

**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,** )  
**HARLEY-DAVIDSON MOTOR COMPANY** )  
**OPERATIONS, INC.,** )  
) )  
**Defendants.** )  
) )  


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**Case No.**  
**1:16-CV-1687 (EGS)**

**NOTICE OF LODGING OF CONSENT DECREE**

Consistent with the requirements of 28 C.F.R. § 50.7, the United States hereby lodges with the Court a substitute consent decree for the one it lodged on August 18, 2016, the substitute having been concurred to and signed by all parties to this matter. After the requisite Federal Register Notice is published, the thirty-day time period for comments has run, and the comments, if any, have been evaluated, the United States will further advise the Court as to any requested action that may be required at that time. The United States requests that the Court take no action on the substitute consent decree at this time.

On August 18, 2016, the United States filed with this Court a Clean Air Act (“Act”) complaint against Harley-Davidson, Inc., and affiliated companies (“Harley-Davidson” or “defendants”), Dkt. Nos. 1, 4, and simultaneously lodged a proposed consent decree resolving the allegations in the complaint, Dkt. 2. In brief, the proposed consent decree required

defendants: (1) to come into compliance with the Act by, among other things, ceasing sale of the illegal motorcycle “tuners” that are at the heart of this case; (2) to pay a civil penalty of \$12 million; and (3) 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 (“HC”) and oxides of nitrogen (“NOx”) in the northeastern United States by replacing old, higher polluting woodstoves with emissions-certified woodstoves (“mitigation project”). The substitute consent decree is identical to the original decree lodged with this Court, except that it does not include the mitigation project. As explained briefly below, certain new developments led the United States and the defendant 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. If after reviewing any public comment received on the revised consent decree, the United States determines that it is appropriate to move for entry of the newly lodged consent decree, the United States will need to demonstrate to the Court that the decree is fair, reasonable, and in the public interest. *Massachusetts v. Microsoft*, 373 F.3d 1199, 1206 n. 1 (D.C. Cir. 2004). The United States believes (subject to review of public comment that may convince it otherwise) that it will be able to make this demonstration.

Respectfully submitted,

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s/Leslie Allen  
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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 20th day of July, 2017.

s/Leslie Allen  
LESLIE ALLEN  
Senior Attorney  
Environmental Enforcement Section  
Environment and Natural Resources Division  
United States Department of Justice