

## EPN Comments on Proposed Repeal of Requirements for Glider Vehicles

### Introduction

The agency proposes to repeal the 2016 final rule requiring most glider vehicle engines to be certified to the year of the vehicle. It, thereby, would allow manufacture and sale of these high-polluting vehicles and engines essentially without constraint. The proposal literally ignores all public health and welfare ramifications.<sup>1</sup> These ramifications are — there is no other word — horrendous. The proposal would allow unlimited deployment of what Congressman Raskin accurately called the “oldest, dirtiest, and deadliest” diesel engines<sup>2</sup> — engines lacking essentially any more than rudimentary control of PM or NOx emissions because they predate model year 2002. The proposal would create a tilted playing field, heavily favoring glider manufacturers, strongly pushing legitimate manufacturers and dealers to also build and sell glider vehicles with high-polluting engines. Under the proposal there is the possibility that all or a high percentage of tractor-trailers could be a glider with a filthy engine. This means the emissions and risk estimates from the 2016 Final Rule — 700-1600 premature mortalities for every model year at current glider vehicle production rates — could be significantly understated. Response to Comment Document (EPA-420-R-16-901 (August, 2016)) (“RTC”) pp. 1880, 1962.<sup>3</sup> The implications of the proposal also have the potential to

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<sup>1</sup> While the agency referred to comments submitted in the Phase 2 GHG rulemaking (81 Fed. Reg. 73478 (October 25, 2016) (“2016 Rulemaking” or “2016 Final Rule”)) and statements made in the petition to reconsider concerning the emissions impacts of glider vehicles, nowhere did the agency discuss its current view on emissions impact or in any way evaluate EPA’s prior position on emissions impact in the 2016 Final Rule. All the agency did was invite comment on whether glider vehicles produce fewer emissions compared to the vehicles they replace, the agency did not even invite comment on whether glider vehicles produce significantly greater emissions than vehicles with current model year engines, as EPA found in the 2016 Final Rule. See 82 Fed. Reg. 53442, 43-44, 47 (November 16, 2017).

<sup>2</sup> Statement of the Hon. Jamie Raskin (D-Md.) at the December 4, 2017 public hearing.

<sup>3</sup> As EPA noted, the 2016 Risk Assessment is itself highly conservative because it only considers premature mortalities from exposure to PM<sub>2.5</sub>. It does not account for diesel exhaust’s carcinogenicity, or for harm from exposure to ozone. RTC p. 1876.

eliminate the effectiveness of all Title 2 vehicular emission standards. Under the interpretation announced in the Proposal, all a manufacturer would have to do is install one or more used parts or components on an otherwise new motor vehicle, and the vehicle would no longer be subject to Title 2 standards.<sup>4</sup> The agency nowhere discussed this or any other programmatic impact of its proposed interpretation. The absurdity of this result and its horrific emissions impact highlight the flaws in the agency's proposal.

The agency's proposal is blithely oblivious to these deleterious consequences. It rests entirely on a reinterpretation of a portion of EPA's conclusion on its authority under section 202(a)(1) to set standards for glider vehicles, kits, and engines, as set out in the 2016 Final Rule. It is no exaggeration to say that the statutory interpretation advanced in the proposal is devoid of any legal merit. Moreover, that reinterpretation of section 202(a)(1)'s authority would not justify repeal even if it were valid. Finally, even though the agency offers its reinterpretation as an exercise of the agency's *Chevron* "step 2" authority to change its approach, the proposal offers **absolutely no** factual, technical, or policy analysis in support of that change. These defects are fundamental and cannot be cured by a response in the agency's final action. If the agency wishes to proceed with this initiative, it must issue a new proposal addressing the defects set out below and invite public comment on it.

These comments begin with a brief background session. They next explain why the agency's proposal on its own terms would not justify repeal of the 2016 glider provisions. They then describe the legal defects of the proposal, and conclude by setting out some of the factual and policy issues that the agency has entirely failed to analyze, but that it would need to address before it could take final action.

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<sup>4</sup> EPA's position is that "[based on that structure and history, it seems likely that Congress understood a 'new motor vehicle,' as defined in CAA § 216(3), to be a vehicle comprised entirely of new parts and certainly not a vehicle with a used engine." 82 FR at 53446.

## II. Background

As noted above, glider vehicles are heavy duty tractors (as in tractor-trailer) consisting of a newly manufactured tractor chassis combined with an older engine and drive train. Until recently, only a small number of glider vehicles were produced each year, about 300, primarily to allow engines in disabled trucks to complete their useful lives. However, with the advent of stricter diesel emission standards annual glider production has climbed dramatically, to over 10,000 vehicles per year.<sup>5</sup>

The engines installed in glider trucks are almost exclusively diesels more than 15 years old, dating from before requirements to use modern emission control technology. See, e.g. RTC pp. 1879-1880; 1876 n. 240. The 2016 Final Rule estimates conservatively (see n.3 above) that each model year of production, at estimated production rates of 10,000, causes the premature death of hundreds to thousands of Americans, and that annual monetized benefits of the final glider rule are from \$3 to \$11 billion. RTC p. 1880 and RTC chapter 14 Appendix A.

EPA concluded that this increase in sales of glider trucks would cause a health-damaging increase in of diesel particulate and NOx emissions entirely disproportionate to the number of gliders sold, and that control was warranted. EPA therefore proposed, and later promulgated, a set of control requirements that in many cases will require glider trucks to meet the diesel engine emission standards applicable to the year in which the trucks are offered for sale, rather than the year the engines were originally built. However, there are important exceptions to these requirements. Most notably, if a glider uses an engine that is still within its “useful life”, namely the period within which EPA emission standards apply, or otherwise has not been used much, it need not meet the stricter standards. In addition, there is an annual allowance for small business manufacturers to produce up to their 2010-2014 production limit or 300 glider vehicles (whichever

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<sup>5</sup> Witnesses at the December 4, 2017 public hearing suggested that production rates are considerably higher. See, e.g. Testimony of Volvo and Nuss Motors.

is less) certified to the year the engine was originally built. See 81 Fed. Reg. 73941, 74111, 74060 (40 CFR § 1037.635(c)(1) and 1037.150 (t)).

No petitions for review were filed with respect to the 2016 glider vehicle provisions. However, two manufacturers of glider trucks petitioned the agency for reconsideration of these provisions in the spring of 2017, and, after an undisclosed meeting between one of these manufacturers (Fitzgerald Glider Kits) and Administrator Pruitt, the agency proposed to grant this petition.

### **III. The Agency’s Proposal Ignores EPA’s Authority and Prior Action under the Clean Air Act’s Rebuild Provisions**

With one important exception, §202(a) of the Clean Air Act largely confines EPA’s authority to regulate emissions to new as opposed to existing vehicles or engines. Some glider manufacturers argued during the 2016 rulemaking that EPA could not regulate glider trucks as new motor vehicles because they use an old engine and powertrain. However, the agency concluded that gliders still fell within this authority because glider vehicles meet the statutory definition of “new motor vehicle”. 81 Fed. Reg. at 73517. We discuss that argument below. However there is a separate source of authority that EPA relied on in adopting the 2016 Final Rule. The Clean Air Act contains another provision that is **not** restricted to new vehicles or engines and is directly applicable to gliders.

Specifically, §202(a)(3)(D) provides that

**REBUILDING PRACTICES** —The Administrator shall study the practice of rebuilding heavy-duty engines and the impact rebuilding has on engine emissions. On the basis of that study and other information available to the Administrator, the Administrator may prescribe requirements to control rebuilding practices, including standards applicable to emissions from any rebuilt heavy-duty engines (whether or not the engine is past its statutory useful life), which in the Administrator’s judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare taking costs into account. Any regulation shall take effect after a period the Administrator finds necessary to permit the development and application of the requisite control measures, giving appropriate consideration to the cost of compliance within the period and energy and safety factors.

The uncontradicted record shows that all engines installed in glider trucks are rebuilt. See 81 Fed. Reg. 73518 n. 93. Accordingly, they fall squarely within the scope of this authority.<sup>6</sup>

The agency in its 2017 proposal specifically recognized and reaffirmed EPA's authority to regulate rebuilt engines under this authority. 82 Fed. Reg. 53442, 53443 (Nov. 16, 2017). However, and unaccountably, the agency did not acknowledge that the existing 2016 Final Rule clearly rests its glider engine provisions on this authority.<sup>7</sup> The first sentence of the 2016 Final Rule's discussion of EPA's legal authority expressly cites §202(a)(3)(D) as one of the provisions relied on. 81 Fed. Reg. at 73512. Later, in a more focused discussion, EPA stated that "a previously used engine installed in a glider vehicle is within EPA's multiple legal authorities" and expressly cited §202(a)(3)(D). 81 Fed. Reg. at 73518.<sup>8</sup> In a more detailed discussion, EPA explained why applying this authority to glider engines was consistent with §202(a)(3)(D)'s requirement that adequate lead time be provided, and rejected arguments that the more general lead time provisions of §202(a)(3)(C) should apply instead of the focused provisions of §202(a)(3)(D). 81 Fed. Reg. at 73519.

The agency cannot repeal the glider engine provisions of the 2016 Final Rule without addressing and revoking its prior exercise of the rebuild authority. The agency has outright failed to explain that it is proposing any such revocation and why it would do so, an arbitrary action. See *Motor Vehicle Manufacturers Ass'n. v. State Farm Mutual Automobile Insurance Co.* ("State Farm"), 463 U.S. 29, 42 ("an

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<sup>6</sup> EPA satisfied the preconditions to exercise of section 202 (a)(3)(D): there is a rebuilding study (see 61 Fed. Reg. 63449 (June 27, 1996); in promulgating regulations implementing the authority, EPA acted on "other information available to the Administrator"; EPA found long since that diesel exhaust endangers public health and welfare (see , e.g., 72 Fed. Reg. 3204 (Jan. 24, 2007); and engines in glider vehicles contribute to the air pollution which endangers (81 Fed. Reg. 73943). EPA also considered cost; energy; safety; and lead time. See, e.g. 81 Fed. Reg. 73943 and RTC p. 1881 (cost); 80 Fed. Reg. 40529 (July 13, 2015) (safety); RTC pp. 1879, 1884 (energy); and 81 Fed. Reg. 73518-19 and RTC 1880 (lead time).

<sup>7</sup> The provisions for control of greenhouse gas emissions from glider vehicles (as opposed to controls on criteria pollutant and greenhouse gas emissions from glider engines) do not rest on this authority, but rather on the authority of section 202 (a)(1) and (2) of the Act. These are addressed below in the discussion of standards for glider kits.

<sup>8</sup> Also see 81 Fed. Reg. at 73944 n. 991 and 73945, and the extended discussion at RTC p. 1879.

agency changing course must supply a reasoned explanation for the change beyond that which may be required when an agency does not act in the first instance”) and 43 (agency acts arbitrarily when it “entirely failed to consider an important aspect of the problem”).

Nor does any reasoned explanation for revoking this exercise of authority exist. The proposal, if enacted, will result in hundreds to thousands of premature mortalities for each model year of production. Pollution from high polluting engines can go on more or less indefinitely, since, as a glider builder testified at the public hearing, heavy duty diesel engines can be rebuilt multiple times and typically run for approximately one *million* miles before overhaul is needed.<sup>9</sup> The proposal also creates a profound incentive for other manufacturers to produce these high polluting vehicles since they are otherwise at a decisive competitive disadvantage over price and vehicle maintenance.<sup>10</sup> In addition, billions of investment dollars in advanced diesel engine pollution control is put at risk by the proposal, and thousands of jobs in industries producing and deploying these controls are jeopardized.<sup>11</sup> There are also significant safety issues with glider vehicles, since they lack important safety features of modern trucks. Because they lack modern electronics, they lack electronic stability rollover control, automatic emergency brakes, and excess speed control.<sup>12</sup>

Moreover, this is not a legal defect that can be cured in a response to comments accompanying final agency action. It is a defect of such magnitude that the public must have a right to see and comment on the agency’s technical, legal, and policy analysis and reasoning should the agency wish to conclude that the

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<sup>9</sup> Testimony of Farrell Dale Clark on behalf of D&B Truck and Equipment Sales, December 4, 2017 public hearing.

<sup>10</sup> See, e.g. Testimony of American Trucking Ass’n, Heavy Duty Fuel Efficiency Group (major fleet owners and engine manufacturers), Volvo, December 4, 2017 public hearing.

<sup>11</sup> See, e.g. Testimony of Heavy Duty Fuel Efficiency Group, Volvo, Manufacturers of Emission Controls Association (MECA), December 4, 2017 public hearing.

<sup>12</sup> Testimony of Consumers Union, December 4, 2017 public hearing. See also 80 Fed. Reg. 40529 where NHTSA voiced safety concerns regarding glider vehicles.

current controls adopted under §202(a)(3)(D) should be repealed. If the agency now wishes to undo the 2016 Rule’s glider provisions, it is legally required to do so through a public comment process that considers them in comparable detail. See section VI. below.

#### **IV. The Agency has completely Failed to Justify Its Proposal that Gliders are Not “New Motor Vehicles”**

##### **A. EPA’s Prior Position**

EPA based its 2016 conclusion that gliders are “new motor vehicles” on a number of interlocking considerations. Specifically:

- The statute defines both a “new motor vehicle” as one “the legal or equitable title to which has never been transferred to an ultimate purchaser”. CAA §216(3). This language draws no distinction on whether the vehicle in question contains some previously used or refurbished parts. It clearly applies to assembled glider trucks. 81 Fed. Reg. at 73514.
- In addition, the definition of “new motor vehicle engine” also includes “any engine in a new motor vehicle” regardless of whether that engine had previously been sold to an ultimate purchaser. *Id.* This means that a new motor vehicle can contain a used engine. *Id.*
- Moreover, EPA concluded that glider vehicles were manufactured, sold, and considered in all significant ways as new trucks. Indeed, the 2016 Final Rule cites a glider manufacturer web site stating that “[a]ll... glider kits will be titled in [the manufacturer’s home state] and you will receive a title to transfer to your state.” 81 Fed. Reg. at 73514 n. 83.

##### **B. The Agency’s Proposal**

###### ***1. The Agency’s Secondary Arguments***

The agency’s proposal either accepts, or does not question, many aspects of EPA’s reasoning when it set the glider standards. Specifically, the agency admits that the statutory language saying that a vehicle is new

if it has not yet been sold to an ultimate purchaser supports EPA's position in the 2016 Final Rule. 82 Fed. Reg. at 53445. Though the agency attempts to deny it, this should be conclusive, since the plain language of a statute is overwhelmingly the best guide to its meaning. See e.g. *Council for Urological Interests v. Burwell*, 790 F. 3d 212, 219 (D.C. Cir. 2015) (one must begin, as always, with the plain language of the statute); *NRDC v. Browner*, 57 F. 3d 112, 1127 (D.C. Cir. 1995) (“[w]here the terms of a statute are unambiguous further judicial inquiry into the intent of the drafters is generally unnecessary”). The agency attempts to undermine this conclusion by citing the need to consider “the whole statutory text, considering the purpose and context of the statute” 82 Fed. Reg. 53445. The “whole statutory text” unambiguously means that glider vehicles are new motor vehicles, and that a new motor vehicle can contain a used engine. The agency does not question EPA's documented conclusion that gliders are manufactured and sold as new trucks. The agency does attempt to challenge EPA's arguments based on the disjunctive use of “engine” and “vehicle,” but in a way that actually underlines the strength of EPA's original argument.

Specifically, the agency's proposal states:

As Title II currently reads, the term “new motor vehicle” appears some 32 times, and in all but two instances, the term is accompanied by “new motor vehicle engine,” indicating that, at the inception of Title II, Congress understood that the regulation of engines was essential to control emissions from “motor vehicles.” 82 Fed. Reg. 53443 n. 3

However, the interesting part of Congress' so often repeated references to vehicles and engines in the disjunctive is not the obvious conclusion that engine emission control is generally essential to vehicle emission control.<sup>13</sup> It is rather the clear textual implication that engine control can take place without vehicle control and vice versa.

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<sup>13</sup> There are exceptions. See CAA sections 202 (a)(5)(A), 202 (a)(6), and 202 (k) (control of gasoline refilling emissions and other evaporative emissions). Non-engine vehicular controls such as aerodynamic improvements and low rolling resistance tires contribute to reductions in greenhouse gas emissions.



The agency similarly ignores plain meaning when it discusses the statutory definition of “new motor vehicle engine” as including any engine in a new motor vehicle. Here, the agency simply asserts that since a glider chassis cannot be a “new motor vehicle”, installing a used engine in it cannot make it one, dismissing the contrary position as “circular thinking”. 82 Fed. Reg. at 53448. But it is the agency that thinks in circles. Its conclusion makes sense only if based on a prior belief that gliders can never be new vehicles. However the two-part definition of “new motor vehicle engine” necessarily means that an engine can become “new” even if previously sold if it is installed in a vehicle that is new in other respects. This is a glider vehicle.

Moreover, as noted above, the criterion of first transfer of title draws no distinction with respect to the kinds of components in the vehicle. The definition also expressly indicates that used engines can be in a new motor vehicle, and that used imported vehicles are considered to be new. The agency’s proposed interpretation would simply read out of existence a statutory provision that the agency finds inconvenient.

## *2. The Agency’s Main Argument*

What does the proposal do to find that this straightforward and seemingly “mandated” — interpretation — 81 FR at 73514 — is “not the best reading”? 82 FR at 53445. It does not cite any legislative history, any other Clean Air Act provisions, or any Clean Air Act statutory purposes to support a different meaning. *NRDC v. Browner*, 57 F. 3d at 1127 (detailing these as circumstances where courts can look beyond statutory text as interpretive aids in a *Chevron* analysis). The proposed reinterpretation rests instead on two incorrect propositions. The first is “whether or not Congress, in defining ‘new motor vehicle’ for purposes of Title II, had a specific intent to include within the statutory definition such a thing as a glider vehicle”. 82 FR 53445. This is not the correct question. For *Chevron* step 1 purposes, the proper question is whether Congress evinced a specific intent on whether a new motor vehicle can contain one or

more used components.<sup>14</sup> As just discussed, the answer is an unqualified yes: the transfer of title is the criterion, without reference to the prior usage of the vehicle's components or parts, and Congress explicitly said that new motor vehicles can include used engines and used imported vehicles.

The second proposition is equally lacking in merit. Delving into the past, it suggests that the CAA definition of "new motor vehicle", including the selection of sale to the ultimate purchaser as the dividing line between new and not-new, was taken from the Automobile Information Disclosure Act of 1958 (AIDA), which required new automobiles sold by dealers to have a label with certain basic information, 85-506 Stat. 325. Even though the agency offers no positive evidence of any such reliance<sup>15</sup> the agency claims that reliance on this prior statute "serves to illuminate Congressional intent". Specifically, the agency claims that

Insofar as the ... CAA definition of "new motor vehicle" was based on the Disclosure Act definition of "new automobile," it would seem clear that Congress intended, for purposes of Title II, that a "new motor vehicle" would be understood to mean something equivalent to a "new automobile"—i.e., a true "showroom new" vehicle. It is implausible that Congress would have had in mind that a "new motor vehicle" might also include a vehicle comprised of new body parts and a previously owned power train. 82 Fed. Reg. at 53446.

It is no exaggeration to say that this archaic statute offers no support at all for EPA's conclusion, which therefore consists only of bare assertion.<sup>16</sup>

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<sup>14</sup> Put another way, the question for purposes of *Chevron 1* is not whether at the time of enactment Congress was consciously thinking about one future, fact specific application of a statutory definition designed to address potentially hundreds if not thousands of fact-specific applications over many decades of implementation. The Supreme Court rejected this approach in *State of Massachusetts v. EPA*, 549 U.S. 497, 532 (2007) ("the broad language of [CAA] § 202(a)(1) reflects an intentional effort to confer the flexibility necessary to [address changing circumstances and scientific developments] ... [T]he fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.") The definition of new motor vehicle reflects this same flexibility and breadth.

<sup>15</sup> In fact, contemporaneous understanding was that glider vehicles were new motor vehicles. The Internal Revenue Service took the position that a glider vehicle was a new motor vehicle for federal excise tax purposes, and its position was upheld on judicial review. See *Boise National Leasing, Inc. v. United States*, 389 F.2d 634, 636-37 (9<sup>th</sup> Cir. 1968).

<sup>16</sup> "The tendency to assume that a word that appears in two or more legal rules, and so in connection with more than one purpose, has and should have precisely the same scope in all of them, runs through legal discussions. It has all the tenacity of original sin and must be constantly guarded against." *General Dynamics Land Systems v. Cline*, 540 U.S. 581, 595 n. 8 (2004) (quoting Cook, "Substance" and "Procedure" in the Conflict of Laws, 42 Yale L. J. 333, 337 (1933)).

The AIDA definition itself does no more than draw a sensible ministerial line to settle a case where a line must be drawn, namely how to distinguish between a new vehicle and a vehicle that has passed that point and become existing. It does not remotely support a conclusion that in order to be new a vehicle must consist entirely of new components. Most devastatingly for purposes of the agency's unsupported assertion, it is not AIDA's definition of "new automobile" that creates the "showroom new" window labeling requirement, but a separate section applicable to manufacturers.<sup>17</sup> In effect, Congress defined new automobile somewhat broadly in AIDA, but then narrowed the labeling requirement by limiting it to only those new automobiles delivered to new car dealers.

The CAA and AIDA differ in many important ways, and it is clear that in the CAA Congress did not take the narrow approach used in AIDA and did not focus on the subset of vehicles presented for show in new car dealer's showrooms.

(1) The CAA's Title II provisions address a much broader societal problem – air pollution problems, reaching broadly across the country - while AIDA addresses a specific consumer information problem involving just new car dealers.

(2) Unlike AIDA, the CAA's definition of new motor vehicle covers many more kinds of vehicles than passenger cars. The CAA covers all kinds of cars and trucks, from the smallest passenger car to the largest commercial tractor trailer. It covers many more kinds of manufacturers and their

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<sup>17</sup> "Every manufacturer of new automobiles distributed in commerce shall, prior to the delivery of any new automobile to any dealer, or at or prior to the introduction date of new models delivered to a dealer prior to such introduction date, securely affix to the windshield, or sidewindow of such automobile a label on which such manufacturer shall endorse clearly, distinctly and legibly true and correct entries disclosing the following information concerning such automobile" (emphasis supplied) 15 U.S.C. 1232. The enforcement for this labeling requirement is addressed in 15 U.S.C. 1233.

distribution networks, the ways in which new cars or trucks are sold to their buyers. The vehicles and their manufacturing and distribution networks are more varied than the limited world of manufacturer deliveries of passenger cars to new car dealers.

(3) Unlike AIDA, the definition of new motor vehicle is not limited to a line drawn based on the transfer of title to an ultimate purchaser. As explained above, the definition of new motor vehicle is broader in scope, and it is clear that a new motor vehicle may include an engine whose title has already passed to an ultimate purchaser, that is, a new motor vehicle may include a used engine, as well as all imported vehicles, new and used. Thus, on its face the definition of new motor vehicle is not limited to the kind of “showroom new” vehicles shown by new passenger car dealers.

(4) It is the manufacturer requirement that focuses AIDA on new car dealers’ showrooms, not the definition of new automobile. The parallel manufacturer provision in the CAA is section 203(a), which requires that a manufacturer obtain an EPA certificate of conformity before selling, offering for sale, introducing into commerce or delivering a new motor vehicle for introduction into commerce. Nothing narrows this prohibition or somehow limits Title 2 to vehicles delivered to a dealer for presentation in “showroom new” condition in their showroom. The CAA prohibition is much broader in scope than the labeling requirement in AIDA, properly reflecting the broader scope of the air pollution problem Congress was trying to solve.

Thus, even assuming without evidence that Congress was informed by AIDA, it is clear that Congress rejected the narrow AIDA approach and instead chose a broader and more expansive approach for the CAA.

### *3. Chevron 2 Reinterpretation*

EPA’s interpretation in the 2016 rule is a straightforward interpretation fully consistent with the statutory language and Congressional purposes, and there are no countervailing indicia of legislative intent.

The prior interpretation thus appears to be “mandated”. 81 Fed. Reg. at 73514. The proposal nonetheless maintains that the new interpretation is “permissible” since “ambiguity exists” in the statute. 82 Fed. Reg. at 53446. There is no statutory ambiguity. Even assuming there were, the proposal fails to explain how its reinterpretation is “permissible”. And for good reason. A permissible interpretation, under *Chevron* step 2, must be compatible with the statutory purposes of the provision and the statute being interpreted. See, e.g. *Council for Urological Interests*, 790 F. 3d at 222 (an interpretation is permissible under *Chevron* step 2 if “it is a reasonable explanation of how an interpretation serves the statute’s objectives”); *Northpoint Tech Ltd. v. FCC*, 412 F. 3d 145, 151 (D.C. Cir. 2005) (same). This proposal is antithetical to the critical statutory objective of protecting public health and the environment from exposure to emissions from heavy duty vehicles and engines. See, e.g. CAA sections 202(a)(1), 202 (a)(3)(A) and (B); 202 (a) (3)(D); 213. It is likewise antithetical to the goals of attaining and maintaining National Ambient Air Quality Standards by allowing unlimited, uncontrolled numbers of heavy duty vehicles emitting NOx and PM at rates 40 to 450 *times* higher than new engines.

The agency has signally failed to examine or reexamine any substantive issue in any analytic detail. It summarizes information contained in the reconsideration petition but without analyzing or taking a position on any of it. 82 Fed. Reg. at 53444. And again for good reason. EPA testing has now confirmed that glider vehicles are even higher polluting than EPA estimated at the time of the 2016 Final Rule - PM emission being up to an order of magnitude *higher (450 times!)*.<sup>18</sup> EPA has also shown that the Tennessee Tech study offers no support for the proposition that glider vehicles are no more polluting than current model year trucks for which they would substitute. The most drastic deficiency is that PM emissions from

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<sup>18</sup> EPA, “Chassis Dynamometer Testing of Two Recent Model Year Heavy-Duty On-Highway Diesel Glider Vehicles,” (November 20, 2017). See: <https://www.regulations.gov/document?D=EPA-HQ-OAR-2014-0827-2417>

glider vehicles was not even measured – they were merely estimated by visual observation.<sup>19</sup> It is also possible that NOx was tested under unrepresentative conditions (testing was only for 50 seconds after a 5 minute “vehicle warmup”, potentially too brief a period for the catalyst to ‘light on’ in which case the Selective Catalytic Reduction NOx controls would not activate — although the test report is so cursory that no firm conclusions can be drawn as to test conditions and testing methodology.<sup>20</sup> In addition, none of the testing used the certification test procedures.<sup>21</sup>

Moreover, the TTU study tested unrepresentative glider vehicles, namely those from model years 2002-2006 using “optimized and remanufactured 2002-2007 engines”.<sup>22</sup> In fact, the typical glider vehicle uses even higher polluting *pre*-2002 engines.<sup>23</sup> Glider manufacturers even tout use of these engines in their advertising.<sup>24</sup> These engines pollute at significantly greater rates than the already high-polluting 2002-2007 engines.

If the agency wants to consider revising the 2016 interpretation, the agency has to comprehensively examine all of the relevant issues in analytical detail, as EPA did when originally promulgating the glider provisions. Here are some of the issues that would require re-examination:

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<sup>19</sup> Memorandum, EPA Teleconference with Tennessee Tech University Regarding Glider Test Report Summarized in June 2017 Letter; Tennessee Tech University – Summary of Heavy Duty Truck Study and Evaluation of the Phase II Heavy Duty Truck Rule, Nov. 13, 2007, available at <https://www.regulations.gov/document?D=EPA-HQ-OAR-2014-0827-2416> (“TTU stated that no particulate matter samples were collected during testing. The sample probe filter used with the Enerac M500 was visibly inspected for particulate matter. Particulate quantification was subjective in that it was visual only. TTU stated that they performed a smoke test but did not elaborate.”).

<sup>20</sup> See *id.* at p. 3 and Appendix B p. 1. In contrast, the transient test procedure for certification testing is a 20 minute test with 17 minutes of the test conducted under hot start conditions.

<sup>21</sup> *Id.* Appendix B.

<sup>22</sup> *Id.* Appendix A p. 1.

<sup>23</sup> 81 Fed. Reg. 73942-43.

<sup>24</sup> 81 Fed. Reg. 73943 and n. 987.

- The impact on air pollution. EPA’s Phase 2 rule claimed that allowing gliders to remain essentially unregulated would cause massive and disproportionate increases in air pollution with attendant health damage. No commenter on the Phase 2 proposal disagreed with this assessment. 81 Fed. Reg. 73943. The agency’s proposal to deregulate gliders, however, contains **no discussion** of this issue, despite its central relevance to the original rule and to the statutory purposes.
- The impact on the industry. This should be fully examined in any attempt to repeal or relax the glider rule. The 2016 Final Rule requires only that glider manufacturers (1) use engines still within the useful life of their emission standards, (2) produce no more than 300 high polluting glider vehicle allowance for each small business manufacturer, providing flexibility to continue all the traditional recycling uses of gliders,<sup>25</sup> or (3) use new, properly controlled engines, which are available at any time. The impact of these requirements on the manufacturers, sellers, and buyers of glider vehicles should be analyzed and discussed in detail. The agency also has to consider the impact on manufacturers of compliant engines and vehicles, as well as the distributors who sell and service these vehicles.<sup>26</sup>
- Overall costs and benefits. It is unchallenged here that the 2016 Final Rule results in annual monetized benefits (PM2.5 control — without monetizing benefits of avoided cancers and avoided ozone exposure) of \$3-\$11 billion annually. These benefits exceed any costs of requiring glider

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<sup>25</sup> Taken directly from Fitzgerald Glider Kit’s public statement that it can be profitable at that level of production. RTC pp. 1881, 1882.

<sup>26</sup> Ironically, Administrator Pruitt stated on October 17, 2017 that EPA should not be picking winners and losers in regulating. See [CNN.Com](http://www.cnn.com) “Pruitt Announces Withdrawal of Clean Power Plan” (Oct. 17, 2017). That is precisely the result of the proposal, which would result in a profoundly tilted playing field for the advantage of a handful of manufacturers of high-polluting glider vehicles.

vehicle manufacturers to abide by the same rules as all other manufacturers of heavy duty vehicles and engines.

- Consequences on other Title 2 programs. EPA also would have to discuss the breathtakingly — there is no other word — destructive consequences of its proposed reinterpretation. If a “new motor vehicle” consists entirely of new parts, all title 2 vehicular standards can be evaded by the expedient of adding a used part to the vehicle. In addition to eviscerating all controls over glider vehicles, the proposal would eviscerate the remainder of Title II vehicular controls as well. Such an absurd result in and of itself demonstrates the impermissibility and irresponsibility of the proposed reinterpretation.

#### **V. The 2016 Final Rule Reasonably Applied Standards to Manufacturers of Glider Kits**

In the 2016 Final Rule, EPA indicated that either the glider kit manufacturer or the glider vehicle manufacturer could certify compliance with the greenhouse gas vehicle standard. 81 FR at 73517-18. EPA indicated that this was a routine application of the ‘delegated assembly’ regulatory provisions, which provide that when a new motor vehicle has multiple manufacturers, any of those manufacturers can certify compliance with applicable standards provided certain conditions are satisfied. *Id.* at 73518 and 73945 referring to the regulations at 40 CFR part 1037.620 through 1037.622; see also RTC p. 1884. The provisions in the Final Rule with respect to glider vehicles thus pertain to the GHG vehicle standard, not to the provisions pertaining to control of engine emissions in glider vehicles. Thus, the glider kit provisions do not involve the provisions in the Final Rule which require most glider vehicle engines to be certified to meet criteria pollutant standards corresponding to the year of the vehicle. Nor do they pertain to the GHG engine standards.



The proposal would eliminate the provisions regarding glider kits. 82 FR at 53446. The agency offered two grounds: if glider vehicles are not new motor vehicles, then the glider kits cannot be regulated as incomplete new motor vehicles, and a glider kit may not itself meet the definition of new motor vehicle because, lacking a powertrain, it is not self-propelled. *Id.*

As explained above, it is abundantly clear that glider vehicles are new motor vehicles. In light of this, it is equally clear that EPA has ample authority to promulgate the various provisions concerning glider kits in the Final Rule. First, EPA has obvious authority to promulgate GHG standards for glider vehicles. Second, the issue then becomes which entity involved in manufacture of the vehicle must certify compliance with those standards. As EPA explained in the preamble to the final rule, the Act contemplates that there can be multiple manufacturers of a motor vehicle. See 81 FR at 73515-16. Since any manufacturer can certify under section 206, EPA rules have long provided provisions allowing manufacturers to choose which certifies and what obligations the non-certifying manufacturer(s) assumes. These are the various provisions relating to delegated assembly in sections 1037.620-.622. The provisions provide a needed measure of flexibility to the certification process by allowing manufacturers themselves to determine which entity is most appropriate to certify in a given instance, and allows an upstream manufacturer to introduce a vehicle into commerce before it is in certified condition when a downstream manufacturer certifies. See 81 Fed. Reg. 73517. As EPA explained the Final Rule, the provisions regarding glider kit manufacturers in the Final Rule are simply an application of these long-standing provisions. *Id.*<sup>27</sup>

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<sup>27</sup> If the glider kit manufacturer chooses not to certify, it must send certain information to the downstream manufacturer of the glider vehicle, including a fuel map for each engine used, or a default map consistent with good engineering judgment should a manufacturer be unable to generate or obtain a fuel map for the actual engine. 81 FR at 73942. Glider kit manufacturers are also responsible for generating test data with respect to aerodynamics and tires. These requirements are justified not only under section 202 (a)(1) but also section 208 (a), which provides authority over manufacturers of “new motor vehicle or engine parts or components”.

In short, the proposal misidentifies the issue, compromises long-standing and useful delegated assembly regulatory provisions, and lacks merit in any case.

## **VI. The Proposal Fails to Give Adequate Notice**

The proposal is utterly deficient in providing proper notice of key issues involved in any rational analysis of whether to repeal provisions requiring glider vehicles to meet the same standards as other new heavy duty vehicles and engines. See CAA section 307 (d)(3) (proposal to provide information of among other things, relevant factual data and policy considerations, none of which are articulated in this proposal). To provide adequate notice an agency must "make its views known to the public in a concrete and focused form so as to make criticism or formulation of alternatives possible". *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 36 (D.C.Cir. 1977 ) This obligation "is especially important in light of Congress' intent, expressed in Sec. 307(d), that EPA provide a detailed proposal for interested parties to focus their comments on." *Small Lead Refiner Phase-Down Task Force v. EPA*, 705 F. 2d 506, 546 (D.C. Cir. 1983) This proposal fails to provide adequate notice on a host of relevant issues, among them consideration of any environmental consequence of the proposal; impacts on disadvantaged, near-road communities which will be disproportionately exposed to the diesel exhaust from glider vehicles; cost and other impacts on glider vehicle manufacturers and their sellers and buyers; cost and other impacts on manufacturers and dealers (many of them small businesses) of current engines and trucks; implications for attainment and maintenance of PM and ozone NAAQS; safety of glider vehicles; and most fundamentally, how the proposal is consistent with the goals and objectives of the Clean Air Act. See also *State Farm*, 463 U.S. at 43 (agency acts arbitrarily where it "entirely failed to consider an important aspect of the problem"). Without any indication from the agency of its views on any of these relevant and vital matters, no final action in this proceeding is possible unless and until adequate notice and opportunity to comment is provided by the agency.

## VII. Issues on Which the Agency Solicits Comment

1. The proposal states that commenters asserted that “a glider vehicle is often a suitable option for those small businesses and independent operators who cannot afford to purchase a new vehicle, but who wish to replace an older vehicle with a vehicle that is equipped with up-to-date safety features”. First, as explained above, glider vehicles are not equipped with important current safety features, lacking proper rollover and speed control, among other things. Second, used trucks of more recent model vintage with current safety and emissions control are readily available at lower price, without the need to purchase a high polluting and less safe glider vehicle.<sup>28</sup> Third, there is credible information that fleets, not individuals or small businesses, are the chief purchaser of glider vehicles.<sup>29</sup> Finally, the 2016 Rule preserves ample flexibility for small businesses and other glider vehicle manufacturers to manufacture glider vehicles with old engines.

2. “Whether limiting availability of glider vehicles could result in older, less safe, more-polluting trucks remaining on the road that much longer.” The suggestion that glider vehicles are replacing trucks that are even higher polluting, 82 Fed. Reg. 53447, does not withstand scrutiny. Trucks are replaced when they are at the end of their useful life, so the glider vehicle is replacing a truck that has little if any life left as a tractor trailer. As noted above, glider vehicles can run literally a million miles, and then the engines can be rebuilt multiple times to run millions of more miles — polluting without restriction the entire time. Moreover, there are no engines which are more polluting than the pre 2002 engines used in glider vehicles — witness the tests of the Fitzgerald glider vehicle conducted by EPA staff where PM emissions were so high as to temporarily overwhelm the measuring apparatus.<sup>30</sup> Glider vehicles are often tuned to emphasize fuel

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<sup>28</sup> Testimony of Southeast Air Quality Management District, Dec. 4, 2017 public hearing.

<sup>29</sup> Testimony of Volvo, December 4, 2017 public hearing.

<sup>30</sup> EPA, “Chassis Dynamometer Testing of Two Recent Model Year Heavy-Duty On-Highway Diesel Glider Vehicles,” (November 20, 2017), pp. 14 and 15 and Figure 9. See: <https://www.regulations.gov/document?D=EPA-HQ-OAR-2014-0827-2417>.

efficiency, neutering even the rudimentary pollution controls on the engines.<sup>31</sup> Glider vehicles lack proper safety equipment, including rollover control and speed control, as noted above. See 80 Fed. Reg. at 40529 (NHTSA voices glider vehicle safety concerns). Nor are truck owners needing to replace a truck faced with the alternative of buying a new truck or the high-polluting glider vehicle. They can purchase a used truck of later model year with proper air pollution controls, and not imperil public health.<sup>32</sup>

3. Should EPA grant more time to phase in the final rule requirements? As emphasized repeatedly in the public comments to the Phase 2 final rule, any delay in implementing the final rule's provisions will result in massive pre-buy of high polluting glider vehicles. See 81 Fed. Reg. at 73942. Given the again, no better word, horrific emission impacts of these vehicles, no further time for compliance should be afforded. Any delay will result in unnecessary American deaths.

## CONCLUSION

The agency's proposal is without legal merit, and fails to provide adequate notice of a plethora of relevant issues. Should the agency wish to proceed here, it cannot lawfully do so unless it provides adequate notice and opportunity for comment.

Respectfully submitted,

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<sup>31</sup> Testimony of Doub TMI Truck and Equipment, December 4, 2017 public hearing.

<sup>32</sup> See December 4, 2017 public hearing testimony of Southwest Air Quality Management District.