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Maryland, Oregon, Rhode Island, Vermont, Washington, the District of Columbia, and the
Puget Sound Clean Air Agency**

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VIA ELECTRONIC MAIL

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Re: Amended proposed consent decree in *United States v. Harley-Davidson, Inc.*
(D.D.C., Civil Action No. 1:16-cv-01687)/D.J. Ref. No. 90-5-2-1-11333

Dear Assistant Attorney General:

The Attorneys General of New York, Massachusetts, Delaware, Illinois, Iowa, Maine, Maryland, Oregon, Rhode Island, Vermont, Washington, the District of Columbia, and the Puget Sound Clean Air Agency (together, “States”) provide these comments in response to the notice of lodging of an amended proposed consent decree in *United States v. Harley-Davidson, Inc.* (D.D.C., Civil Action No. 1:16-cv-01687), 82 Fed. Reg. 34,977 (July 27, 2017). The States object to the proposed decree as amended, specifically the decision by the Department of Justice (DOJ) and the Environmental Protection Agency (EPA) to forego a \$3 million emissions mitigation project included in the original decree. DOJ and EPA fail to reasonably explain their decision to eliminate that project. Moreover, the decision not to hold Harley-Davidson to its agreement to mitigate the excess air pollution caused by its conduct is contrary to the fundamental requirement that a consent decree must “fairly and reasonably resolve the controversy in a manner consistent with the public interest.” *Massachusetts v. Microsoft*, 373 F.3d 1199, 1206 n.1 (D.C. Cir. 2004). Therefore, the States request that DOJ and EPA restore the original mitigation project or, alternatively, require Harley-Davidson to mitigate its excess emissions using another equivalent approach. The States stand ready to work with DOJ and EPA to implement the settlement in a way that addresses any of the federal government’s concerns, yet does not forfeit the air quality benefits to our residents that the original consent decree would have provided.

Settlement Background

In August 2016, EPA and DOJ announced a settlement with Harley-Davidson that resolved the government’s claims that Harley-Davidson had violated the Clean Air Act by selling approximately 340,000 unlawful defeat devices (tuners). The federal government’s complaint alleged that these tuners, once installed, caused the motorcycles to emit higher amounts of air pollution—hydrocarbons and nitrogen oxides (NO_x)—than the company had certified to EPA in obtaining authorization to sell them. In the settlement, Harley-Davidson

agreed to stop selling the tuners by August 23, 2016, buy back and destroy unsold tuners from dealers, pay a \$12 million civil penalty, and fund a \$3 million mitigation project to address the impacts of its excess emissions. The consent decree described the mitigation component as an “Emissions Mitigation Project” that Harley-Davidson would spend \$3 million to implement pursuant to Appendix A of the decree. Original Consent Decree, ¶ 17. In particular, Appendix A stated that Harley-Davidson had chosen the American Lung Association Northeast to administer the project, a program to retrofit or change-out high-polluting wood burning devices and replace them with EPA-certified wood stoves or cleaner burning, more energy efficient appliances, such as pellet stoves.¹

In the press release accompanying the settlement, EPA Assistant Administrator Cynthia Giles said that “Harley-Davidson is taking important steps to buy back the ‘super tuners’ from their dealers and destroy them, while funding projects to mitigate the harm they caused.” See Press Release: Harley-Davidson to Stop Sales of Illegal Devices that Increased Air Pollution from the Company’s Motorcycles, <https://www.epa.gov/enforcement/reference-news-release-harley-davidson-stop-sales-illegal-devices-increased-air> (EPA Press Release). With respect to mitigation specifically, EPA’s summary of the settlement stated that “Harley-Davidson will . . . spend \$3 million on a project to mitigate air pollution through a project to replace conventional woodstoves with cleaner-burning stoves in local communities.” <https://www.epa.gov/enforcement/harley-davidson-clean-air-act-settlement>. And, in the press release, EPA further explained that “[t]he woodstove project, which Harley-Davidson will undertake in conjunction with an independent third party, will eliminate excess air pollution caused by the illegal tuners by providing cleaner-burning stoves to designated communities, thereby assuring better air quality in the future.” EPA Press Release, *supra*.

After DOJ lodged the initial consent decree, a member of Congress and conservative organizations raised objections to the mitigation project. Subsequently, after the Trump Administration took office, Attorney General Jeff Sessions issued a memorandum entitled “Prohibition on Settlement Payments to Third Parties” (June 5, 2017) (Sessions Memorandum). The Sessions Memorandum prohibits the federal government from entering into a settlement agreement “that directs or provides for a payment or loan to any non-governmental person or entity that is not a party to the dispute.” *Id.* at 1. The Memorandum contains some exceptions to this general prohibition, including a payment “that otherwise directly remedies the harm that is sought to be redressed, including, for example, harm to the environment.” *Id.*

Rather than filing a motion asking the court to approve and enter the original consent decree as a final judgment resolving the case, DOJ, on July 20, 2017 (nearly a year after it filed the original decree), lodged an amended decree. The only difference between the original and amended decrees is the absence of the \$3 million mitigation project. DOJ and EPA did not propose to replace the mitigation project with anything, effectively reducing a settlement with a total value of \$15 million to a settlement with a total value of \$12 million. In attempting to justify its decision to abandon the requirement that Harley-Davidson mitigate its excess

¹ EPA has found that wood stoves and wood boilers are sources of numerous air pollutants, including volatile organic compounds and NO_x. See *Standards of Performance for New Residential Wood Heaters*, 80 Fed. Reg. 13,672, 13,694 (March 16, 2015).

pollution, DOJ stated that in light of the fact that Harley-Davidson was going to pay a non-governmental third party (American Lung Association) to implement the project, “[q]uestions exist as to whether this mitigation project is consistent with the new policy” on settlements set forth in the Sessions Memorandum. 82 Fed. Reg. at 34,978. DOJ also noted that in response to an inquiry from a member of Congress, the Government Accountability Office (GAO) “is developing a legal opinion regarding the original Consent Decree, focused on the mitigation project” and that such opinion may not be available for many more months. *Id.* DOJ subsequently issued a Federal Register notice seeking comment on the amended decree.

States’ Interest

The States have several interests that are implicated by the proposed amended consent decree. First, the States have an interest in protecting our residents from excess emissions of NO_x, which harm human health and damage aquatic ecosystems. Because the mitigation project was designed, in EPA’s words, to “eliminate excess air pollution caused by the illegal tuners by providing cleaner-burning stoves to designated communities, thereby assuring better air quality in the future,” our residents will experience greater air pollution without mitigation. EPA Press Release, *supra*. Second, several of the States are involved in litigation to clean up emissions from high-polluting wood stoves and wood boilers.²

Third, the States have extensive experience working with DOJ and EPA in bringing environmental enforcement cases and implementing mitigation projects as part of settlements. For example, several of the States brought a Clean Air Act enforcement case with DOJ and EPA against American Electric Power (AEP). Following eight years of litigation, the parties entered into a consent decree that required AEP to pay \$60 million to fund mitigation actions to address its excess air pollution. *See* Consent Decree in *United States v. American Elec. Power* (S.D. Ohio, Case No. 2:99-cv-01182), ¶ 119-28. The states have used their share of that \$60 million (\$24 million), to fund numerous mitigation projects, including school bus pollution control retrofits, photovoltaic solar energy systems, electric vehicle infrastructure, and wood stove change-outs. Most recently, the United States’ settlements with Volkswagen for emissions cheating included the creation of a \$2.925 billion fund to mitigate air pollution from noncomplying motor vehicles, money that states will be able to draw on to fund designated projects to reduce emissions of NO_x. *See* Partial Consent Decree in *In Re: Volkswagen “Clean Diesel” Marketing, Sales Practices, and Products Liability Litigation* (N.D. Cal. Case No. MDL No. 2672), Appendix D. In summary, States have relied on mitigation projects in the past—and intend to do so in the future—to reduce pollution from violations of environmental laws that has caused harm to public health and the environment.

² New York, Maryland, Massachusetts, Oregon, Rhode Island, Vermont, and the Puget Sound Clean Air Agency are amici supporting EPA in litigation brought by industry groups challenging EPA’s 2015 emission standards for new wood stoves and wood boilers, *Hearth, Patio, and Barbecue Ass’n v. EPA* (D.C. Cir. No. 15-1056). Those same states and Puget Sound Clean Air Agency had sued EPA to prompt issuance of these standards after the agency missed its eight-year statutory deadline under section 111 of the Clean Air Act to review, and as appropriate, revise, emission standards, *New York v. McCarthy* (D.D.C. No. 13-1553).

I. The Air Pollution Mitigation Project Should Be Reinstated.

A. DOJ and EPA have failed to reasonably explain their decision to eliminate the air pollution mitigation project.

The primary reason cited by DOJ and EPA to eliminate the mitigation project is that “[q]uestions exist as to whether this mitigation project is consistent with the new policy” on settlements set forth in the Sessions Memorandum, 82 Fed. Reg. at 34,978. This explanation is an inadequate basis to jettison a material aspect of a settlement—the only provision requiring Harley-Davidson to address harm from the air pollution caused, and continuing to be caused, by its conduct. This equivocal assertion does not purport to find that the project would in fact violate the policy in the Sessions Memorandum. Nor has DOJ or EPA raised questions about the ability of the project to reduce air pollution to address harm to public health and the environment. Indeed, current EPA policy touts the benefits of wood stove change-out programs. *See* EPA’s Guide to Financing Options for Wood-burning Appliance Changeouts at 6 (Sept. 17, 2014) (hereinafter, EPA Guide), https://www.epa.gov/sites/production/files/2016-03/documents/epas_guide_to_financing_options.pdf (wood burning appliance change-out programs “have been an effective way to significantly improve public health and the environment”).

In addition, the original consent decree and statements made by EPA and DOJ contemporaneously when that consent decree was lodged support the conclusion that the emissions mitigation project is in fact *consistent* with the Sessions Memorandum because it would consist of an “otherwise lawful payment or loan that provides restitution to a victim or that otherwise directly remedies the harm that is sought to be redressed, including, for example, harm to the environment.” Sessions Memorandum at 1. Here, as noted above, the consent decree described the project as an “Emissions Mitigation Project.” EPA Assistant Administrator Giles characterized the settlement as requiring Harley-Davidson to “fund[] projects to mitigate the harm they caused.” EPA Press Release, *supra*. Similarly, DOJ and EPA referred to the purpose of the project as “to mitigate air pollution through a project to replace conventional woodstoves with cleaner-burning stoves in local communities.” *See* EPA, Harley-Davidson Clean Air Act Settlement, <https://www.epa.gov/enforcement/harley-davidson-clean-air-act-settlement>; *see also* EPA Press Release, *supra* (“The woodstove project, which Harley-Davidson will undertake in conjunction with an independent third party, *will eliminate excess air pollution caused by the illegal tuners by providing cleaner-burning stoves to designated communities, thereby assuring better air quality in the future.*” (emphasis added)).

The second reason for discarding the mitigation project DOJ and EPA cited—that the GAO is preparing a legal opinion about the project—is even less persuasive. The fact that the GAO is evaluating an issue at the request of a member of Congress is not unusual and, in any event, the outcome of the legal opinion is unknown and its timing unclear. In addition, as discussed below, the Mitigation Project in the original decree was hardly unique. Instead, mitigation projects like the one in the original decree have been common components of federal settlements in environmental cases for years, across multiple administrations, and have been approved by courts across the country. There is a reason for that: projects like the one at issue

here seek to remedy past and ongoing environmental harm that is not otherwise addressed by a settlement. They thus serve a distinct and separate purpose from the payment of a civil penalty alone. Given the Mitigation Project's consistency with longstanding EPA and DOJ practice, the existence of an ongoing study of this particular project simply does not justify its complete elimination from the consent decree.

Because DOJ and EPA have failed to articulate a reasonable basis to eliminate the emissions mitigation project proposed in the original consent decree, the project should be reinstated.

B. Elimination of the Mitigation Project Contravenes Long Standing DOJ/EPA Policy to Require Mitigation of Environmental Harm as Part of Environmental Settlements.

It is longstanding policy of DOJ and EPA to require, in settling cases involving violations of environmental laws, that defendants take actions either directly or through a third-party to mitigate harm their unlawful conduct caused to public health and the environment. Under EPA policy, a "mitigation project" is defined as "injunctive relief sought by the government to remedy, reduce, or offset past (and in some cases ongoing) harm caused by alleged violations in an enforcement action." EPA Guide at 7. "Mitigation is, by definition, work the government believes that a defendant could be compelled to perform as a result of its violations, even in the absence of settlement." Memorandum from Susan Shinkman, Dir., Office of Civil Enforcement, *Securing Mitigation as Injunctive Relief In Certain Enforcement Settlements* (2d ed., Nov. 14, 2012) at 8, available at: <https://www.epa.gov/sites/production/files/2013-10/documents/2ndeditionsecuringmitigationmemo.pdf>. EPA has drawn a distinction between mitigation and "supplemental environmental projects" (SEPs), explaining that:

EPA's ability to obtain mitigation in settlement is based on the likelihood that, in litigation, the United States could establish that mitigation was needed to redress past or ongoing harm to the environment or public health. A SEP, on the other hand, is a voluntary project that results from negotiations between the parties and cannot be secured outside the negotiation context.

Id. at 3.

Here, EPA and DOJ defined the now excised project as the "Emissions Mitigation Project." Original Consent Decree, ¶ 17 (emphasis added). And, consistent with these longstanding policies described above, the mitigation project included in the original consent decree was part of other injunctive relief measures under the "Compliance" section, and EPA described mitigation as a component of injunctive relief in the complaint. See Original Consent Decree, ¶ 17 & Complaint in *United States v. Harley-Davidson*, Prayer for Relief, ¶ g (seeking order requiring Defendants to "mitigate the excess tons of hydrocarbon and NO_x emissions that have occurred from the use of Subject Tuners on certified motorcycles"). In other words, the project resolved a specific aspect of the relief EPA and DOJ asked the Court to award them in the Complaint and would have remained available to them if the parties had litigated the claims.

Consistent with DOJ and EPA's longstanding policies, the mitigation project should be reinstated.

C. Elimination of the Mitigation Project Is Unfair, Unreasonable, and Contrary to the Public Interest.

A district court reviews a proposed consent decree to determine whether it is "fair, adequate, reasonable and appropriate under the particular facts," and in the public interest. *Appalachian Voices v. McCarthy*, 38 F. Supp. 3d 52, 55-57 (D.D.C. 2014). "This inquiry entails 'determin[ing] whether the settlement is consistent with the statute that the consent judgment is attempting to enforce and . . . whether the agreement . . . resolves the controversy in a manner consistent with the public interest.'" *Id.* At 55. A court must also assure itself of both the substantive and procedural fairness of a proposed consent decree. *See id.* at 55.

A substantively fair consent decree must "incorporate[] concepts of corrective justice and accountability." *Appalachian Voices*, 38 F. Supp. 3d at 55 (citing *Envtl. Def. v. Leavitt*, 329 F. Supp. 2d 55, 70 (D.D.C. 2004)). And, significantly, "a party should bear the cost of harm for which it is legally responsible." *District of Columbia*, 933 F. Supp. at 48 (quoting *United States v. Telluride Co.*, 849 F. Supp. 1400, 1402 (D. Co. 1994)). "An assessment of procedural fairness involves looking 'to the negotiating process and attempt[ing] to gauge its candor, openness, and bargaining balance.'" *United States v. District of Columbia*, 933 F. Supp. 42, 48 (D.D.C. 1996) (quoting *Telluride*, 849 F. Supp. at 1402).

Finally, in assessing the reasonableness of a decree, a district court must consider "whether the decree adequately accomplishes its purported goal," *Envtl. Def.*, 329 F. Supp. 2d at 71, and whether the settlement reflects the relative strength or weakness of the government's case. *Dist. of Columbia*, 933 F. Supp. at 50; *Telluride*, 849 F. Supp. at 1402. "[T]he court must determine whether the proposed consent decree is reasonable from an objective point of view." *Appalachian Voices*, 38 F. Supp. 3d at 56 (quoting *Envtl. Def.*, 329 F. Supp. 2d at 71).

Courts have not hesitated to decline to enter or to require modification of proposed consent decrees that lacked concrete indicia of fairness and reasonableness or otherwise failed to serve the public interest protected by the underlying statute. For example, in *Appalachian Voices*, the U.S. District Court for the District of Columbia declined to enter a consent decree under which the parties could unilaterally extend deadlines for agency action, because "[a]bsent an impartial determination as to the reasonableness of any extensions of time, the public interest is left unprotected." 38 F. Supp. 3d at 56-57 (quoting *Envtl. Tech. Council v. Browner*, No. CIV. A. 94-2119, 1995 WL 238328, at *6-7 (D.D.C. Mar. 8, 1995)). And in *Telluride*, the U.S. District Court for the District of Colorado declined to enter a consent decree to settle wetlands-fill violations under Clean Water Act where: (1) public comments alleged, among other things, that the decree only required the restoration of approximately one-third of the acres of wetlands destroyed by the defendants' conduct; and (2) the court was "not confident that it is the product of good-faith negotiations through which the parties fully and carefully considered all possible alternatives." 849 F. Supp. at 1405-06; *cf. United States v. MTU Am. Inc.*, 105 F. Supp. 3d 60, 63 (D.D.C. 2015) (approving consent decree in Clean-Air-Act falsified emissions case after searching inquiry into its fairness, reasonableness, and consistency with the public interest).

The recently lodged consent decree lacking the mitigation project is substantively unfair because it does not hold Harley Davidson accountable for mitigation of the air pollution resulting from its unlawful conduct. It is also unreasonable because the original consent decree resulting from arms' length negotiations between the parties—which presumably reflected the strengths and weaknesses of the government's case—included such relief, and there has been no change in the strength of the government's case or other rationale provided by the government that supports dispensing with the mitigation project.³ It is also contrary to the public interest as reflected in the Clean Air Act's purposes of “protect[ing] and enhancing the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population.” 42 U.S.C. § 7401(b)(1). Finally, to the extent that DOJ and EPA jettison the original consent decree's mitigation project without fully and carefully considering possible equivalent alternatives, the proposed consent decree is procedurally unfair. Alternatives exist, and the States are prepared to assist in their implementation.

The Sessions Memorandum does not cure the deficiencies in the proposed amended consent decree. Indeed, as explained above, the Session Memorandum plainly permits projects like this one, which are designed to mitigate public health and environmental harms. And, even if that were not the case, the Memorandum's policy prohibiting certain payments to third-parties to implement projects would not somehow negate EPA's findings that Harley-Davidson's conduct resulted in the emission of hydrocarbons and NO_x and that this excess air pollution required mitigation to address harms to human health and the environment. Nor could it properly waive the United States' ability to seek injunctive relief in the form of mitigation to redress these harms resulting from the use of these emission cheating devices, which continues to this day. None of the other injunctive aspects of the consent decree—such as those obligating Harley-Davidson to stop selling the unlawful tuners and buy back and destroy unsold tuners from dealers—address the harms from this past and ongoing excess pollution.

II. Alternatively, the \$3 Million for Emissions Mitigation Should Be Restored to the Consent Decree and Used to Fund Alternative Measures to Address the Type of Air Pollution Caused by Harley-Davidson's Violations of the Clean Air Act.

Even if concerns about the original emissions mitigation project were well founded, that would not justify eliminating the \$3 million set aside to mitigate air pollution from Harley-Davidson's violations altogether, because alternative means for requiring Harley-Davidson to mitigate the emissions from its unlawful conduct exists.

In the notice of the lodging of the amended consent decree, DOJ and EPA stated that they had attempted (unsuccessfully) to negotiate a substitute mitigation project with Harley-Davidson, and that continuing that effort would hold up implementation of other aspects of the settlement. Neither rationale justifies eliminating the mitigation requirement without additional injunctive relief. First, although it is unclear what alternative projects DOJ and EPA may have explored

³ The absence of any newly arising weakness in the government's case is underscored by Paragraph 74 of the initial August 2016 Consent Decree, in which Defendants consented to entry of the Consent Decree without further notice.

with Harley-Davidson, it is difficult to conceive that another suitable project could not be found. One option would be for Harley-Davidson to design a project that would result in significant hydrocarbon and/or NO_x emissions from its own operations. For example, AEP satisfied part of its mitigation obligations under the consent decree with EPA and states by replacing diesel and gasoline trucks and cars in its fleet with hybrid vehicles. See AEP, *Annual Report for 2016 Required by Consent Decree Entered December 10, 2007* (March 31, 2017), at 9, <https://www.aepsustainability.com/environment/docs/2016-nsr-annual-report.pdf>. In another case, involving alleged New Source Review violations by a cement company, an amended consent decree negotiated by the parties required LaFarge North America to replace an older, high-polluting locomotive used in transporting its cement with a more efficient, less polluting locomotive. See Third Amendment to Consent Decree in *United States v. LaFarge North America, Inc.* Case No. 3:10-cv-44, ¶¶16-21 and Addendum B (S.D. Ill., filed on Nov. 14, 2013).

Or, in the same mode as the original project, Harley-Davidson could fund an emissions mitigation project to be implemented by a different third-party administrator, such as the Northeast States for Coordinated Air Use Management (NESCAUM), a quasi-government organization with extensive experience working with EPA, states, and local pollution control agencies in many areas of the United States on addressing pollution from wood stoves and wood boilers, diesel trucks, and other pollution sources. A number of the States, including Massachusetts, New York, Oregon, Vermont, and Washington have wood stove and/or wood boiler change-out programs in place and are prepared to receive funding to reduce emissions from highly polluting wood burning appliances. And, aside from wood stove and wood boiler change-out programs, there are other readily available alternatives for mitigation, such as those designated under the Volkswagen settlement as appropriate for mitigating excess NO_x emissions.

Second, even if a readily suitable alternative to the original emissions mitigation project could not be quickly identified, the consent decree could easily be structured so that the other injunctive relief obligations (*e.g.*, recall and destruction of tuners) and the civil penalty payments go forward now while a process is identified to choose a different mitigation project. Indeed, the emissions project under the original decree was to take place over a three-year period.


* * *

In conclusion, the States object to the proposed amended consent decree because the decision to forfeit the mitigation of excess air pollution caused by noncomplying motorcycles has not been reasonably explained, is inconsistent with the remedial purposes of the Clean Air Act, and is not fair, reasonable, or in the public interest. The States urge DOJ and EPA to reinstate the original \$3 million emission mitigation project or require Harley-Davidson to implement or fund an equivalent alternative project. The States are ready to work with EPA and DOJ to ensure that the settlement maintains the important air quality benefits that the original consent decree sought to secure while addressing any legitimate concerns that the federal government may have about the original decree.

Sincerely,

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