



January 5, 2018

ATTN: Docket ID No. EPA-HQ-OAR-2014-0827

Subject: Comments on the Irrational Failure to Consider the Environmental Costs or the Implications of Grandfathering of the Proposed Repeal of Emissions Requirements for Gliders

The Institute for Policy Integrity at New York University School of Law<sup>1</sup> offers the following comments on EPA's unreasonable failure to consider the environmental costs of exempting gliders from emissions requirements. Policy Integrity is a non-partisan think tank dedicated to improving the quality of government decisionmaking through advocacy and scholarship in administrative law, economics, and public policy.

EPA's proposed repeal of emissions requirements for gliders flunks the legal standards for rational rulemaking, due to EPA's complete failure to assess the likely effects on air pollution and the attendant costs to public health and environmental quality—obviously important statutory factors under the Clean Air Act. The irrationality and irregularity of the omission is compounded by the classification of the proposed repeal as a “significant regulatory action,”<sup>2</sup> for which Executive Order 12,866 requires a full “assessment of the potential costs and benefits of the regulatory action”<sup>3</sup>—such an assessment is nowhere to be found in the proposed repeal. Particularly glaring is EPA's failure to consider the extent to which exempting glider vehicles from regulation will increase emissions by extending the useful economic life of older, dirtier powertrains. Furthermore, the failure to consider emissions increases and environmental costs undercuts EPA's proposed statutory interpretation. While, as EPA admits, the plain language of the statute supports regulation of gliders as new vehicles,<sup>4</sup> EPA now tries (with tenuous support) to change its statutory interpretation based on congressional intent, though the agency neglects to consider whether the proposed repeal will open a gaping loophole that increases emissions and environmental costs, and whether Congress intended to allow such unchecked and costly pollution under the Clean Air Act.

The Clean Air Act incorporates the principal requirements for rulemaking found in the Administrative Procedure Act. All proposed rules must include a description of the subjects and issues involved.<sup>5</sup> The public must be given a meaningful opportunity to comment, and final rules must include a statement of their basis and purpose.<sup>6</sup> Agency actions cannot be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.<sup>7</sup> Under the

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<sup>1</sup> No part of this document purports to present the views, if any, of New York University School of Law.

<sup>2</sup> 82 Fed. Reg. 53,442, 53,448 (Nov. 16, 2017).

<sup>3</sup> Exec. Order 12,866 § 6(a)(3)(B)(i)

<sup>4</sup> 82 Fed. Reg. at 53,445 (“Focusing solely on . . . the statutory definition . . . a glider vehicle would appear to qualify as ‘new.’”).

<sup>5</sup> 5 U.S.C. § 553(b)(3); 42 U.S.C. § 7607(d)(3) The Clean Air Act generally incorporates the policies of the Administrative Procedure Act, *see e.g.* 42 U.S.C. § 7607(h) (applying the policies of subchapter II of chapter 5 of title 5 of the U.S. Code to rules promulgated under the Clean Air Act).

<sup>6</sup> 5 U.S.C. § 553(c); 42 U.S.C. § 7607(d)(5)-(6).

<sup>7</sup> 5 U.S.C. § 706(2)(a); 42 U.S.C. § 7607(d)(9).

arbitrary and capricious standard, an agency must “examine the relevant data” and “articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.”<sup>8</sup> When an agency reverses course through a repeal of an existing rule, it must provide a “reasoned explanation” for dismissing the “facts and circumstances that underlay” the original rule.<sup>9</sup> Costs and benefits are important categories of “relevant data” that EPA must account for. “‘Cost’ includes more than the expense of complying with regulations; any disadvantage could be termed a cost.”<sup>10</sup> Specifically, costs include “harms that regulation might do to human health or the environment.”<sup>11</sup>

In the proposed repeal of emissions requirements for gliders, EPA has completely omitted any assessment of the effects on emissions or the attendant costs to public health and environmental quality. The proposed rule instead only now asks the public to submit information “on the relative expected emissions impacts if the regulatory requirements at issue here were to be repealed or were to be left in place.”<sup>12</sup> That hardly satisfies the Administrative Procedure Act’s requirements for the agency to support its regulatory proposals with a description of the issues involved and a rational connection between the facts found and the proposed choice. EPA has put the cart before the horse: it has already made its regulatory choice (the proposed repeal) and only now seeks facts. Nor can EPA hide behind an argument that its regulatory choice is dictated by statute: the agency seeks to revise its statutory interpretation based on alleged congressional intent, and yet the environmental costs that EPA fails to consider are essential to determine whether Congress intended the likely results of the proposed repeal. Furthermore, the lack of facts presented in the proposed repeal on the important statutory factor of environmental costs makes it impossible for the public to meaningfully comment on the rulemaking.

The proposed repeal’s irrational and irregular lack of attention to environmental costs is highlighted by the classification of the rule as “significant.”<sup>13</sup> Executive Order 12,866 allows agencies to propose regulations “only upon a reasoned determination that the benefits of the intended regulation justify its costs.”<sup>14</sup> Normally, agencies comply with this obligation by conducting a regulatory impact analysis of costs and benefits. Indeed, EPA admits that “In many rulemaking promulgated under Section 202, EPA would address [costs] in the Draft Regulatory Impact Analysis (RIA). . . . However, EPA is not including a Draft RIA for this proposed rule.”<sup>15</sup> Instead, EPA has prepared only a bare assessment of specific economic impacts under Section 317 of the Clean Air Act. This assessment glosses over compliance costs and consumer costs,

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<sup>8</sup> Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

<sup>9</sup> FCC v. Fox Television Stations Inc., 556 U.S. 502, 515 (2009); Encino Motorcars LLC v. Navarro, 136 S. Ct. 2117, 2126 (2016).

<sup>10</sup> Michigan v. EPA, 135 S.Ct. 2699, 2707 (2015).

<sup>11</sup> *Id.*; see also Competitive Enter. Inst. v. NHTSA, 956 F.2d 321, 326-27 (D.C. Cir. 1992) (holding that the agency should have considered costs in the form of safety risks associated with the smaller size of more fuel-efficient cars).

<sup>12</sup> 82 Fed. Reg. at 53,447.

<sup>13</sup> 82 Fed. Reg. at 53,447.

<sup>14</sup> Exec. Order 12,866 § 1(b)(6).

<sup>15</sup> EPA, Memorandum on Assessment of Economic Factors Associated with the Proposed Repeal of Emission Requirements for Glider Vehicles, Glider Engines, and Glider Kits, EPA-HQ-OAR-2014-0827-2407 (Nov. 16, 2017).

but nowhere mentions environmental costs. There is no assessment of environmental costs to be found anywhere in the regulatory docket for this proposed repeal.

A particularly glaring omission is the failure to consider the extent to which the repeal will increase emissions (and attendant environmental costs) by extending the useful economic life of older, dirtier powertrains. Exempting gliders from new vehicle emission requirements allegedly reduces their cost relative to entirely new vehicles. Thus, an owner who, in the absence of the repeal, would have retired an old powertrain and replaced it with a new, less-polluting one might now opt to keep that powertrain in service through the use of a glider kit. A similar phenomenon has long been observed in the power sector, where utilities have avoided the expense of complying with new source emission standards by investing in extensive upgrades to old power plants rather than constructing new ones.<sup>16</sup>

EPA calls for comments on how the proposed repeal could affect anticipated purchasing behavior of independent drivers and the relative expected emissions,<sup>17</sup> though counterintuitively seems to assume that failing to finalize the proposed repeal and so “limiting the availability of glider vehicles could result in older, less safe, more-polluting trucks remaining on the road that much longer.”<sup>18</sup> EPA fails to consider the reverse (and more likely given historical experience) scenario that exempting gliders from new vehicle emission requirements will extend the lifespan of older, dirtier powertrains and thus increase emission-related environmental costs relative to a baseline scenario.

The proposed repeal lacks adequate assessment and presentation of important factors in the decisionmaking, and the proposal should not move forward under such an unreasonable and insufficient explanation.

Sincerely,

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<sup>16</sup> See Richard L. Revesz & Jack Lienke, *Struggling for Air: Power Plants and the “War on Coal”* 55-81 (2016); see also generally Jonathan Remy Nash & Richard L. Revesz, *Grandfathering and Environmental Regulation: The Law and Economics of New Source Review*, 101 NW. U. L. REV. 1677 (2007).

<sup>17</sup> 82 Fed. Reg. at 53,447.

<sup>18</sup> *Id.*