

CAUSE of ACTION INSTITUTE

Pursuing Freedom & Opportunity through Justice & AccountabilitySM

June 1, 2017

VIA CERTIFIED MAIL

The Honorable Scott Pruitt
Administrator
Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Re: EPA Consent Decree with Harley-Davidson

Dear Administrator Pruitt:

I write on behalf of Cause of Action Institute (CoA InstituteSM), a nonprofit strategic oversight group committed to ensuring that government decision-making is open, honest, and fair.¹ In carrying out its mission, CoA Institute uses various investigative and legal tools to educate the public about the importance of government transparency and accountability. To that end, we are examining the Environmental Protection Agency's ("EPA") consent decree with Harley-Davidson, Inc. and its subsidiary companies (collectively, "Harley-Davidson") to settle alleged Clean Air Act ("CAA") violations.

On August 18, 2016, EPA and the Department of Justice ("DOJ") filed a Complaint against Harley-Davidson under Title II of the CAA.² The Complaint alleges that Harley-Davidson sold 12,682 improperly labeled motorcycles from 2006 to 2008, and sold approximately 340,000 aftermarket tuners from 2008 to 2015.³ The Complaint disingenuously refers to these aftermarket tuners as "defeat devices"—the same term used by EPA to describe the covertly and illegally installed emissions control devices in the Volkswagen diesel scandal.⁴ But notably the Harley-Davidson "defeat devices" were freely and intentionally purchased by individuals, and came with labels that detailed what 'performance enhancements are considered street legal and for competition-use only' and warned against improperly using the devices.⁵ Harley-Davidson maintains that these products, which have been sold for over two decades, "[were] and [are] legal to use in race conditions in the U.S."⁶

¹ See CAUSE OF ACTION INST., *About*, www.causeofaction.org/about (last accessed May 26, 2017).

² Compl., *United States v. Harley-Davidson, Inc.*, No. 16-cv-01687 (D.D.C. filed Aug. 18, 2016), ECF No. 1.

³ *Id.* ¶¶ 16–19.

⁴ Am. Compl., *In re: Volkswagen "Clean Diesel" Marketing*, No. 15-md-02672 28 (N.D. Cal. filed Oct. 7, 2016).

⁵ Ariel Wittenberg, *EPA finds defeat devices in Harley-Davidson motorcycles*, E&E GREENWIRE (Aug. 18, 2016), <https://www.eenews.net/greenwire/stories/1060041795/>.

⁶ Press Release, Harley-Davidson, Inc., *Harley-Davidson, EPA reach settlement* (Aug. 18, 2016), <http://www.prnewswire.com/news-releases/harley-davidson-epa-reach-settlement-300315469.html>.

To avoid “a prolonged legal battle with the EPA,” Harley-Davidson decided to settle the case without admitting any liability.⁷ To that end, Harley-Davidson, DOJ, and EPA filed a consent decree with the court on August 18, 2016.⁸ The consent decree imposes a \$12 million civil penalty on Harley-Davidson and a \$3 million expenditure on an “Emissions Mitigation Project” to be implemented by the American Lung Association of the Northeast (“ALA”).⁹ This “Emissions Mitigation Project” requires Harley-Davidson to fund a “wood-burning appliance changeout and retrofit.”¹⁰ The project is defined as a “supplemental environmental project” (“SEP”) because it falls within EPA’s prosecutorial discretion when negotiating a civil penalty.¹¹ EPA issued a 2015 guidance document outlining the legal requirements enforcement officials must adhere to when crafting an SEP.¹² The SEP Policy exists “to ensure that SEPs are within the Agency’s and a federal court’s authority, and do not run afoul of any Constitutional or statutory requirements” and “may not be waived[.]”¹³ Despite these clear guidelines, the Harley-Davidson consent decree may fail to comport with the SEP Policy.

The Harley-Davidson consent decree violates EPA’s guidance on SEPs by not establishing a sufficient nexus between the mitigation project and the alleged underlying violations of the CAA.¹⁴ Under EPA’s guidance SEPs must have a “sufficient nexus” to the underlying violation. The guidance further requires that EPA’s prosecutorial discretion to settle enforcement actions “not extend to the inclusion of SEPs that do not have a nexus to the violations being resolved.”¹⁵ Accordingly, the guidance points out that a “[n]exus is easier to establish if the primary impact of the project is at the site where the alleged violation occurred, at a different site in the same ecosystem, or within the immediate geographic area.”¹⁶ The guidance also suggests that a violation can have a sufficient nexus even if the pollutants are different provided the “project relates to the underlying violation.”¹⁷

Despite the clear need for a sufficient nexus, retrofitting wood-burning appliances has absolutely no connection to the sale of tuning devices for use with motorcycles on private, closed tracks. EPA is overstepping its authority by requiring Harley-Davidson to implement an

⁷ *Id.*

⁸ Consent Decree, *United States v. Harley-Davidson, Inc.*, No. 16-cv-01687 (D.D.C. filed Aug. 18, 2016), ECF No. 2.

⁹ Consent Decree ¶ 8; Consent Decree App. A.

¹⁰ Consent Decree App. A at 2.

¹¹ See Memorandum from Susan Shinkman, Dir., Office of Civil Enf’t, Env’tl. Prot. Agency, to Reg’l Counsels *et al.*, EPA 3–4 (Nov. 14, 2012).

¹² U.S. ENVTL. PROT. AGENCY, SUPPLEMENTAL ENVIRONMENTAL PROJECTS POLICY 7 (Mar. 10, 2015) [hereinafter SEP Policy].

¹³ *Id.* (footnote omitted).

¹⁴ *See id.*

¹⁵ *Id.* n.8.

¹⁶ *Id.* at 8.

¹⁷ *Id.*

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emissions mitigation project that lacks such a sufficient nexus to the underlying violation. The project and violation lack a sufficient nexus because Harley-Davidson's violation allegedly contributes to greenhouse gas emissions from hydrocarbons while the retrofit project seeks to prevent fine particulate matter emissions from traditional wood burning appliances. The tuners spewed excess nitrogen oxides and hydrocarbons that may have negative effects in the atmosphere, whereas wood burning produces carbon monoxide and volatile organic compounds that may have negative effects in enclosed spaces at ground level.

EPA literature suggesting funding sources for the replacement of older wood-burning appliances is surprisingly large. For example, brochures and fact-sheets suggesting possible financing options list as the first real source of funding, not a congressional appropriation or grant, but the use of SEPs in consent decrees.¹⁸ Because SEPs reduce the defendant's civil penalty that would otherwise have been paid into the Treasury, the SEP Policy exists to prevent unlawful transfers of (what would otherwise be) taxpayer money to favored political groups and to ensure that constitutional and statutory requirements are met. The use of SEPs to fund unappropriated activities has also sparked congressional interest and been the subject of review by the Government Accountability Office and the DOJ Office of Legal Counsel.¹⁹ EPA should not use SEPs to supplant the congressional appropriations process to supplement previously reduced funding for wood-burning appliance changeouts.²⁰

In conclusion, we urge you to reconsider the Harley-Davidson consent decree's unlawful Emissions Mitigation Project, and replace it with a project that conforms to the SEP Policy's sufficient nexus requirement.



Travis G. Millsaps
Counsel

¹⁸ ENVTL. PROT. AGENCY, EPA'S GUIDE TO FINANCING OPTIONS FOR WOOD-BURNING APPLIANCE CHANGEOUTS 4 tbl.2.2 (Sept. 17, 2014).

¹⁹ See U.S. GOV'T ACCOUNTABILITY OFFICE, B-210210, DONATIONS UNDER SETTLEMENT AGREEMENTS (Sept. 14, 1983); U.S. GOV'T ACCOUNTABILITY OFFICE, B-247155, EPA AUTHORITY TO SETTLE MOBILE SOURCE AIR POLLUTION ENFORCEMENT ACTIONS (July 7, 1992); Effect of 31 U.S.C. § 484 on the Settlement Authority of the Attorney General, 4B Op. O.L.C. 684, 688 (1980).

²⁰ Compare American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 1121, 123 Stat. 115, 322 (2009) (amending I.R.C. § 25C) with Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Pub. L. No. 111-312, § 710, 124 Stat. 3296, 3314 (2010) (amending I.R.C. § 25C).