IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. HARLEY-DAVIDSON, INC., HARLEY-DAVIDSON MOTOR COMPANY GROUP, LLC, HARLEY-DAVIDSON MOTOR COMPANY, INC., and HARLEY-DAVIDSON MOTOR COMPANY OPERATIONS, INC., Defendants.	)	No. 1:16-CV-1687 (EGS)

BRIEF OF STATE AND LOCAL GOVERNMENT *AMICI* IN OPPOSITION TO UNITED STATES' MOTION TO ENTER CONSENT DECREE

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The States of Illinois, Iowa, Maine, Maryland, New York, Oregon, Rhode Island, Vermont and Washington, the Commonwealth of Massachusetts and the District of Columbia, by and through their respective Attorneys General, and the Puget Sound Clean Air Agency (collectively "States"), submit this brief in opposition to the United States' Motion for Entry of Consent Decree (Dkt. No. 7). The proposed Consent Decree eliminates the $3 million mitigation project that was included in a proposed Consent Decree previously lodged with the Court, and does not add any alternative mitigation requirement to compensate for either its elimination or the one-sided benefit Harley-Davidson will receive from its elimination. The United States has failed to present sufficient facts and reasons to meet its burden to show that the proposed Consent Decree, which does not include the $3 million mitigation project or a substantially equivalent substitute mitigation project, is fair, reasonable, and in the public interest. Thus, the Court should decline to enter the substitute Consent Decree in its current form, and should instead advise the parties that it will approve it if it is modified to reinstate the $3 million mitigation project or include a substantially equivalent substitute mitigation project.

BACKGROUND

The United States' Complaint and the Original Consent Decree Requiring Mitigation

On August 18, 2016, the United States filed a complaint alleging that Harley-Davidson violated the Clean Air Act by selling prohibited aftermarket defeat devices that, once installed, caused motorcycles to emit higher amounts of certain harmful air pollutants—hydrocarbons and nitrogen oxides—than the company had certified to the U.S. Environmental Protection Agency ("EPA") to obtain EPA's authorization to sell them. Dkt. No. 1. The United States filed a corrected complaint the following day. Dkt. No. 4. In addition to seeking injunctive relief enjoining the further sale of the defeat devices, the complaint specifically sought an order requiring that Harley-Davidson mitigate its excess air pollution from the noncompliant

motorcycles. *Id.* at 12 (¶ g).

On August 18, 2016, the United States also lodged a proposed Consent Decree "concurred to and signed by all parties," which provided for resolution of the claims alleged in the complaint. Dkt. No. 2; Dkt. No. 2-1, ¶ 56. Consistent with the relief the United States sought in its complaint, the proposed Consent Decree required Harley-Davidson to, among other things: (1) cease sale of the prohibited aftermarket defeat devices and offer to buy back any such devices remaining in dealer inventory; (2) pay a civil penalty of $12 million; and (3) mitigate its excess hydrocarbon and NOx emissions by funding a $3 million program to reduce air pollution by retrofitting or replacing higher-polluting wood-burning appliances, such as woodstoves. Dkt. No. 2-1, ¶¶ 8, 12, 13, & 17, & App. A.

Mitigation is a form of injunctive relief that the court may award in appropriate cases. Dkt. No. 7, at 20. Mitigation is "injunctive relief . . . requiring a defendant to remedy, reduce or offset harm caused by past or ongoing violations." Ex. 1, Mem. from Susan Shinkman, Director, Office of Civil Enforcement, EPA, to EPA Regional Counsels *et al*., re Securing Mitigation as Injunctive Relief in Certain Civil Environmental Enforcement Settlements 2 (Nov. 14, 2012), https://goo.gl/i5eTEG. EPA policy "strongly encourage[s] case teams to seek mitigation, where appropriate, as a component of the injunctive relief they seek in civil judicial enforcement cases." *Id.* at 1.

Cases such as this involving "harm to human health or the environment caused by excess emission or unauthorized/noncompliant discharge violations" are "the most common cases in which mitigation should be considered." *Id.* at 2. As the Department of Justice's ("DOJ") and EPA's press releases for the original Consent Decree acknowledged:

> Hydrocarbon and NOx emissions contribute to harmful ground-level ozone and NOx also contributes to fine particulate matter pollution. Exposure to these pollutants has been

> linked with a range of serious health effects, including increased asthma attacks and other respiratory illnesses. Exposure to ozone and particulate matter has also been associated with premature death due to respiratory-related or cardiovascular-related effects. Children, the elderly and people with pre-existing respiratory disease are particularly at risk of health effects from exposure to these pollutants.

Ex. 2, DOJ Press Release: Harley-Davidson to Stop Sales of Illegal Devices that Increased Air Pollution from the Company's Motorcycles (Aug. 18, 2016), https://goo.gl/YSVjS2; Ex. 3, EPA Press Release: Harley-Davidson to Stop Sales of Illegal Devices that Increased Air Pollution from the Company's Motorcycles (Aug. 18, 2016), https://goo.gl/YFy7ei.

Mitigation sometimes involves measures beyond those otherwise required by applicable law to reduce emissions from the facility that is the source of the alleged unlawful emissions. *See, e.g.*, Ex. 4, *United States v. Marathon Petroleum Co., LP*, No. 2:12-cv-11544 (E.D. Mich. Aug. 30, 2012), Consent Decree ¶¶ 65-68, https://goo.gl/9x9Kdq (excess emissions from noncompliant flares at refineries offset by reducing emissions from refinery sludge handling units). In other cases, mitigation involves offsetting excess emissions of pollutants from noncompliant sources by reducing emissions of those pollutants from other sources. *See, e.g.*, Ex. 5, *United States v. Powertrain, Inc.*, No. 1:09-cv-00993-RBW (D.D.C. Feb. 28, 2011), Consent Decree ¶¶ 19-20 & App. D, https://goo.gl/HkpHrb (emissions from noncompliant nonroad engines offset by reducing emissions from wood-burning appliances). The $3 million mitigation project included in the original Consent Decree is an example of the latter. As DOJ and EPA acknowledged in their press releases, "[t]he woodstove project . . . will eliminate excess air pollution caused by using the illegal [defeat devices] by providing cleaner-burning stoves to designated local communities, thereby assuring better air quality in the future." Ex. 2, DOJ Press Release, *supra*; Ex. 3, EPA Press Release, *supra*.

The Substitute Consent Decree Without a Mitigation Requirement

Nearly a year later, on July 20, 2017, after the change in administration and approximately nine months after expiration of the thirty-day public comment period on the original August 18, 2016 Consent Decree, the United States lodged a substitute for the original Consent Decree. Dkt. No. 6. The substitute Consent Decree, which the United States now requests the Court to enter, is identical to the original Consent Decree, except it does not include the $3 million mitigation project. The United States asserts that the $3 million mitigation project was removed from the original Consent Decree based on a new policy issued by the Attorney General on June 5, 2017. Dkt. No. 7, at 29. Despite its request in its Complaint for an order requiring Harley-Davidson to mitigate the past and ongoing air pollution from the noncompliant motorcycles, the United States did not include in the substitute Consent Decree an alternative mechanism to mitigate that excess air pollution. *See generally* Dkt. No. 6-1. Because the substitute Consent Decree does not require removal of the aftermarket defeat devices from the noncompliant motorcycles on which the devices have been installed, the harm to human health and the environment from the noncompliant motorcycles' excess emissions is continuing.

INTERESTS OF AMICI

The States have several important interests that are implicated by the proposed substitute Consent Decree. First, the States have an interest in protecting their residents from excess emissions of NOx and hydrocarbons emitted by the Harley-Davidson motorcycles that have operated and continue to operate with prohibited aftermarket defeat devices.

Second, several of the States have been active in efforts to control emissions from higher polluting wood burning stoves and boilers. A number of the States, including Maine, Maryland, Massachusetts, New York, Oregon, Vermont, and Washington have developed wood stove and/or wood boiler change-out programs that provide incentives for the retrofit or replacement of

higher polluting wood burning stoves and boilers with lower polluting EPA-certified models. These States are prepared to receive additional funding for their programs. 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*, No. 15-1056 (D.C. Cir.). Those same states and the Puget Sound Clean Air Agency had sued EPA to prompt issuance of those standards after the agency missed its eight-year statutory deadline under section 111 of the Clean Air Act (42 U.S.C. § 7411) to review, and, as appropriate, revise, emission standards for new wood stoves and wood boilers, *New York v. McCarthy*, No. 13-1553 (D.D.C.). Because the original Consent Decree designated the American Lung Association of the Northeast as the administrator of the $3 million mitigation project, the States located in and around the Northeast believed that a portion of the $3 million would have been used to reduce emissions in their states.

Third, the States have a strong interest and extensive experience in enforcing environmental laws, including efforts in which the States have worked closely with DOJ and EPA. This has included participation in the negotiation of substantial settlements, some of which have included mitigation projects, as well as implementation of the agreed to mitigation projects. For example, Maryland, Massachusetts, New York, Rhode Island, and Vermont brought a Clean Air Act enforcement case with DOJ and EPA against American Electric Power Service Corp. ("AEP"). After eight years of litigation, the parties entered into a consent decree that required AEP to, among other things, pay $60 million to fund projects to address its excess air pollution. *See* Consent Decree in *United States v. American Elec. Power*, Civ. A. No. 2:99-cv-01182, ¶¶ 119-128 (S.D. Ohio, Dec. 13, 2007), https://goo.gl/waMdCi. Those states used their share of

the $60 million ($24 million) to fund numerous mitigation projects, including school bus pollution control retrofits, and wood stove change-outs.[1] More recently, nine states, including Maine, Massachusetts, New York, Oregon, Rhode Island, Vermont, and Washington, reached a settlement with Volkswagen and Porsche, whereby Volkswagen and Porsche agreed to pay the states a total of more than $157 million to resolve state law environmental claims related to the automakers' emissions cheating. *See* Jt. Stipulation for Remand Pursuant to Settlement and [Proposed Order] (March 30, 2017) Ex. A (Dkt. No. 3107) in *In Re: Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation*, Case. No. 3:15-md-02672-CRB (N.D. Cal.), https://goo.gl/aYBmPC. The United States' own related settlements with Volkswagen and Porsche 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* United States' Notice of Filing of Trust Agreements, Attachment A (Oct. 2, 2017) (Dkt. No. 51-1), Civ. A. No. 3:16-cv-00295-CRB (N.D. Cal.), https://goo.gl/Z4ZiUx. In summary, the States have extensive experience resolving claims for violations of both state and federal environmental laws and, in resolving their own enforcement actions, 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 have caused harm to public health

[1] The states also bring their own actions to enforce their own state environmental laws and the settlements of those cases often include the payment of substantial civil penalties, injunctive relief, and projects to mitigate the public health and environmental harm caused by those violations. *See, e.g., Massachusetts v. First Student, Inc.*, Civ. A. No. 14-0717-G (Mass. Suffolk Super. Ct., entered Mar. 5, 2014) (consent judgment requiring the payment of $300,000 civil penalty to resolve claims that a school bus operator violated the state Clean Air Act by unnecessarily idling buses and requiring the payment of $150,000 to fund two projects designed to reduce air pollution and encourage the use of cleaner hybrid vehicles). Press Release: Mass. Att'y Gen.'s Off., Largest School Bus Operator in Massachusetts to Pay $450,000 to Settle Air Pollution, Reporting Violations (Mar. 5, 2014), https://goo.gl/a9ANrP (describing *First Student* consent judgment).

and the environment.

STANDARD FOR ENTRY OF CONSENT DECREE

A consent decree must "fairly and reasonably resolve the controversy in a manner consistent with the public interest." *Massachusetts v. Microsoft Corp.*, 373 F.3d 1199, 1206 n.1 (D.C. Cir. 2004). In order to approve a proposed consent decree, a district court must determine that it is "fair, adequate, reasonable and appropriate under the particular facts[,] and that there has been valid consent by the concerned parties." *Appalachian Voices v. McCarthy*, 38 F. Supp. 3d 52, 55 (D.D.C. 2014) (quoting *Citizens for a Better Environment v. Gorsuch*, 718 F.2d 1117, 1126 (D.C. Cir. 1983)). The district court must also determine that "the settlement is consistent with the statute that the consent judgment is attempting to enforce" and "resolves the controversy in a manner consistent with the public interest." *Id.* The court's focus "should be the purposes which the statute is intended to serve, rather than the interests of each party to the settlement." *Citizens for a Better Environment*, 718 F.2d at 1125; *see United States v. City of Miami*, 664 F.2d 435, 441 (5th Cir. 1981) ("if the suit seeks to enforce a statute, the decree must be consistent with the public objectives sought to be attained by Congress.").

In ruling on a motion to enter a proposed consent decree, however, "[t]he court must eschew any rubber stamp approval in favor of an independent evaluation." *United States v. District of Columbia*, 933 F. Supp. 42, 47 (D.D.C. 1996) (quoting *United States v. Hooker Chemicals & Plastics Corp.*, 540 F. Supp. 1067, 1072 (W.D.N.Y. 1982)). In doing so, the court must, based on the facts of record, whether established by evidence, affidavit or stipulation, determine whether a proposed decree represents a reasonable factual and legal determination. *See City of Miami*, 664 F.2d at 441; *see also United States v. Comunidades Unidas Contra La Contaminacion*, 204 F.3d 275, 281 (1st Cir. 2000) (appellate court "scrutinize[s] the record" for "sufficient record evidence . . . that [the consent decree] is adequately supported"); *United States*

v. BP Exploration & Oil Co., 167 F. Supp. 2d 1045, 1049-50 (N.D. Ind. 2001) ("[c]ourt determines whether the consent decree is appropriate under the particular facts of the case"). And where, as here, a consent decree affects the public interest or third parties, the court has a heightened responsibility to protect those interests. *United States v. Oregon*, 913 F.2d 576, 581 (9th Cir. 1990); *see United States v. Telluride Co.*, 849 F. Supp. 1400, 1402 (D. Colo. 1994) (in suits affecting the public interest the court's role is more searching).

As the United States acknowledges (Dkt. No. 6, at 3), the burden is on the government "to demonstrate to the Court that the decree is fair, reasonable, and in the public interest." The burden is on the government to proffer sufficient facts and reasons to establish that this standard is met and approval is warranted. *United States v. Davis*, 11 F. Supp. 2d 183, 189 (D.R.I. 1998) (citing *United States v. Pesses*, 1994 WL 741277, at *5 (W.D. Pa. Nov. 7, 1994)).

Although a court should not rewrite a decree, it may advise the parties of problems that it identifies and allow them an opportunity to revise the agreement. *United States v. Colorado*, 937 F.2d 505, 509 (10th Cir. 1991); *see also Officers for Justice v. Civil Service Comm'n*, 688 F.2d 615, 630 (9th Cir. 1982) ("the district court may suggest modifications"); see *Environmental Tech. Council v. Browner*, 1995 WL 238328 (D.D.C., March 8, 1995) (advising parties that court will approve the consent decree if they address the court's concerns with one paragraph of the decree that the court determined may not be in the public interest); *New York v. Microsoft Corp.*, 231 F. Supp. 2d 144, 202-03 (D.D.C. 2002) (court conditionally approved proposed consent decree subject to parties correction of one provision). Here, as explained below, the United States' has not satisfied the standards set out above and this Court should accordingly deny the United States' motion to enter the substitute Consent Judgment.

ARGUMENT

The United States' suggestion that the substitute Consent Decree should be "evaluated

within its own four corners," as though the original Consent Decree providing for mitigation never existed (Dkt. No. 7, at 27) is without merit. The Court is required to evaluate the substitute Consent Decree based on the record before the Court. *See City of Miami*, 664 F.2d at 441. The original Consent Decree is part of the record here.[2] The United States has not shown, and cannot show, that the substitute for the previously signed Consent Decree that had been lodged with the Court for the sole purpose of public comment, which includes no replacement for a key $3 million mitigation requirement that was stripped from the original decree based on a Department of Justice of policy issued more than nine months after lodging, meets the required standards of fairness, reasonableness and consistency with the public interest. Indeed, the United States' rationale for eliminating the $3 million mitigation project is demonstrably false, because the eliminated mitigation project is squarely consistent with the policy, even if the policy should be applied here.

I. The Substitute Consent Decree is Unreasonable and Contrary to the Public Interest Due to the Absence of the Previously Agreed to Mitigation Project.

The Substitute Consent Decree is unreasonable and contrary to the public interest because it eliminates the $3 million mitigation project, which was an integral part of the United States' complaint and original Consent Decree, and fails to replace it with a substantially equivalent replacement mitigation requirement.

A. The Substitute Consent Decree is Not Reasonable.

This Court's review of the reasonableness of a proposed consent decree requires consideration of whether the proposed decree: (1) is technically adequate to accomplish the goal

[2] Furthermore, with respect to the fairness requirement addressed in Section II, below, the United States concedes that the Court must consider the "negotiating process." Dkt. No. 7, at 15 (citing *District of Columbia*, 933 F. Supp. at 48). The parties entered into the original Consent Decree in the course of their efforts to resolve the matter before the Court.

of cleaning the environment; (2) will sufficiently compensate the public for the costs of remedial measures; and (3) reflects the relative strengths and weaknesses of the government's case against the environmental offender. *District of Columbia*, 933 F. Supp. at 50 (citing *Telluride Co.*, 849 F. Supp. at 1402); *United States v. Cannons Eng'g Corp.*, 899 F.2d 79, 89-90 (1st Cir. 1990); *see also* Dkt. No. 7, at 17 (agreeing that this is the appropriate standard). "[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 *Environmental Defense v. Leavitt*, 329 F. Supp. 2d 55, 71 (D.D.C. 2004)).

Regarding the third factor, the United States has offered only generalities regarding the strengths and weaknesses of its case. Dkt. No. 7. Specifically, the United States alleges that it believes it would prevail in the litigation, but that there are uncertainties as to how the court would view various factors, such as economic benefit, the seriousness of the violations, including the amount of excess emissions the United States would be able to prove, and whether a court would hold Harley-Davidson responsible for all of them or just a portion of them. Dkt. No. 7, at 25. The United States also explains that although it believes its case is strong, it would be time-consuming and expensive to litigate. *Id.* at 25-26. While the Court and the public have not been provided with any more specific information regarding these various factors—all of which are relevant to the required reasonableness inquiry—the record does clearly show that the United States and Harley-Davidson negotiated and executed the original Consent Decree, which included all of the relief included in the substitute Consent Decree, *plus* the $3 million mitigation project. Dkt. No. 2-1. Nothing in the record suggests that the original Consent Decree was not the result of good faith, arms-length negotiations between the parties and the government's assessment of the strengths and weakness of its case, including the factors mentioned above.

Indeed, the original Consent Decree states that it "has been negotiated by the parties in good faith," and that it is "fair, reasonable and in the public interest." *Id.* at 4. By so stating, the United States acknowledged that the original Consent Decree was a compromise that reflected the strengths and weaknesses of the government's case based on the considerations described above.

The United States' case did not become weaker after it lodged the original Consent Decree. Indeed, the United States does not claim that the law has changed or that new facts have been discovered that might cast doubt on the strength of its claims. For its part, Harley-Davidson agreed to entry of the original Consent Decree "without further notice." Dkt. No. 2-1, ¶ 74. And, even if this were not the case, the "evaluation of relative bargaining strengths must occur against the backdrop of what the parties knew or should have known at the time the parties agreed to be bound." *United States v. Atlas Minerals & Chemicals, Inc.*, 851 F. Supp. 639, 652-653 (E.D. Pa. 1994). Because the United States claimed that the original Consent Decree was reasonable based on an assessment of the strengths and weaknesses of the Government's case, the substitute Consent Decree, which lacks a primary component of the original decree—the $3 million mitigation project—or any equivalent substitute, is, *a fortiori*, unreasonable given the absence of any change in the strength of the Government's case.

With respect to factors (1) technical adequacy to cleanse the environment and (2) compensation to the public, the substitute Consent Decree also falls short of the original Consent Decree due to the elimination of the $3 million mitigation project. The substitute Consent Decree contains no requirements for mitigating harm to public health and the environment from past and continuing excess NOx and hydrocarbon emissions resulting from the aftermarket defeat devices. Given that the United States' complaint seeks an order of the Court requiring Harley-Davidson to mitigate its excess air pollution, there is no longer congruence

between the complaint and the Consent Decree. In contrast, the original Consent Decree provided for Harley-Davidson to pay $3 million for mitigation of past and future excess emissions caused by its violations. The $12 million civil penalty required by the substitute Consent Decree represents a 20% reduction from the combined $15 million ($12 million civil penalty, plus $3 million for mitigation) provided for by the original Consent Decree. These factors, therefore, also weigh against a finding of reasonableness here.

B. The Sessions Memorandum Does Not Support a Reasonableness Finding.

The United States asserts that "[c]oncerns stemming from application of" a new policy entitled *Prohibition on Settlement Payments to Third Parties*, a copy of which is attached as Exhibit 6 (the "Sessions Memorandum"), https://goo.gl/w2NTF3, were the "primary reason that the United States decided to remove the woodstove project from the settlement." Dkt. No. 7, at 29. The policy was adopted on June 5, 2017, approximately nine and one-half months after the United States and Harley-Davidson "concurred to[,] . . . signed," and then lodged the original Consent Decree on August 18, 2016. Dkt. Nos. 2 and 2-1, at 29-33. The Sessions Memorandum was also issued more than eight months after expiration of the public comment period on the original decree (s*ee* 81 Fed. Reg. 57,036 (Aug. 24, 2016)) during which the United States received five comments totaling ten pages (Dkt. 7-1, at 3-12),[3] and nearly seven months after the United States advised the Court on November 15, 2016 that "[t]he United States intends in the near future either to file a motion for entry of the consent decree or to notify the Court that it withdraws or withholds its consent if the comments have disclosed facts or considerations indicating that the settlement is inappropriate, improper, or inadequate." Dkt. No. 5, at 2; *see*

[3] The only commenter who provided comments specific to the $3 million mitigation project was the State of Wyoming, which generally supported the project. *See infra* p.21 & n.9.

also Dkt. No. 2-1, ¶ 74. Even if the policy could properly be applied here after-the-fact[4] and read to prohibit the $3 million mitigation project, which, as explained below, it cannot, the fact remains that Harley-Davidson had agreed in the original Consent Decree to provide $3 million more in value than is provided for in the substitute Consent Decree. And critically, the $3 million was not to be paid into the U.S. Treasury like the $12 million civil penalty, but was instead to be used to fund projects designed to mitigate the past and ongoing public health and environmental harm caused by the violations. In these circumstances, the United States cannot simply eliminate the sole mitigation in the Consent Decree without replacing it with an alternative mitigation project expected to achieve comparable mitigation to meet the reasonableness requirement. Because the substitute Consent Decree contains neither the $3 million mitigation project nor a reasonably equivalent substitute, it fails to meet the reasonableness requirement for entry.

Even if this were not the case, the United States' "primary," and in fact only, reason for eliminating the $3 million mitigation project from the original Consent Decree is specious. The Sessions Memorandum simply does not itself prohibit the $3 million mitigation project, as the United States' wrongly claims. The Sessions Memorandum does state that Department of Justice attorneys may not enter into any settlement of federal claims that "directs or provides for a

[4] The United States lodged the original Consent Decree with the Court for the sole purpose of soliciting public comments as required by DOJ Regulations, 28 C.F.R. § 50.7. Consistent with the regulation, the United States in the original Consent Decree reserved the right to withhold or withdraw its consent to the decree if, and only if, "the comments regarding the Consent Decree disclose facts or considerations indicating that the Consent Decree is inappropriate, improper or inadequate." Dkt. No. 2-1, ¶ 74. Despite representing to the Court on November 15, 2016 that it intended "in the near future" to either move to enter the Decree or exercise its reserved right to withhold or withdraw its consent to the proposed decree if public comments disclosed inadequacies (Dkt. No. 5, at 2; *see also* Dkt. No. 2-1, ¶ 74), the United States subsequently approached Harley Davidson and obtained its consent to strip the $3 million mitigation project from the consent decree based, *not* on the public comments, but on the Sessions Memorandum (*See* Dkt. No. 6, at 2; Dkt. No. 7, at 29).

payment or loan to any non-governmental person or entity that is not a party to the dispute." Ex. 6. However, "th[is] policy does not apply to 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." *Id*. The $3 million mitigation project is thus fully consistent with the policy, because it was designed to "directly remed[y] the harm that" the Complaint sought to redress, i.e., past and future public health and environmental harm caused by Harley-Davidson's violations of the Clean Air Act.

The "Emissions Mitigation Project" requirements of the original Consent Decree provided for Harley-Davidson to spend $3 million on a program to retrofit or change out higher-polluting wood-burning appliances, such as wood-stoves, with EPA certified wood-stoves, or other cleaner burning appliances, such as Energy Star natural gas furnaces, wood pellet, gas or propane stoves. Dkt. No. 2-1, ¶ 17 & App. A. Under the terms of the original Consent Decree, Harley-Davidson was required to enter into an agreement with the American Lung Association of the Northeast, the "Implementing Entity" *selected* by Harley-Davidson, and provide funding to the American Lung Association of the Northeast to implement the project. *Id.* App. A ¶¶ 7 & 8.b. It is undisputed that the purpose of the project was "to mitigate emissions of hydrocarbons and oxides of nitrogen" (Dkt. No. 7, at 2, 28; 82 Fed. Reg. 34,977 (July 27, 2017)), the very pollutants that the United States alleges Harley-Davidson motorcycles emitted in excess amounts. Dkt. No. 4, ¶ 28. Thus, the $3 million Emissions Mitigation Project is entirely consistent with the Sessions Memorandum, which, again, allows for payments that "directly remed[y] the harm that is sought to be redressed, including, for example, harm to the environment." Ex. 6.

Having admitted that the purpose of the $3 million mitigation project was to mitigate

emissions of the pollutants allegedly emitted by Harley-Davidson motorcycles in excess amounts, the United States nevertheless contends that the mitigation project is inconsistent with the Session Memorandum "because the woodstove project would have been carried out in only one region of the country—the Northeast"— and the environmental impact from the noncompliant motorcycles is occurring throughout the country. Dkt. No. 7, at 30. This is an arbitrary rationale. The Sessions Memorandum, by its terms, "does not apply" to any otherwise lawful payment that "directly remedies the harm sought to be redressed." Ex. 6. Whether a particular payment remedies some or all of the harm, and whether a payment remedies harm in one part of the country or in all parts of the country, it still remedies the harm.

Further, the United States' position here flies in the face of EPA policy and the mitigation requirements of numerous past settlements. For example, the EPA Memorandum on Securing Mitigation as Injunctive Relief discussed above states: "[c]ase teams should also recognize that a mitigation action *need not completely* redress the harm caused by the violation." Ex. 1, EPA Mitigation Mem., *supra* p. 2, at 7 (emphasis added). Consistent with this policy, the United States has negotiated Consent Decrees that provide for partial mitigation of the harm caused by alleged violations—including mitigation of the harm in only a portion of the affected geographic area—in numerous cases. *See, e.g.*, Ex. 4, *Marathon Petroleum Co., LP,* Consent Decree ¶¶ 65-68 (Consent Decree resolving Clean Air Act violations at six refineries in six states required a mitigation project to reduce emissions at one of the refineries); Ex. 7, *United States v. Ash Grove Cement Co.*, No. 2:13-cv-02299 (D. Kan. Aug. 14, 2013), Consent Decree ¶¶ 61-66 & App. C, https://goo.gl/wz3S7J (Consent Decree resolving Clean Air Act violations at nine cement plants in nine states required a mitigation project to reduce emissions from heavy duty vehicles located at three plants in three states). Indeed, in settlements of claims for violation of the Clean Air

Act's mobile source requirements similar to the claims in this case, the United States has included wood stove retrofit/replacement mitigation projects to be implemented by a single state, local or tribal agency, or nonprofit. Ex. 8, *United States v. Edge Products, LLC* (January 16, 2013), Consent Decree ¶¶ 19-25, https://goo.gl/8Upa2f (claims for manufacture and sale of aftermarket defeat device that when installed on diesel pickup trucks caused excess particulate matter emissions); Ex. 9, *In re Loncin (USA), Inc.*, No. AED/MSEB # 7872 (EPA Dec. 23, 2011), Administrative Settlement Agreement ¶ 32, https://goo.gl/UMTucY (claims for importing and selling all-terrain vehicles not covered by a certificate of conformity that may have emitted excess hydrocarbons, NOx and carbon monoxide). Further, this Court approved a mobile source Consent Decree, which, like the original decree here provided the defendant with the option of implementing a wood stove mitigation project in one or more jurisdictions. Ex. 5, *Powertrain, Inc.*, Consent Decree ¶¶ 19-20 & App. D, *supra* p. 3 (claims for importing and selling nonroad engines not covered by a certificate of conformity that emitted excess hydrocarbons, NOx and carbon monoxide); *see* Dkt. No. 2-1, App. A ¶ 8.c ("Defendants may implement the Project in one or more states of its choosing"). These cases are strikingly similar to the case before this Court in that the excess emissions and resulting harm occurred "wherever the noncompliant [vehicles] are ridden [or driven], presumably throughout the United States." Dkt. No. 7, at 30. Despite the nationwide harm, the United States' settlements in these cases included woodstove mitigation projects that would or could be implemented in a limited geographic area. Assuming that the United States is correct that the woodstove project here would have been carried out in a single region of the country, or even in a single state (Dkt. No. 7, at 30), the project, nevertheless, would have mitigated harm from the noncompliant Harley-Davidson motorcycles. The Sessions Memorandum provides no basis for eliminating the $3 million mitigation project

from the parties' agreement.[5]

In sum, the substituted Consent Decree is unreasonable because it does not include the $3 million mitigation project, which the parties, based on good faith arms-length negotiations and the strengths and weaknesses of the government's case, had included in the original Consent Decree, or an equivalent substitute for the mitigation project.

C. The Substitute Consent Decree is Contrary to the Public Interest Due to the Absence of the Mitigation Project.

The purposes of the Clean Air Act include "protect[ing] and enhanc[ing] 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). The mitigation project that the parties included in the original Consent Decree undeniably serves these purposes, and, therefore, is in the public interest. Indeed, current EPA policy touts the benefits to public health and the environment of wood stove change-out programs. *See* EPA's Guide to Financing Options for Wood-burning Appliance Changeouts 6 (Sept. 17, 2014), https://goo.gl/g4swiW (wood burning appliance change-out programs "have been an effective way to significantly improve public

[5]The United States may seek to rely on a January 9, 2018 Memorandum of DOJ's Environment and Natural Resources Division, which "provides guidance concerning the application of the [Sessions Memorandum]." Mem. from Jeffrey H. Wood, Acting Assistant Attorney General, Subj: Settlement Payments to Third Parties in ENRD Cases, https://goo.gl/X6PCcE. This memorandum, which was issued after the motion to enter now before the Court, states that "[m]obile source cases often involve excess emissions that occurred nationwide," and that "excess emissions nationwide could be addressed through a project that addresses the relevant harm in areas in multiple regions of the United States, or that otherwise would make widely distributed areas eligible for mitigation, such as selected nonattainment areas." *Id.* at 4. To the extent that this policy disapproves of mitigation projects in mobile source cases involving nationwide harm that are implemented in a single region of the country, it is not a logical outgrowth of the Sessions Memorandum, and is inconsistent with the United States' settlements of mobile source cases described above. Further, as we discuss at Page 21, *infra*, it appears that a simple fix requiring expenditure of mitigation funds in more than one region of the country is available here to make the mitigation project in this case consistent with this new policy.

health and the environment").

Approving the substitute Consent Decree that does not include the mitigation project or any mitigation project whatsoever deprives the public of the benefits of the mitigation project. The United States has provided no reasonable basis for eliminating the project and has pointed to no public benefits that accrue from eliminating the project. In fact, the only party that benefits from the elimination of the $3 million mitigation project is the party that allegedly caused the past and ongoing harm in the first instance—the Defendant, Harley-Davidson. The parties previously agreed to include the mitigation project in the original Consent Decree based on their assessment of the strengths and weaknesses of the government's case. Therefore, it is reasonable to conclude that the public will only realize the lasting benefits of the mitigation project or a substantially equivalent project if the Court declines to enter the substitute Consent Decree and advises the parties that it will not provide its approval unless the parties lodge a modified agreement that includes the mitigation project or a substantially equivalent project.[6] The proposed substitute Consent Decree is contrary to the public interest as expressed in 42 U.S.C. § 7401(b)(1).

II. The Substitute Consent Decree is Unfair Because it is Not the Result of Adversarial Vigor and the United States Failed to Confer with the States and Adequately Consider Their Comments and Reasonable Alternatives.

[6] Given the lengthy delays for which the United States has been responsible, including nearly a year between the lodging of the original and substitute Consent Decrees, the United States is hardly in a position to complain about further delay attributable to additional negotiations and/or litigation. Further, Harley-Davidson agreed to comply or begin complying with two of the Consent Decree's major injunctive relief requirements even before expiration of the thirty-day public comment period on the original Consent Decree lodged August 18, 2016. Specifically, Harley-Davidson agreed to cease sale and distribution of the aftermarket defeat devices by August 23, 2016, and agreed to offer to buy back devices from dealers between September 1, 2016 and November 1, 2016. Dkt. No. 6-1, ¶¶ 12-13. It appears that Harley Davidson has complied with these requirements. Dkt. No. 7, at 9-10. Thus, further delay here would not delay the public's realization of the benefits of these requirements of the proposed Consent Decree.

The Court should decline to find that the Consent Decree is fair because the United States has not shown that it is the product of adversarial and non-collusive bargaining. In fact, the objective facts suggest the contrary. Additionally, the United States has not dealt openly with interested states, adequately responded to their comments, or sufficiently considered reasonable alternatives to the mitigation project.

A. The Substitute Consent Decree is Procedurally Unfair Because it is Not the Result of Adversarial Vigor.

The Court's review of the proposed decree's fairness requires assessment of both procedural and substantive fairness, and in assessing procedural fairness the Court should look to "the negotiating process and attempt to gauge its candor, openness and bargaining balance." *District of Columbia*, 933 F. Supp. at 48 (quoting *Telluride Co.*, 849 F. Supp. at 1402); *Cannons Eng'g Corp.*, 899 F.2d at 86; *see also* Dkt. No. 7, at 15. In so doing, the Court should consider whether the negotiating process was full of adversarial vigor and substantial give-and-take and was non-collusive. *See United States v. Chevron, Inc.*, 380 F. Supp. 2d 1104, 1110-12 (N.D. Cal. 2005).

Here, the United States asserts that each side was represented by experienced counsel and technical personnel, and that the "negotiation process was adversarial." Dkt. No. 7, at 15-16. Beyond stating that "the parties negotiated for over a year" (*id.*),[7] no details are provided and no supporting evidence is presented by declaration or otherwise.[8] The objective facts suggest the parties' dealings that led to elimination of the mitigation project in the substitute Consent Decree

[7] This statement is of little value. It is unclear what negotiations occurred prior to or subsequent to the original Consent Decree.

[8] In contrast, in both *United States v. Pacific Gas & Electric*, 776 F. Supp. 2d 1007, 1025 (N.D. Cal. 2011) and *Chevron*, 380 F. Supp. 2d at 1112, the United States submitted declarations regarding the negotiations.

lacked adversarial vigor. The United States obtained nothing of value in exchange for eliminating the $3 million mitigation project, and it is hard to conceive of a fact more indicative of a lack of adversarial vigor. There was no "give-and-take." *Chevron, Inc.*, 380 F. Supp. 2d at 1112. The substitute Consent Decree is procedurally unfair because the parties' dealings that led to elimination of the $3 million mitigation project lacked adversarial vigor.

B. The Substitute Consent Decree is Procedurally Unfair Because the United States Failed to Consult with the States, and Adequately Respond to Comments and Consider Reasonable Alternatives to the Mitigation Project.

Fairness should be evaluated from the standpoint of signatories and nonparties to a decree. *United States v. Akzo Coatings*, 949 F.2d 1409, 1435 (6th Cir. 1991). "[C]ourts must take under serious consideration any comments received during [the public comment] period." *United States v. City of Waterloo*, 2016 WL 254725, at *6 (N.D. Iowa Jan. 20, 2016). Whether there was a "manifested willingness of [the] EPA to thoroughly consider all oral and written comments made with regard to the proposed decree" is an important inquiry in deciding whether to approve it. *Id.* (quoting *Akzo Coatings*, 949 F.2d at 1435). Furthermore, the Court should decline to approve a consent decree if it is "not confident that it is the product of good-faith negotiations through which the parties fully and carefully considered all possible alternatives." *Telluride Co.*, 849 F. Supp. at 1406.

The United States alleges that it "undertook significant efforts to negotiate with Harley-Davidson to modify the proposed woodstove project or to agree upon an alternative project that would redress the harm from Harley-Davidson's violations," and that the parties were "unable to reach agreement on a revised or alternative mitigation project." Dkt. No. 7, at 30-31. Again, no details or evidentiary support are provided.

Given the United States' sole asserted rationale for why the project runs afoul of the

Sessions Memorandum—that the project would have been implemented in only one region of the country—a simple fix requiring that the mitigation funds be spent in more than one region of the country could have addressed the United States' concerns. It is not obvious why Harley-Davidson would object to such an approach given that it had already signed the original Consent Decree and committed to fund a $3 million mitigation project as part of the overall deal. Further, the State of Wyoming proposed just such an approach in its comments on the original Consent Decree. Wyoming proposed that the American Lung Association be prohibited from spending all of the mitigation funds in one region of the country. Dkt. No. 7-1, at 6-7.[9] The United States did not meaningfully respond to this proposal in its Motion to Enter and response to comments. Its sole response to Wyoming's detailed and specific comments was to characterize them as a statement that Wyoming would have liked to have been brought into the negotiations, which it asserted it was not required to do. Dkt. No. 7-2, at 1-2.

Alternatively, as the States suggested in their comments on the substitute Consent Decree, some other third party Implementing Entity could have implemented the woodstove mitigation project, 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. Dkt. No. 7-1, at 57.

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[9] Wyoming also requested EPA to ensure that at least $300,000 was spent in Wyoming. While offering these suggested changes, Wyoming's comments strongly supported the mitigation project, stating:

> Under the proposed settlement, Harley-Davidson will invest $3 million in a wood stove replacement program to mitigate past excess emissions. This is a creative mitigation project that will limit future emissions of nitrogen oxides. . . . *This is a good project*.

Id. at 5-6 (emphasis added).

If agreement could not be reached on modification to the woodstove mitigation project, as the States also pointed out in their comments on the substitute Consent Decree, numerous other types of projects to mitigate NOx and/or hydrocarbon emissions are also available. Dkt. No. 7-1, at 57. For example, in the United States' recent settlements with Volkswagen for emissions cheating, the United States approved a number of different types of projects as acceptable for expenditures from a nationwide $2.925 billion mitigation fund, including replacement of trucks, transit and school buses, airport ground support equipment, forklifts and port cargo handling equipment with newer, less polluting models, or repowering of those types of vehicles and equipment with less polluting engines. *See* United States' Notice of Filing of Trust Agreements, Attach. A, *supra* p. 6.

Another option that the States suggested in their comments (Dkt. No. 7-1, at 57) was 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, at 9 (Mar. 31, 2017), https://goo.gl/t51e5u. In another case, involving a cement company's alleged violations of the federal Clean Air Act's New Source Review program, 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* Ex. 10, Third Amendment to Consent Decree in, *United States v. LaFarge North America, Inc.*, Case No. 3:10-cv-44, ¶¶ 16-21 & Add. B (S.D. Ill. Nov. 14, 2013). In light of the myriad options for a replacement mitigation project, it is difficult to believe that the United States and Harley-Davidson could not figure out a suitable

alternative. To the extent that Harley-Davidson saw the Sessions Memorandum as an opportunity to avoid paying $3 million to mitigate its excess air pollution as it had previously agreed to, this would further emphasize the importance of the Court taking action to ensure that the settlement adequately protects the public health and welfare and the environment.

In addition to providing detailed suggestions regarding possible substitute mitigation projects, the States contacted DOJ shortly after lodging of the proposed substitute Consent Decree and offered to discuss possible substitute mitigation projects with the United States. In their comments on the substitute Consent Decree, the States reiterated their interest in working with the United States to find an acceptable alternative approach to mitigation. Dkt. No. 7-1, at 50, 57. The United States did not accept the States' offer, and did not meaningfully respond to the States' comments in its Motion to Enter and accompanying response to comments. Indeed, the Motion to Enter and response to comments does not indicate that the United States raised any of the States' suggestions with Harley-Davidson, or determined that they ran afoul of the Sessions Memorandum or were otherwise unacceptable.

The United States' refusal to enter into discussions with the States and to meaningfully respond to their comments evidence a lack of openness and failure to consider alternatives, which support a finding of procedural unfairness. See *District of Columbia*, 933 F. Supp. at 48 (quoting *Telluride Co.*, 849 F. Supp. at 1402) (court should look to openness of negotiating process); *Davis*, 11 F. Supp. 2d at 189 ("Generally, the requirement of procedural fairness is satisfied if the proposed settlement is reached through arms-length negotiations in which all parties, including non-settlors, are afforded an opportunity to participate."); *Telluride Co.*, 849 F. Supp. at 1406 (court must be confident that parties have fully and carefully considered all reasonable alternatives).

The cases cited by the United States (Dkt. 7-2, at 3) for the proposition that conducting negotiations on its own without involving interested third parties does not render a proposed decree procedurally unfair are inapposite. In *District of Columbia*, the court held that "the mere fact that Virginia was not included in the negotiations when it was not a party" did not "prove that the Agreement is itself unfair," where "[b]oth the EPA and DOJ met with representatives from Virginia to discuss its concerns." 933 F. Supp. at 49-50. In *Cannons Eng'g Corp.*, the court upheld the United States' common practice in Superfund cases involving multiple responsible parties of making good faith groupings of responsible parties based on degree of culpability and negotiating separately with the different groups. 899 F.2d at 86-87. In *Comunidades Unidas Contra La Contaminacion*, the district court initially denied a citizens group's motion to reject a consent decree on the ground that it had not been allowed to participate in the negotiations. 204 F.3d at 277. Instead, the court directed the group to submit comments during the public comment period. *Id.* After the group submitted comments, the United States and the Defendant undertook to consider the comments and renegotiate the terms of the consent decree, and "[t]here were meetings, telephone conferences, and correspondence with the [citizens group]." *Id.* The group's comments on Clean Air Act issues were rejected in an "EPA response of some 55 pages." *Id.* Many of the group's comments on Clean Water Act issues were favorably received and resulted in significant changes to the parties' agreement that were incorporated into a modified consent decree. *Id.* at 278.

The States' claim here is not that there is an absolute requirement that the United States allow the States or other third parties to participate directly in negotiations with a defendant, but that the United States declined to consult with the States, did not adequately respond to the States' comments, and does not appear to have given them any serious consideration whatsoever.

These failures are especially troubling here, given the States' expertise and experience, and EPA's own policy that encourages consultation with states in developing mitigation projects. *See* Ex. 1, EPA Mitigation Mem., *supra* p. 2, at 6 ("Since states often have developed local projects which could serve as effective mitigation actions in a particular case, case teams should consult with affected states whenever appropriate.").

In sum, the proposed substitute Consent Decree is procedurally unfair because: (1) the parties' dealings leading to the elimination of the $3 million mitigation project lacked adversarial vigor and lacked openness with respect to the States; and (2) the United States failed to meaningfully respond to their comments and consider alternatives to the $3 million mitigation project.

CONCLUSION

For these reasons, the Court should decline to enter the substitute Consent Decree. The States respectfully request that the Court advise the parties that it will approve the substitute Consent Decree if they modify it to either reinstate the $3 million mitigation project or include a substantially equivalent substitute mitigation project.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon all counsel of record through the Court's CM/ECF system on this 31st day of January, 2018.

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