



NOTICE

DEPARTMENT OF JUSTICE

Notice of Lodging of Proposed Consent Decree Under The Clean Air Act

On July 20, 2017, the Department of Justice lodged a proposed Consent Decree with the United States District Court for the District of Columbia in the lawsuit entitled *United States v. Harley-Davidson, Inc., et al.*, Civil Action No. 1:16-cv-01687.

The United States' Complaint, filed on August 18, 2016, Dkt. Nos. 1, 4, alleges that Harley-Davidson, Inc. (and three related companies) manufactured and sold over 339,392 after-market devices (known as "Super Tuners" and used with Harley-Davidson motorcycles) in violation of the Clean Air Act prohibition on the manufacture or sale of devices that defeat the functioning of the motorcycles' certified emissions control system. The Complaint also alleges, relatedly, that Defendants violated the provision of the Act that prohibits any person from removing or rendering inoperative a motor vehicle's certified emissions control system and from causing such "tampering." Finally, the Complaint alleges that Defendants manufactured and sold more than 12,000 motorcycles from model years 2006, 2007, and 2008 that were not certified by EPA as required by the Clean Air Act.

The Consent Decree requires Defendants to stop selling the illegal tuners in the United States by August 23, 2016. Defendants will also offer to buy back all such tuners in stock at Harley-Davidson dealerships across the country and destroy them. The Decree requires Defendants to obtain an Executive Order from the California Air Resources Board (CARB) for any tuners Defendants sell in the United States in the future. These Executive Orders (EOs) will demonstrate that the CARB-certified tuners do not cause Defendants' motorcycles to exceed the

EPA-certified emissions limits. Defendants must also conduct tests on motorcycles that have been tuned with the EO-certified tuners and provide the results to EPA to ensure that their motorcycles remain in compliance with EPA emissions requirements. In addition, for any uncertified Super Tuners that Defendants sell outside the United States in the future, they must label them as not for use in the United States.

Under the Consent Decree, Defendants must also ensure that all of their future motorcycle models intended for sale in the United States are certified by EPA.

Finally, Defendants will pay a civil penalty of \$12 million.

The Consent Decree lodged with the Court on July 20 is identical to a Consent Decree lodged with this Court on August 18, 2016, Dkt. 2, except that the Consent Decree lodged on July 20 (and on which comment is now being sought) does not include the requirement in the original Consent Decree for Defendants to “fund a program” (described in Appendix A of the original Consent Decree) that required Defendants to pay a third-party organization to mitigate emissions of hydrocarbons and oxides of nitrogen in the northeastern United States by replacing old, higher polluting woodstoves with emissions-certified woodstoves (“mitigation project”). As explained briefly below, certain new developments led the United States and Defendants to agree to revise the Consent Decree in this manner.

On June 5, 2017, the Attorney General issued a policy, *Prohibition on Settlement Payments to Third Parties*, which prohibits a settlement that “directs or provides for a payment or loan to any non-governmental person or entity that is not a party to the dispute[,]” unless it is “an otherwise lawful payment . . . that . . . directly remedies the harm that is sought to be redressed, including, for example, harm to the environment” This policy became effective upon issuance and applies to, among other things, consent decrees entered into on behalf of the

United States. The original Consent Decree would have required Defendants to pay a non-governmental third-party organization to carry out the mitigation project. Questions exist as to whether this mitigation project is consistent with the new policy.

The United States and Defendants also became aware that the U.S. Government Accountability Office (“GAO”) is developing a legal opinion regarding the original Consent Decree, focusing on the mitigation project. On February 6, 2017, the United States received a letter from counsel for Harley-Davidson asking the United States to delay moving to enter the Consent Decree until GAO completed its evaluation. The United States has been informed by GAO that development of its legal opinion would likely not be concluded for many more months. The mitigation project was also the subject of public comment during the notice and comment period.

In light of these facts, the United States and Harley-Davidson attempted to negotiate a substitute mitigation project, but were unable to reach timely agreement on a suitable alternative. The United States is mindful of the length of time this settlement has already been pending and, in the interest of moving forward with the important relief secured by the Consent Decree, has sought and received Defendants’ approval to modify the Decree to remove the mitigation project. The United States has decided on balance that proceeding now with the substitute Consent Decree is in the public interest.

The publication of this notice opens a period for public comment on the Consent Decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and should refer to *United States v. Harley-Davidson, Inc., et al.*, D.J. Ref. No. 90-5-2-1-11333. All comments must be submitted no later than thirty (30) days after the publication date of this notice. Comments may be submitted either by e-mail or by mail:

<i>To submit comments:</i>	<i>Send them to:</i>
By e-mail	pubcomment-ees.enrd@usdoj.gov
By mail	Assistant Attorney General U.S. DOJ – ENRD P.O. Box 7611 Washington, D.C. 20044-7611

During the public comment period, the Consent Decree may be examined and downloaded at this Justice Department website: <https://www.justice.gov/enrd/consent-decrees>. We will provide a paper copy of the Decree upon written request and payment of reproduction costs. Please mail your request and payment to:

Consent Decree Library
U.S. DOJ – ENRD
P.O. Box 7611
Washington, D.C. 20044-7611

Please enclose a check or money order for \$9.50 (25 cents per page reproduction cost) payable to the United States Treasury.

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