Minnesota, by and through the Minnesota Air Pollution Control Agency, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, by and through its Attorney General and the Pennsylvania Department of Environmental Protection, Vermont, and Washington, and the District of Columbia.

Respondents: The United States Environmental Protection Agency ("EPA"), and Andrew K. Wheeler, in his official capacity as Acting Administrator of EPA.

(B) Rulings Under Review

Petitioners seek review of the final action taken by EPA on July 6, 2018, entitled "Conditional No Action Assurance Regarding Small Manufacturers of Glider Vehicles," and reproduced in an Addendum to this motion.

(C) Related Cases

Petitioners are aware of a related Petition for Review filed by the Environmental Defense Fund, Center for Biological Diversity, and Sierra Club, that has been assigned Case Number 18-1190.

DATED: July 19, 2018

/s/ David A. Zonana
David A. Zonana

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EPA	United States Environmental Protection Agency
NGO-A	Appendix submitted by Movants in Case No. 18-1190
ST-A	Appendix submitted by Movants in this case

INTRODUCTION AND SUMMARY OF ARGUMENT

State Petitioners[1] respectfully move for summary vacatur of the United States Environmental Protection Agency's (EPA's) July 6, 2018 "Conditional No Action Assurance Regarding Small Manufacturers of Glider Vehicles" ("EPA's Action" or "the EPA Memo"). EPA's Action concerns regulatory restrictions on the production and sale of "gliders" — new heavy-duty trucks manufactured with highly polluting, refurbished engines that do not comply with modern emissions standards (the "2016 Rule"). The EPA Memo effectively suspends the 2016 Rule's annual 300-unit-per-manufacturer limit on glider production for 2018 and 2019, while EPA considers whether to modify or repeal the Rule. The effect of EPA's *ultra vires* action is to enable glider manufacturers to put many thousands more of these highly polluting trucks on the road than would be allowed under the 2016 Rule, starting immediately, before any formal process to modify or repeal the 2016 Rule has been completed. In both substance and process, EPA's Action is unlawful.

[1] State Petitioners include the States of California (by and through its Attorney General and California Air Resources Board) Delaware, Illinois, Maine, Maryland (by and through its Attorney General and the Maryland Department of the Environment), the Commonwealth of Massachusetts, Minnesota (by and through the Minnesota Pollution Control Agency), New Jersey, New Mexico, New York, North Carolina, Oregon, the Commonwealth of Pennsylvania (by and through its Attorney General and Department of Environmental Protection), Vermont and Washington, and the District of Columbia.

EPA's Action circumvents Congress's established limits on the Agency's authority to suspend or stay a rule (limits that this Court has recently made clear to EPA), as well as limits on its authority to exempt new motor vehicles or engines from regulation. It also constitutes a complete reversal of EPA's position, reflected in the 2016 Rule, that it is mandated to regulate glider emissions — a reversal made without adequate explanation or good reason. Had EPA engaged in the public notice and comment process required to stay or amend a regulation, these faults would have been exposed prior to consummation, but EPA's Action provided no opportunity for public input.

EPA's Action should be vacated because EPA lacks authority to take the action, failed to supply good reasons for its change in policy, and failed to engage in the notice and comment procedure required to amend or stay the 2016 Rule. EPA's framing of its Action as an exercise of enforcement discretion rather than an amendment to or stay of the 2016 Rule does not allow it to escape review. EPA stated that it is taking this Action precisely because it has not been able to finalize a repeal of the 2016 Rule, and because it does not have a proposal that it can act on to "extend the compliance date" of these regulations. Because the EPA Memo sets out a generally applicable policy that contravenes a validly promulgated regulation, this Court is well within its jurisdiction to hear the matter, and it should vacate the action as unlawful.

In the alternative, State Petitioners request that this Court stay EPA's Action. Fed R. App. P. 18 & 27. Allowing EPA's Action to remain in effect while this litigation remains pending would result in serious health and economic impacts. According to EPA's own estimates, *each* additional glider sold will cause, on average, between 300,000 and 1,100,000 dollars in monetized public health impacts resulting from increased particulate matter pollution—impacts that will fall on State Petitioners and their residents. The additional production of gliders in 2018 and 2019 will cause hundreds of premature deaths and heart attacks and thousands of asthma exacerbations and lost workdays. And air pollution caused by the gliders that manufacturers will produce if EPA's Action remains in force in 2018 and 2019 will impede State Petitioners' efforts to improve air quality and meet EPA-mandated emissions reduction targets. A stay would prevent these significant and irreparable harms to State Petitioners and to the public interest by maintaining the full effectiveness of the 2016 Rule until this case is resolved.

BACKGROUND

A. Glider Vehicles

A "glider vehicle" is a new heavy-duty truck that is manufactured by installing a previously owned powertrain — consisting of the engine, transmission, and usually the rear axle — into a "glider kit," which typically includes a truck's

body, front axle, cab, and brakes. NGO-A331.[2] Glider kits historically were used to salvage powertrains from relatively new trucks that had been in crashes, but in recent years, as emissions-control standards have become more stringent, manufacturers have increasingly used them to circumvent these standards. ST-A, Tab III [80 Fed. Reg. 40,528-29]; NGO-A337, 688.

According to EPA's own conservative estimates, the model year 1998-2001 engines that typically are used in glider vehicles emit 20 to 40 times more particulate matter (PM) and oxides of nitrogen (NOx) than engines that conform to current emissions standards. NGO-A318, 406. Testing of glider vehicles conducted by EPA in 2017 showed even greater emissions impacts: NOx emissions were as much as 43 times higher than emissions from compliant vehicles, and PM emissions as much as 450 times higher. NGO-A21-47. NOx and PM are linked to serious adverse health effects, including increased incidence of respiratory and cardiovascular disease and premature death. NGO-A605-613.

[2] For efficiency, State Petitioners requested and received permission to cite to the appendix provided to the Court by NGO Petitioners in Case No. 18-1190, *Environmental Defense Fund et al. v. United States Environmental Protection Agency*. Citations to the NGOs' appendix are identified herein as "NGO-A". Citations to additional documents in the State Petitioners separate appendix are identified herein as "ST-A."

According to EPA's own modeling, the average monetized health impacts from just one additional glider are between 300,000 and 1,100,000 dollars.[3]

B. EPA's Regulation of Glider Manufacturers

The Clean Air Act (CAA) requires EPA to set and enforce emissions standards applicable to entities that manufacture or assemble "new motor vehicles." Section 202 of the CAA directs EPA to establish and revise emissions standards for any air pollutant from any class of "new motor vehicles or new motor vehicle engines" that "cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7521(a)(1). Section 202 also requires that the standards specifically governing heavy-duty vehicles and engines "reflect the greatest degree of emission reduction achievable." 42 U.S.C. § 7521(a)(3)(A)(i).

In 2011, EPA, together with the National Highway Traffic Safety Administration (NHTSA), issued Phase 1 of a comprehensive two-phase regulatory package of emissions control and fuel efficiency standards for new medium- and heavy-duty engines and vehicles. An interim provision of the Phase 1

[3] EPA's assessment is low because it considered only *some* PM effects, and no impacts related to other pollutants. NGO-A595, 613; ST-A, Tab IX [New Jersey Decl., ¶ 34.]. For example, EPA did not quantify cancer, mutagenicity, or genotoxicity effects; increased incidence of chronic and subchronic bronchitis cases, strokes and cerebrovascular disease, low birth weight, and loss of pulmonary function; or non-asthma respiratory emergency room visits. NGO-A611.

regulation, designed to allow the traditional salvage of a few hundred powertrains a year from relatively new trucks that had been damaged in accidents, exempted vehicles with pre-2014 engines from the generally applicable requirement that all new vehicles be certified as conforming to the new standards. 40 C.F.R. § 1037.150(j).

Between 2011 and 2015, the market for glider vehicles grew exponentially, and EPA became concerned that the exemption was being used for a wholly different purpose — to circumvent emission-control requirements. ST-A, Tab III [80 Fed. Reg. 40,528-29]. To curtail this abuse, EPA proposed the 2016 Rule as part of Phase 2 of the medium and heavy-duty program, which took effect in December 2016. *Id.* The 2016 Rule phased in limits on sales of glider vehicles that do not comply with Phase 2 emissions standards, while permitting the continued use of glider vehicles for the traditional purpose of salvaging relatively new powertrains. NGO-A336, 404-409; *see also* 40 C.F.R. § 1037.150 (t). In 2017, a glider manufacturer could produce gliders that did not meet current emissions standards in numbers up to the highest number that manufacturer produced in any year from 2010 to 2014, inclusive. NGO-A336. In 2018 and beyond, a glider manufacturer could produce fewer non-compliant gliders—the *lower* of 300 or the most gliders that manufacture sold between 2010 and 2014. *Id.* EPA estimated that the production of gliders with non-compliant engines would be limited to

approximately 1,000 new vehicles per year in 2018 and beyond. NGO-A606.

In promulgating the Phase 2 standards, EPA found that restricting sales of new glider vehicles that do not meet otherwise-applicable emissions standards would produce significant health and economic benefits. EPA conservatively estimated that without the 2016 Rule, 10,000 gliders would be sold in the United States each year. NGO-A605, 609. According to EPA's modeling, the excess lifetime PM emissions from these 10,000 gliders — the PM emissions that exceed those of new vehicles with compliant engines — would cause 700 to 1,600 premature deaths, and avoiding those emissions would result in $3 to $11 billion in monetized human health benefits.[4]

C. EPA's Reconsideration of the 2016 Rule and Proposed Repeal

EPA's 2016 Rule went into effect without any party challenging it in court. It was only many months later, after one of the largest glider manufacturers met with former EPA Administrator Scott Pruitt, that the three largest glider manufacturers filed a petition for reconsideration. NGO-A60-66, 75. That petition cited to a glider-industry-funded study that has since been withdrawn due to questions about its methodology and accuracy as evidence that emissions of harmful pollutants from rebuilt glider engines were similar those that of newly built engines. NGO-

[4] NGO-A599, 610-611. EPA's modeling accounts for only *some* of the benefits attributable to reduction in a single pollutant (PM2.5). NGO-A610-613.

A15, 64, 68-71, 284, 300.

EPA expeditiously granted the industry petition and proposed to repeal the 2016 Rule. NGO-A49. EPA did not consider the emissions impacts of the repeal, nor did it repudiate the findings about the health impacts of glider vehicle emissions it had made in support of adopting the 2016 Rule. *See* NGO-A50-53. Rather, the proposed repeal was based primarily on an argument that EPA lacked authority to regulate gliders because gliders are not "new motor vehicles" subject to regulation under Section 202. NGO-A50-53. EPA had rejected this argument when adopting the 2016 Rule, concluding that the CAA provides "no basis" for the glider manufacturers' proposed interpretation of "new motor vehicle" to exclude glider vehicles, and that such an interpretation "would impede meaningful control" of emissions from such vehicles, contrary to the CAA's "purpose of controlling emissions of air pollutants from motor vehicle engines, with special concern for pollutant emissions from heavy-duty engines." NGO-A332, 336.

Many states, non-governmental organizations, trucking industry representatives, and members of the public submitted comments opposing EPA's proposed repeal, and the proposal appears to have stalled. *See* ST-A, Tab IV. As noted above, after the close of comments, new questions emerged about the University study submitted in support of reconsideration and mentioned in the proposed repeal. NGO-A15, 284, 300. In May, EPA's Science Advisory Board

decided to review the proposed repeal, citing "'uncertainty about what scientific work, if any, would support' this action." NGO-A10.

D. EPA's July 6, 2018 Memo

After many months of seeming inaction from EPA, on July 6, 2018, former Administrator's Pruitt's last day in office, EPA quietly produced a "Conditional No Action Assurance Regarding Small Manufacturers of Glider Vehicles." NGO-A2-3. Earlier that day, Bill Wehrum, Assistant Administrator, Office of Air and Radiation, penned a memorandum requesting the "no action assurance." NGO-A5-6. Mr. Wehrum stated that glider manufacturers who had reached the 2016 Rule's 300-gliders-per-year cap "must cease production for the remainder of 2018, resulting in the loss of jobs and threatening the viability of these Small Manufacturers." NGO-A6. He noted that EPA had published a notice of proposed rulemaking to repeal the 2016 Rule, but that, "additional evaluation of a number of matters" regarding the proposed repeal would be required before the repeal could move further. NGO-A6. He then requested that a "no action assurance" be issued "as a bridge to a rulemaking in which [EPA] will consider extending the deadline for Small Manufacturers to comply with" the 2016 Rule's 300 vehicle limit for model years 2018 and 2019. NGO-A5.

That same day, Assistant Administrator Susan P. Bodine wrote in response that "[c]onsistent with the intent and purpose of [the Office of Air and Radiation's]

planned course of action," EPA will issue a "no action assurance" that it will not enforce the 300-vehicle limit against manufacturers who produce up to their prior limits (several thousand vehicles) in 2018 and 2019. NGO-A3. The Memo adopted much of Mr. Wehrum's description and reasoning. EPA noted the stalled process of the notice of proposed rulemaking, and the absence of any existing proposed rule to extend the 2016 Rule's compliance dates. NGO-A3. As its sole justification for the action, the EPA Memo cited Mr. Wehrum's warning that absent the ability to produce more noncompliant vehicles, glider manufacturers will cease production. NGO-A3.

Absent from the EPA Memo and Mr. Wehrum's request is any discussion of the environmental or public health consequences that flow from the decision. No mention is made of EPA's own calculations of the additional emissions by gliders as compared to compliant trucks nor of EPA's own economic estimates of the toll those emissions take on the public's health and welfare.

JURISDICTION

This Court has jurisdiction under Section 307(b)(1) of the Clean Air Act, 42 U.S.C. § 7607(b)(1), which specifies that a petition for review of any "nationally applicable…final action taken" by EPA under the CAA. The decision represents EPA's "'last word on the matter' in question" — namely, its decision to continue to apply the national limitations on glider vehicle production in effect in 2017 and

effectively to suspend the more stringent provisions that took effect on January 1 of this year — and is thus final and reviewable.[5] *Whitman v. Am. Trucking Associations*, 531 U.S. 457, 478 (2001); NGOA-2 (stating that EPA "will" apply the 2017 production caps until either "11:59 p.m. EDT on July 6, 2019 or "the effective date of a final rule extending the compliance date").

ARGUMENT

I. EPA'S ACTION IS UNLAWFUL AND SHOULD BE VACATED

A. EPA's Action is, in Effect, an Unlawful Stay or Suspension of the 2016 Rule

EPA intends the Memo to allow those manufacturers that would be subject to the 300-glider-vehicle production cap under 40 C.F.R. § 1037.150(t)(1)(ii) to ignore that cap and continue producing glider vehicles up to the higher limits that expired on December 31, 2017. NGO-A3. To this end, EPA's Memo commits the agency to set aside the current 300-glider cap, and instead apply the less stringent, transitional regulatory limitations that were in effect in 2017 to manufacturers' 2018 and 2019 production. *Compare* 40 C.F.R. § 1037.150(t)(3) ("[f]or calendar year 2017," exempting glider vehicles up to a limit equal to a manufacturer's

[5] That EPA is engaged or may engage in further proceedings concerning the 2016 Rule does not make its current action any less final. See *Clean Air Council v. Pruitt*, 862 F3d 1, 7 (D.C. Cir. 2017).

"highest annual production of glider kits and glider vehicles for any year from 2010 to 2014") *with* 40 C.F.R. § 1037.150(t)(1)(ii) (capping exempt vehicles at 300 per manufacturer). In effect, then, EPA's Memo rewrites the transitional provision for the year 2017 (40 C.F.R. § 1037.150(t)(3)) to include the years 2018 and 2019. *See* NGO-A3 ("EPA will exercise its enforcement discretion with respect to the applicability of 40 C.F.R. § 1037.635 [limiting production of glider vehicles with non-compliant engines] 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).").

Such a revision, which "effectively suspends the implementation of important and duly promulgated standards, …constitutes rulemaking subject to notice and comment…." *Environmental Defense Fund, Inc. v. Gorsuch*, 713 F.2d 802 (D.C. Cir. 1983); *see also Natural Res. Def. Council v. Nat'l Highway Traffic Safety Admin.*, 894 F.3d 95 (2d Cir. 2018) ("*Natural Res. Def. Council v. NHTSA*") (notice and comment requirements apply "when an agency seeks to delay or repeal a previously promulgated final rule"). It cannot be accomplished by memorandum. Nor is EPA free to simply ignore the 2016 Rule: "an agency issuing a legislative rule is itself bound by the rule until that rule is amended or revoked." *Nat'l Family Planning & Reproductive Health Ass'n v. Sullivan*, 979 F.2d 227, 234 (D.C. Cir.

1992). Accordingly, "delayed implementation of a final regulation normally constitutes substantive rulemaking," subject to notice and comment. *Envtl. Def. Fund, Inc*. v. E.P.A., 716 F.2d 915, 920 (D.C. Cir. 1983).

B. EPA's Action Is Reviewable, despite EPA's Characterization of It as an Exercise of Enforcement Discretion

In an apparent attempt to circumvent review, as well as the requirements to stay or revise a validly promulgated regulation, EPA styled its action as a decision to "exercise its enforcement discretion." NGO-A3. But even accepting at face value EPA's characterization of its blanket suspension of the 2016 Rule's 300-vehicle production limit as an exercise of enforcement discretion, EPA's Action is still reviewable and subject to vacatur.

While an agency's *ad hoc* decision not to take enforcement action in a particular case is presumptively unreviewable, "an agency's adoption of a general enforcement policy is subject to review." *OSG Bulk Ships, Inc. v. United States*, 132 F.3d 808, 812 (D.C. Cir. 1998); *see also Heckler v. Chaney*, 470 U.S. 821, 833 n. 4 (1985) (agency action in the form of a "general policy" may be reviewable to determine whether the policy amounted to "an abdication of [the agency's] statutory responsibilities" or instead represented a decision "committed to agency discretion"); *Crowley Caribbean Transp., Inc. v. Pena*, 37 F.3d 671, 676 (D.C. Cir. 1994) (presumption of unreviewability applicable to a "single shot nonenforcement decision" does not apply to "an agency's statement of a general enforcement

policy" articulated in the "form of [a] universal policy statement"). This is true whether the general enforcement policy is contained in a "formal regulation after the full rulemaking process" or in "informal contexts such as letters." *Crowley*, 37 F.3d at 676-77.

EPA's decision to effectively suspend the regulation that took effect on January 1, 2018 and instead continue to apply the 2017 limitations on glider production to gliders produced in 2018 and 2019 is not the sort of individualized, *ad hoc* enforcement decision that is presumptively entrusted to agency discretion. *See Crowley*, 37 F.3d at 677. Rather, the EPA's Memo clearly sets out its reasons for suspending the more restrictive production limits in a manner that is "easily reviewable." *Ibid*. And, as described below, the decision represents the sort of "'abdication of statutory responsibilities'" — both to involve the public in the rendering of significant decisions and to carry out the purposes of the Clean Air Act—that renders the application of a presumption of non-reviewability inappropriate. *Ibid*.

Further, there is "law to apply" to EPA's Action. *Nat'l Wildlife Federation v. EPA*, 980 F2d 765, 773 (D.C. Cir. 1992), citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971). First, section 203(b) of the Clean Air Act limits the Administrator's discretion to exempt manufacturers from vehicle emissions standards to specific purposes (e.g., research, investigations, studies,

demonstrations or training) which do not apply here. 42 U.S.C. § 7522(b)(1). Second, section 307(b) of the Clean Air Act limits the bases on which the Administrator may stay the effective date of a rule, and limits to duration of a stay to three months. EPA's Action does not accord with either of those limits.

C. EPA Has No Inherent or Statutory Authority to Stay or Suspend the 2016 Rule By Fiat

It is well established that the suspension of a rule, even if for a limited duration, is effectively a revocation of a final rule that is subject to review as an exercise of substantive agency rulemaking, and thus must be predicated on authority conferred by Congress. See *Public Citizen v. Steed*, 733 F.2d 93, 98 (D.C. Cir. 1984) ("an 'indefinite suspension' does not differ from a revocation simply because an agency choses to label it as a suspension.") If agencies had free rein to suspend the effective dates of final rules, "it would mean that an agency could guide a future rule through the rulemaking process, promulgate a final rule, and then effectively repeal it, simply by indefinitely postponing its operative date." *Natural Res. Def. Council v. EPA*, 683 F.2d 752, 762 (3d Cir. 1982). EPA's current Action is merely a variant on the theme, employing the cloak of a "no action assurance" to achieve what EPA has not been able to accomplish through any rulemaking process.

As this Court recently held, EPA has no "'inherent authority' …not to enforce a lawfully issued final rule" while it reconsiders it, and the CAA does not provide

it any such authority. *Clean Air Council v. Pruitt*, 862 F.3d at 9. As a general rule, the CAA prohibits EPA from suspending or staying the effectiveness of a regulatory provision on the basis that EPA is reconsidering it. 42 U.S.C. § 7607(b)(1) (the filing of an administrative petition for reconsideration "shall not postpone the effectiveness" of a final rule or action) & (d)(7)(B) (agency "reconsideration shall not postpone the effectiveness of a rule). And EPA has, with good reason, failed to invoke the sole exception to this rule, which is applicable only to stays "for a period not to exceed three months" issued in connection with a petition for reconsideration that raises an issue that had not been raised and could not practically have been raised during the comment period and is "of central relevance to the outcome of the rule." 42 U.S.C. § 7607(d)(7)(B).[6]

D. EPA's Action Is Arbitrary and Capricious Because EPA Failed to Consider the Clean Air Act's Statutory Mandates and Provide a Reasoned Explanation for its Reversal

EPA's Action also constitutes an arbitrary and capricious reversal of its prior position.[7] An agency action is arbitrary and capricious where the agency "entirely fail[s] to consider an important aspect of the problem," or when it "offer[s] an

[6] Similarly, EPA's authority to exempt manufacturers from vehicle emissions standards is inapplicable. 42 U.S.C. § 7522(b)(1).

[7] Agency actions are subject to judicial reversal where they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;" "in excess of statutory jurisdiction, authority, or limitations;" or "without observance of procedure required by law." 5 U.S.C. § 706(2)(A), (C), (D); *see also*, Clean Air Act, § 307(b)(1), (d)(9), 42 U.S.C. § 7607(b)(1), (d)(9).

explanation for its decision that runs counter to the evidence before the agency." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983) ("*State Farm*"). When reversing course by changing a prior policy, an agency is required to provide a "reasoned explanation" for the change, and show that the new policy is "permissible under the statute" and that "there are good reasons for it." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) ("*Fox*"); *see also Action for Children's Television v. F.C.C.*, 821 F.2d 741, 745 (D.C. Cir. 1987) ("It is axiomatic that an agency choosing to alter its regulatory course must supply a reasoned analysis indicating its prior policies and standards are being deliberately changed, not casually ignored.").

EPA's Memo fails on all counts. First, it entirely fails to consider the central aspect of the problem that Congress mandated that EPA address, namely emissions of oxides of nitrogen and particulate matter from classes or categories of heavy-duty vehicles. *See* CAA, § 202(a)(3)(A)(i), 42 U.S.C. § 7521(a)(3)(A)(i). Rulemaking "ordinarily requires paying attention to the advantages and disadvantages of agency decisions". *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015). EPA's Memo does not mention, much less attempt to quantify, the additional NOx and PM emissions that will flow from the decision to allow manufacturers of gliders to multiply their production and sales "in 2018 and 2019" at levels many times the 300-vehicle-per-manufacturer limit. Indeed, EPA's

Memo ignores the endangerment to the public health and welfare. That danger, as described below in the discussion of irreparable harm, is immediate and severe, and will result in a significant number of lives lost and additional hospitalizations, particularly among vulnerable and sensitive populations. See *infra* Part II.A.

Second, the agency's proffered explanation for its action is inadequate: It lacks any support, is contradicted by EPA's Memo itself, and runs counter to the evidence that is before the agency. EPA asserts that its action is taken to preserve the viability of businesses and jobs, but at the same time EPA acknowledges that the 2016 Rule does not restrict the manufacture or sale of gliders that "use engines that comply with the emissions standards applicable to the model year in which the glider vehicle is manufactured." NGO-A2, 5. Nor does EPA consider the impact of its action on other manufacturers and their employees, who are producing emissions compliant heavy-duty trucks. EPA also fails to consider comments submitted by a leading glider manufacturer that it is "set up to make a profit at 300 [non-emissions compliant glider vehicles] a year." NGO-A600.

Third, EPA's Memo, to the extent it purports to be based on economics, looks solely at one side of the equation. That is, the Memo only considers speculative cost impacts on glider manufacturers, but gives no consideration to EPA's own quantification of the economic consequences of the health impacts of increased

glider sales, which EPA estimated to be, on average, from 300,00 to 1,100,000 dollars for each non-emissions compliant additional glider sold. NGO-A610.

Thus, EPA has wholly failed to "show that there are good reasons for the new policy," and provide a "reasoned explanation" for why the agency is "disregarding facts and circumstances that underlay or were engendered by the prior policy." *Fox*, 556 U.S. at 515.

E. EPA's Failure to Take Notice and Comment Before Implementing Its De Facto Suspension Violates the APA

The APA generally requires agencies to publish a notice of proposed rulemaking and solicit public comment on all rulemakings. *Id.* § 553. A proposed rule must be published in the Federal Register not less than thirty days before its effective date. *Id.* § 553(d). These requirements apply both when an agency promulgates a rule and when it amends or appeals a rule. *See id.* § 551(5); *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1206 (2015).

It is well established that the APA's notice-and-comment requirements also apply when an agency suspends the effectiveness of a rule. *Natural Res. Def. Council v. NHTSA*, 894 F.3d 95, 2018 WL 3189321 at *12 (notice and comment "requirements apply with the same force when an agency seeks to delay or repeal a previously promulgated final rule"); *Environmental Def. Fund, Inc. v. EPA*, 716 F.2d 915, 920 (D.C. Cir. 1983) (same); *Natural Res. Def. Council v. EPA*, 683 F.2d 752, 761-62 (2d Cir. 1982) (effective date is "an essential part of any rule" and

"material alterations" are subject to APA's rulemaking provisions). Failure to comply with these procedural requirements requires invalidation of an agency's actions. *Natural Res. Def. Council v. Abraham*, 355 F.3d 179, 206 (2d Cir. 2004).

Here, the facts are clear and undisputed. EPA did not engage in any notice and comment process in connection with its Action. Add. 1 and 2. Nor can EPA's promise to "move as expeditiously as possible to undertake a rulemaking in which it will consider extending the compliance date" cure its failure to take notice and comment before the EPA Memo effectively suspending the 2016 Rule. *Natural Res. Def. Council v. NHTSA*, 894 F.3d 95, 2018 WL 3189321 at * 14.

II. IN THE ALTERNATIVE, EPA'S ACTION SHOULD BE STAYED

To obtain a judicial stay, State Petitioners must demonstrate that: (a) they are likely to succeed on the merits; (b) they are likely to suffer irreparable harm in the absence of a stay; (c) the balance of equities favors a stay; and (d) an injunction is in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The final two factors "merge when," as here, "the Government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435 (2009).[8] State Petitioners have established above that they are likely to succeed on the merits because EPA's Action constitutes an unlawful suspension or modification of the 2016 Rule, which

[8] State Petitioners complied with Rule 18(a) by, prior to filing this Petition and Motion, requesting EPA to immediately withdraw or administratively stay the EPA Action. NGO-A259-276, ST-A, Tabs V-VIII. *See also*, Fed. R. App. P. 18(a).

EPA has attempted to accomplish without undertaking the required notice and comment process, and without the consideration of the Action's significant impacts on air quality and public health that would be necessary to any reasoned decision-making process. Below, State Petitioners demonstrate that a stay is necessary to prevent significant, irreparable harm to State Petitioners, and that it would be in the public interest to allow the 2016 Rule to remain in full effect for as long as this challenge to EPA's Memo remains pending.[9]

A. Without a Stay, Air Pollution from Additional Gliders Sold in 2018 and 2019 Will Contribute to Hundreds of Premature Deaths and Thousands of Serious Health Incidents

If EPA's Action is not vacated or stayed, thousands of additional gliders will be sold as a result, and these gliders will travel the roads for many years to come, emitting huge quantities of dangerous air pollutants.[10] By any reasonable estimate, these emissions will cause hundreds of premature deaths and heart attacks, and tens of thousands of asthma exacerbations and lost work days around the country. An immediate stay is necessary to prevent these serious, irreparable harms.

[9] EPA's no-action letter has a one-year duration. By the time this case is briefed, argued, and decided on the merits, much or all of the one-year period likely will have elapsed. Thus, in the absence of a stay (or summary vacatur), glider manufacturers will effectively receive much or all of the benefit of EPA's Action, even if the Memo is ultimately deemed unlawful on the merits.

[10] ST-A, Tab IX [CARB Decl. ¶ 6].

The Court should issue a stay to maintain in effect a duly promulgated federal vehicle regulation, such as the 2016 Rule, if irreparable harm would result from unsafe vehicles that, without a stay, would make their way onto the roads. *See Coleman v. Paccar, Inc*., 424 U.S. 1301, 1306-09 (1976) (Rehnquist, C.J., in chambers) (citing potential for long-term, irreparable harm if noncomplying vehicles manufactured during litigation over final safety regulations "find their ways to the highways"). Early deaths and widespread morbidity caused by air pollution unquestionably qualify as irreparable harm. *E.g.*, *Nat'l Ass'n of Farmworkers Organizations v. Marshall*, 628 F.2d 604, 613-614 (D.C. Cir. 1980) (holding that risk of exposure to pesticides constitutes irreparable harm); *Sierra Club v. U.S. Dep't of Ag.*, 841 F.Supp.2d 349, 358-59 (D.D.C. 2012) (finding "risk of severe health problems (including premature death)" from exposure to particulate matter air pollution constitutes irreparable harm).

Petitioners have demonstrated that such harms will result from EPA's Action. By a conservative estimate, EPA's Action will result in an additional 6,400 gliders being sold. The EPA Memo exempts 2018 and 2019 glider sales from EPA enforcement until a manufacturer's sales reach its 2017 "Interim Allowance," defined as "the greatest number [of gliders] produced in any one year during the period of 2010-2014." NGO-A2-3. According to EPA's own projections in its response to comments on the Phase 2 rulemaking, the greatest number of gliders

produced in those years was approximately 4,200. NGO-A605-606. That figure, which is based on a September 2013 study, is almost certainly lower than the actual 2014 production.[11] But assuming conservatively that EPA's projections were correct, it would be reasonable to estimate that, with EPA's Memo in place, manufacturers could produce and sell at least 4,200 non-compliant glider vehicles per year without fear EPA enforcement in both 2018 and 2019. EPA estimated that, beginning January 1, 2018, when the 300-vehicle cap took effect, "fewer than 1,000 glider[s]" would be sold "in most years."[12] Thus, conservatively estimated, EPA's Memo sanctions the sale of 3,200 *additional* gliders in both 2018 and 2019, for a total of 6,400 additional gliders over and above what the 2016 Rule would allow.

These 6,400 gliders would emit an *extra* 265,600 tons of NOx and 4,352 tons of PM, and would have the same emissions impact as roughly 121,000 to 151,000 new emissions-compliant trucks.[13] EPA estimates a glider sold in 2017 emits, on average, 41.5 more tons of NOx and 0.68 more tons of PM over the trucks'

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[11] NGO-A605. EPA projected in September 2016 that glider sales would likely grow to 10,000 or more per year by 2016. *Id*. And, as documented in a declaration in a consolidated case, actual sales figures in 2017 totaled over 6,500. NGO-A122. So NGO Petitioners' estimate that, unless vacated or stayed, EPA's Action will lead to 11,190 additional glider sales is reasonable, and likely more accurate than EPA's estimate. ST-A, Tab IX [CARB Decl. ¶ 18].

[13] ST-A, Tab IX [CARB Decl. ¶ 40].

lifetimes, as compared to a vehicle with modern emission-control technology. NGO-A609.

PM and NOx are both very harmful pollutants. PM from diesel exhaust is easily inhaled in the bronchial and alveolar regions of the lung.[14] Exposure is associated with cardiovascular and respiratory hospitalizations, cancer, and early deaths.[15] NOx recombines to form ground-level ozone, a gas that irritates and damages respiratory organs.[16] Ozone exposure is associated with increases in respiratory-related hospital admissions, respiratory symptoms and medication use in asthma sufferers, and emergency department visits for chronic obstructive pulmonary disease and asthma.[17] NOx is also very harmful: Exposure to one of its primary components, $NO_{2,}$ is linked to increased hospital admissions and emergency department visits for asthma, respiratory symptoms and airway inflammation in people with asthma, and decreased lung function in children with asthma.[18]

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[14] ST-A, Tab IX [CARB Decl. ¶ 10; NY Decl. ¶ 18].

[15] *Id.*; ST-A, Tab IX [NJ Decl. ¶ 14]; *see* NGO-A372-373.

[16] ST-A, Tab IX [CARB Decl. ¶ 11; NJ Decl. ¶ 16; NY Decl. ¶ 18].

[17] ST-A, Tab IX [CARB Decl. ¶ 11]; *see* NGO-A373-374.

[18] ST-A, Tab IX [CARB Decl. ¶ 11]; *see* NGO-A374-375.

Given this, EPA unsurprisingly found, "even a small number of additional glider vehicles would have severe impacts" on public health.[19] EPA's analysis of glider emissions found that, for every 1,000 noncompliant gliders sold, between 70 and 160 people will die early, and that that emissions from *each* additional glider would generate (on average) 300,000 to 1,100,000 dollars in costs related to adverse health impacts.[20] Scaled for 6,400 additional gliders, the EPA's Action risks between 448 and 1,024 early deaths and $1.9 to $7 billion in avoidable serious health effects.[21]

These staggering harms, clearly proved using EPA's own analysis of glider emissions impacts, compel a stay of EPA's Action.

B. State Petitioners Will Be Irreparably Harmed by Dangerous Air Pollution Unless EPA's Action is Stayed

Many of these hundreds of deaths and thousands of illnesses—likely more than half of them—would occur within Petitioner States.[22] The extra air pollution and related health impacts will irreparably injure the States' quasi-sovereign interests

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[19] NGO-A1881; NGO-A406. EPA's estimates of the NOx and PM impacts from new gliders were not contested by any of the commenters on the draft rule. NGO-A593.

[20] NGO-A611; ST-A, Tab IX [CARB Decl. ¶32].

[21] ST-A, Tab IX [CARB Decl. ¶ 6].

[22] ST-A, Tab IX [*See* CARB Decl., Exh. A (using each State's proportions of nationwide population living near major roadways to estimate state-specific impacts)].

in the quality of the "air within [their] domains" and in "protect[ing] [their] citizens from air pollution." *Massachusetts v. EPA*, 549 U.S. 497, 518-19 (2007) (internal quotation marks omitted).[23]

Petitioners include densely populated Northeastern, Great Lakes, and coastal states with extensive highway networks, and are home to many of the largest trade freight gateways in the country, including air- and seaports in Los Angeles, New York/New Jersey, Long Beach, Tacoma, Chicago, Washington, D.C., Boston, and Baltimore. Although State Petitioners represent 33% of the national population, over half of the early deaths and other health effects attributable to glider emissions will likely occur in these States.[24] This disproportionate effect is attributable to the fact that an above-average percentage of State Petitioners' populations live near major roadways, since pollution from gliders (and other diesel trucks) is more likely to affect people living near major roadways frequented by heavy-duty trucks.[25] It is well-documented that people who live and work near high-traffic roadways "experience higher rates of numerous adverse health effects," especially respiratory and cardiovascular effects, from diesel exhaust than people who live far from major roads. NGO-A381-382, 391; *see also* NGO-A380 (hundreds of peer-

[23] State Petitioners' evidence of these harms also satisfies Article III standing. *Sierra Club v. EPA*, 292 F.3d 895, 899-900 (D.C. Cir. 2002).

[24] *Id.*

[25] ST-A, Tab IX [CARB Decl., ¶ 23; NJ Decl., ¶ 30].

reviewed studies have found correlation between ambient levels of diesel exhaust pollution and proximity to major roadways).

The States' analysis of EPA's health impact assessment prepared for the 2016 Rule, apportioned using reasonable assumptions about the geographic distribution of excess emissions from 6,400 extra gliders, finds that state-by-state impacts are significant and alarming.[26] For example, an estimated 47 to 109 Californians would die prematurely and more than 50 Californians would have non-fatal heart attacks if these gliders reach the nation's highways.[27] Californians with asthma will experience thousands of exacerbated attacks, and Californians will miss thousands of days of work.[28] In each of the Petitioner States, glider emissions threaten early deaths and enormous public health costs.[29]

The Court should stay EPA's Action to protect the State Petitioners from these grave and irreparable harms.

C. The Sale and Operation of 6,400 Additional Gliders Will Undermine and Impede State Petitioners' Efforts to Improve Air Quality

[26] *See generally* ST-A, Tab IX [CARB Decl., Exh. A].

[27] ST-A, Tab IX [CARB Decl. ¶ 27].

[28] *Id.*

[29] *See generally* ST-A, Tab IX [CARB Decl., Exh. A].

Excess glider emissions of NOx and PM2.5 will also cause irreparable harm to State Petitioners by impeding their attainment and maintenance of the EPA-mandated National Ambient Air Quality Standards (NAAQS) [30] for ozone and PM, and by cancelling out other, costly efforts the States have made to reduce these harmful pollutants. ST-A, Tab IX [CARB Decl. at ¶¶ 34-45; NJ Decl. ¶ 51; WA Dec. ¶¶ 5-8; Mass. Decl ¶¶ 6-17; NC Decl. ¶¶ 5-30; NY Decl. ¶¶ 32-42; OR Decl. ¶ 18]. For example, over the past decade California and New Jersey, and their residents and businesses, have spent billions of dollars to reduce NOx and PM emissions from heavy-duty diesel vehicles, and have required many stationary sources of emissions to implement stringent and costly emissions controls as part of their efforts to attain and maintain the ozone and PM NAAQS. ST-A, Tab IX [CARB Decl. ¶¶ 32-33; NJ Decl. ¶¶ 36-44]. EPA's Action, and the increase in PM and NOx emissions it will generate, will undermine and may, in fact, cancel out some of these efforts, causing additional irreparable injury to the States. ST-A, Tab IX [CARB Decl. ¶¶ 41-45]. In California, the excess NOx emissions resulting from EPA's Action would more than cancel out the NOx reductions achieved by the Commercial Harbor Craft regulation, a program with compliance costs of 15 to 46 million dollars. ST-A, Tab IX [CARB Decl. ¶ 42]. And in Oregon, the PM

[30] The NAAQS are standards setting limits on the concentration of harmful pollutants in the air, including PM and NOx, at a level necessary to protect public health. 42 U.S. Code § 7412(c)(9)(B).

emissions from additional glider trucks would offset 5 years of emission-reduction benefits from the multi-million dollar Oregon Clean Diesel Initiative. ST-A, Tab IX [OR Decl. ¶ 18].

States also rely on EPA's heavy-duty vehicle emissions standards as part of the State Implementation Plan submissions they make to EPA in connection with ozone and PM NAAQS. *See* 42 U.S.C. § 7410(a). By unexpectedly suspending emissions standards for highly polluting gliders, EPA is undermining the regulatory baseline that States rely on to demonstrate compliance with the CAA. ST-A, Tab IX [NJ Decl. ¶ 36]. If 6,400 additional, highly polluting gliders can now be sold, without fear of EPA enforcement, air pollution from heavy-duty vehicles will significantly worsen year-to-year, even as EPA is requiring states to meet the more stringent ozone NAAQS adopted in 2015. ST-A, Tab IX [NJ Decl. ¶ 44]. Emissions from additional glider vehicles could jeopardize Charlotte, North Carolina's attainment status for the NAAQS for PM2.5 and ozone. ST-A, Tab IX [NC Decl. ¶¶ 17, 30; *see also,* Mass Decl. ¶ 15 (EPA's Action will make it harder to maintain attainment with ozone NAAQS)]. In New Jersey, the expected PM emissions resulting from EPA's Action would offset nearly a year of PM reductions by the State's mandatory diesel retrofit program, which is part of New Jersey's effort to maintain compliance with the NAAQS for PM. ST-A, Tab IX [NJ Decl. ¶ 51].

Put simply, EPA's Action makes States' compliance with the federal NAAQS "more difficult and onerous" than it would otherwise be, a cognizable injury. *See West Virginia v. EPA*, 362 F.3d 861, 868 (D.C. Cir. 2004). At least some State Petitioners will have to analyze the consequences of EPA's Action and make decisions as to whether to adopt or revise regulations or other offsetting emissions-reducing measures. *See* ST-A, Tab IX [NJ Decl. ¶ 44; Mass Decl. ¶ 14]. And those activities impose costs and occupy limited resources that would otherwise be available for other actions that would benefit the States and their people. ST-A, Tab IX [Mass Decl. ¶ 14]. State Petitioners will suffer these harms unless EPA's Action is neither vacated nor stayed during litigation over its legality.

D. No Party to this Litigation will be Harmed if the Court Grants a Stay, and the Public Interest Strongly Favors a Stay

In contrast to the irreparable harm that Petitioners and their residents face under EPA's Action, EPA will not be harmed by a stay during this litigation. The issuance of a stay would simply mean that EPA could (and should) enforce its duly promulgated limitation on glider sales—limitations that had already gone into effect more than six months before EPA issued the Memo. It is not an irreparable injury to an agency to leave its duly promulgated and already-in-effect regulations in place.

Any harm to the public through loss of jobs in the glider industry would be minimal. EPA found that the industry "will not be significantly impacted by the

new requirements" in the Phase 2 Rule and that existing glider manufacturers would "remain profitable." NGO-A600-601. A stay would simply mean that EPA could compel the 2-3 largest glider manufacturers — those whose 2017 allowances exceeded 300 gliders with non-compliant engines — to limit their production to 300, and after that produce gliders with engines meeting the emissions standards that all other new trucks are required to meet.[31] While it is conceivable that these few manufacturers — manufacturers who have in recent years increased production of non-compliant glider vehicles in order to circumvent emissions standards — might lose some of this business, their competitors that manufacture gliders and other trucks with emissions-standard compliant engines will benefit from the newly re-leveled playing field.

Moreover, any harm to these few companies is overwhelmingly outweighed by the public interest in protecting lives and health from dangerous and avoidable air pollution. The EPA Action risks the lives of hundreds of people nationwide, and the health of thousands more. The "real potential for hundreds of premature deaths" from exposure to excess air pollution outweighs any "speculative harm" from disruption of a regulated industry by emissions regulations. *Nat'l Ass'n of Farmworkers Organizations v. Marshall*, 628 F.2d 604, 617 (D.C. Cir. 1980); *see*

[31] 40 C.F.R. § 1037.150(t)(1)(ii).

also id. ("Plainly, any possible reduction in the price of produce that might result from denying preliminary relief would be only short-term, and would never approach the value of the children's health to the nation"); *Fed. Mar. Comm'n v. City of Los Angeles*, 607 F.Supp.2d 192, 193,196, 203-04 (D.D.C. 2009) (refusing to enjoin California clean truck programs intended to reduce diesel exhaust air pollution by phasing out old, polluting trucks, despite potential of air pollution rules to increase transportation costs and decrease competition for transportation services); *see United States v. NCR Corp.*, 688 F.3d 833, 842-43 (7th Cir. 2012) (finding that public interest in preventing injuries from exposure to toxic chemicals outweighs harm that specific company may have to pay more than its share of cleanup costs).

Even in purely economic terms, the $1.9 to $7 billion dollars of health-related impacts from PM 2.5 emissions that a stay would avoid is likely orders of magnitude greater than the economic benefits of the EPA Action to the handful of companies making non-compliant gliders. Notably, after describing the "severity" of the public health impacts of gliders for every year the Phase 2 Rule is not in effect, EPA previously refused to further delay phase-in of the Rule "merely" to avoid "the potential for inconvenience to the industry." NGO-A599.

EPA has already taken significant steps to mitigate any economic harm to glider manufacturers. EPA went to great lengths to cushion the impacts of the

Phase 2 Rule, phasing in the production caps for gliders and allowing continued sales to serve the original purpose of gliders — to salvage relatively new engines from truck bodies destroyed in crashes. NGO-A405. EPA estimated that approximately 1,000 non-compliant gliders per year (up to 300 per manufacturer) can still be sold using pre-2002 engines NGO-A606. Perhaps more importantly, glider manufacturers can "continue *unlimited* production using low-polluting engines," which are "readily available." NGO-A600 (emphasis added).

EPA's Memo grants a couple of manufacturers an unfair means to evade emissions standards "at the expense of domestic manufacturers producing engines complying with the latest" emissions standards. NGO-A599. Many retailers and manufacturers commented *in favor* of the Phase 2 Rule's glider limitations because they level the playing field for all truck companies. NGO-A595, 599, 602-603. Those interests in a level playing field are part of the interests that should be weighed here, and they tip the scale in favor of a stay.

For all these reasons, the balance of equities and the public interest clearly support a stay of EPA's Action.

CONCLUSION

The Court should vacate EPA's Action, or if it does not do so, stay implementation of that action while this litigation remains pending.

Dated July 19, 2018 Respectfully submitted,

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Attorney for Petitioner State of Rhode Island

CERTIFICATE OF COMPLIANCE

I certify that the foregoing Motion for Summary Vacatur or, in the Alternative, for Stay Pending Judicial Review was prepared in a proportionally spaced, 14-point font and that, according to the word-count program in Microsoft Word, it contains 7,762 words. *See* D.C. Cir. R. 18(b) (7,800-word limit).

DATED: July 19, 2018

/s/ David A. Zonana
David A. Zonana

CERTIFICATE OF SERVICE

I certify that on July 19, 2018, this Motion for Summary Vacatur or, in the Alternative, for Stay Pending Judicial Review was electronically served on Respondent United States Environmental Protection Agency through the appellate electronic case filing system.

DATED: July 19, 2018

/s/ David A. Zonana
David A. Zonana

CERTIFICATE OF COMPLIANCE WITH RULE 18(a)(1)

I hereby certify that this Motion for Summary Vacatur or, in the Alternative, for Stay Pending Judicial Review complies with D.C. Circuit Rule 18(a)(1).

Relief was previously requested from Respondents. On July 13, 2018, Movants sent a letter via Federal Express for next business day delivery and via electronic mail to the Acting Administrator, with a copy sent via electronic mail to Assistant Administrators Susan Bodine and Bill Wehrum. See Appendix 2 to this Motion. Because Federal Express was unable to deliver the letter, on July 17, 2018, Movants sent a second copy of the letter to Acting Administrator Wheeler via certified mail and electronic mail. Movants letter objected to the Respondents' action and requested that it be immediately withdrawn or administratively stayed. As of the date of filing their Petition for Review and this Motion on July 19, 2018, Petitioners have not received a response from EPA or Acting Administrator.

On July 17, 2018, the undersigned provided notice of this filing by telephone to Eric Hostetler, Assistant Attorney General, Environmental Defense Section, Environment and Natural Resources Division, United States Department of Justice. In addition, on July 18, the undersigned provided notice of this filing by telephone

to Daniel Dertke, who has entered an appearance for EPA in related Case No. 18-1190.

DATED: July 19, 2018

/s/ David A. Zonana
David A. Zonana