Before the
United States Department of Justice
Washington, D.C. 20530-0001

In the Matter of	
Notice of Lodging of Proposed Partial Consent Decree Under the Clean Air Act	81 Fed. Reg. 44051
In re Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation	MDL No. 2672 CRB (JSC)

Comments of the Competitive Enterprise Institute, American Commitment, Americans for Prosperity, Freedom Works, Frontiers of Freedom, Heartland Institute, Institute for Energy Research, Rio Grande Foundation, Science and Environmental Policy Project, and Taxpayer Protection Alliance, to the Assistant Attorney General, Environment and Natural Resources Division, United States Department of Justice

SUMMARY

As part of the proposed partial consent decree,[1] Volkswagen (VW) agrees to invest $1.2 billion over ten years "to support increased use of zero emission vehicle (ZEV) technology." The court should not approve the national ZEV investment component of the proposed partial consent decree for four reasons:

1. The ZEV plan is unreasonable because it does not share a relationship, or "nexus," with the underlying Clean Air Act violations;

1. Proposed Partial Consent Decree, *In re* Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation, MDL No. 2672 CRB (JSC), (N.D. Cal. June 28, 2016), *available at* https://www.justice.gov/opa/file/871306/download.

2. As injunctive relief, the retrospective purpose of the ZEV plan conflicts with limits on the court's equitable jurisdiction established by the Clean Air Act;

3. Because the Obama administration repeatedly tried and failed to pass a virtually identical policy through Congress, the court could not approve the settlement without impermissibly interfering in the separation of powers; and

4. The Obama administration's attempt to enact industrial policy—i.e., the ZEV plan—through a negotiated settlement is inefficient, encourages crony capitalism, and works against the public interest.

STATUTORY BACKGROUND

The Clean Air Act requires the EPA Administrator to prescribe standards for emissions of air pollutants from new motor vehicles and motor vehicle engines if the emissions "cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare."[2] A manufacturer that wishes to sell new motor vehicle engines in the United States must conduct tests to show that the engines meet emissions standards prescribed under the Act.[3] If the engine meets EPA standards, the agency issues a "certificate of conformity" allowing the manufacturer to sell the engines in the United States for up to one year.[4] It is unlawful to install in any vehicle so-called defeat devices whose purpose is to manipulate emissions tests required to

2. Clean Air Act § 201(a)(1); 42 U.S.C. § 7521(a)(1).
3. Clean Air Act § 206(a)(1), 42 U.S.C. § 7525(a)(1); *see also* 40 C.F.R. § 89.119(a)–(b).
4. Clean Air Act § 206(a)(1), 42 U.S.C. § 7525(a)(1).

establish conformity with the Act.[5] It is also illegal to sell a new motor vehicle in the United States that fails to comply with a certificate of conformity.[6]

The Clean Air Act sets forth a comprehensive remedial regime for violations. Section 204 gives district courts the jurisdiction to "restrain violations."[7] Section 205 establishes criteria by which district courts assess civil penalties for violations.[8]

FACTUAL HISTORY

On September 18, 2015, EPA issued a Notice of Violation of the Clean Air Act to Volkswagen AG, Audi AG, and Volkswagen Group of America, Inc. alleging that model year 2009 – 2015 Volkswagen and Audi diesel cars equipped with 2.0 liter engines—approximately 499,000 vehicles—included software that circumvents EPA emissions standards for nitrogen oxides. This software is a "defeat device" as defined by the Clean Air Act.

On January 4, 2016, the Department of Justice filed a complaint on behalf of EPA against Volkswagen AG, Audi AG, Volkswagen Group of America, Inc., Volkswagen Group of America Chattanooga Operations, LLC, Porsche AG, and Porsche Cars North America, Inc. for alleged violations of the Clean Air Act.

On June 28, 2016 the EPA and VW proposed a multi-billion dollar settlement and partial consent decree to partially resolve alleged Clean Air Act violations based on the sale of 2.0 liter diesel engines that were equipped with "defeat devices." In the

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5. Clean Air Act § 203(a)(3)(A) (making it illegal to install a defeat device) and § 203(a)(3)(B) (making it illegal to sell a car that is equipped with a defeat device).
6. Clean Air Act § 203(a)(1), 42 U.S.C. § 7522(a)(1).
7. Clean Air Act § 204(a); 42 U.S.C. § 7523(a).
8. Clean Air Act § 205(a), § 205(b); 42 U.S.C. § 7524(a), § 7524(b).

proposed partial consent decree, VW admits the Clean Air Act violations and agrees, *inter alia*, to invest $1.2 billion over ten years "to support increased use of zero emission vehicle technology."

STANDARD OF REVIEW

Before a court may approve the settlement, "the court must assure itself that the proposed consent decree is fair, reasonable, and equitable."[9] However, "consideration of the extent to which consent decrees are consistent with Congress'[s] discerned intent involves matters implicating fairness and reasonableness."[10] Therefore, "reasonableness, fairness, and *fidelity to the statute* are the horses which district judges must ride" when they evaluate a proposed settlement.[11]

In determining whether a settlement is faithful to the statute, the court looks only to whether the agreement conflicts with the underlying statute. True, a court may approve a settlement that provides a remedy beyond what is available to the court were the case to have gone to trial, so long as the consent decree "com[es] within the general scope of the case made by the pleadings" and "further[s] the objectives of the law upon which the complaint was based."[12] So while a court may approve a consent decree that exceeds statutory remedial bounds within limited

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9. Sierra Club, Inc. v. Electronic Controls Design, Inc., 703 F. Supp. 875, 876 (D. Or. 1989) (citations and internal quotations omitted).

10. United States v. Cannons Engineering Corp., 899 F.2d 79, 90 (1990).

11. *Id.* at 80 (emphasis added); *see also Sierra Club, Inc.*, 703 F. Supp at 876 (adding that a consent decree may not "violate the law or public policy," in addition to the requirements that it be "fair" and "reasonable."); United States v. BP Exploration & Oil Co., 167 F. Supp. 2d 1045, 1054 (N.D. Cal. 2001) ("A consent decree may not contravene the statute upon which the initial claims are based.").

12. Local Number 93 v. City of Cleveland, 478 U.S. 501, 525 (1986).

circumstances, it may not approve a settlement that violates the statute or the Constitution.

ARGUMENT

I. The National ZEV Investment Plan is unreasonable because it does not share a relationship, or "nexus," with the underlying violation.

Although a court may approve consent decree remedies that exceed the bounds of the statute on which the pleadings were based, these remedies must share a relationship with the underlying statutory violation.[13] Otherwise, the EPA and the Justice Department could negotiate unrelated policy priorities into any settlement.

In fact, the terms of the settlement indicate that the ZEV plan lacks any connection whatsoever to the underlying violation. According to the settlement, the $2.7 billion mitigation trust described in Appendix D "is intended to fully mitigate the total, lifetime excess NOx emissions from the [vehicles]."[14] Regarding the purpose of the ZEV plan described in Appendix C, the proposed partial consent decree states these investments "are intended to address the adverse environmental impacts arising from consumers' purchases of the [vehicles]."[15] This raises an obvious question: how can the ZEV program address "adverse environmental impacts" caused by VW's violations of the Clean Air Act if a separate component of the agreement already "is intended to *fully* mitigate the total" environmental harm attributable to the vehicles?

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13. Horne v. Flores, 557 U.S. 433, 450 (2009) (finding that the remedy must "flow" from the pleadings)
14. Proposed Partial Consent Decree at 5, lines 7–9.
15. *Id.* at 4, lines 27–28

There are other clear indications that the ZEV plan shares no relationship with the allegations against VW. The EPA has published internal rules to ensure that consent decree remedies have a sufficient "nexus" with the pleadings.[16] According to these guidelines, the specificity of the settlement's stipulations is a major factor in identifying a nexus between the proposed remedy and the underlying complaint:

> [Consent decree stipulations] may not be agreements to spend a certain amount on a project that will be defined later. For a case team to properly evaluate a [consent decree's] characteristics (like "what, where, when" of the [settlement]), and establish the connection to the underlying violation being resolved, the type and scope of each project must be specifically described and defined. Without a well-defined project with clear environmental and public health benefit, the EPA cannot demonstrate nexus.[17]

In conspicuous contravention of the EPA guidelines, the ZEV plan is bereft of specific descriptions and definitions. Instead, the settlement is basically a plan to submit a future plan, which itself is subject to change. To be precise, the settlement requires VW to file a "Draft National ZEV Investment Plan" within 120 days. And this submission—the details of which are unknown—may change if the EPA requires as much in exchange for the agency's approval. As such, the very structure of the ZEV plan precludes the inclusion of specific implementation details in the settlement.

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16. Envtl. Prot. Agency, Issuance of the 2015 Update to the 1998 U.S. EPA Supplemental Environmental Projects Policy (Mar. 10, 2015), *available at* https://www.epa.gov/enforcement/2015-update-1998-us-epa-supplemental-environmental-projects-policy.

17. *Id.* at 8.

It is an agreement to agree. Absent such specificity, there is an insufficient nexus between the remedy and the underlying violation.[18]

By the plain terms of the settlement, there is no link between the ZEV plan and the pleadings. And by the plain terms of EPA's own internal guidelines, the ZEV plan is too speculative to share a nexus with the enforcement action that gave rise to the complaint against VW. And if a settlement provision lacks such a nexus, then EPA does not have prosecutorial discretion to negotiate it into a consent decree. Otherwise, there would be no limits on the president's ability to achieve his or her policy preferences through enforcement action.

II. Approving the retrospective National ZEV Plan would contravene the Congress's intent to limit the court's equitable jurisdiction to prospective remedies.

It is incontrovertible that the ZEV plan is beyond EPA's organic legal authority. No one argues the Clean Air Act empowers the EPA to oversee a billion dollar investment in ZEV infrastructure.[19] As explained above, a court nonetheless may approve a consent decree containing *ultra vires* remedies, so long as they fall within the "general scope" of the complaint and "further the objectives" of the statute.[20] However, such extra-statutory remedies cannot violate the statute. Within this

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18. *See generally* United States v. Microsoft Corp., 56 F.3d 1448, 1461 (D.C. Cir. 1995) ("A district judge pondering a proposed consent decree would and should pay special attention to the decree's clarity.").

19. Instead, the Act limits the agency's regulatory purview to "vehicles and engines." *See* 42 U.S.C. § 7521 *et seq*. Moreover, the EPA's rules for stationary sources forbid the agency from imposing regulations that "redefine" a source (*see* Envtl. Prot. Agency, New Source Review Workshop Manual, at B-13); logically, the same reasoning applies to vehicles, such that EPA could not promulgate regulations for "vehicles and engines" that required investment in infrastructure to support an entirely different technology.

20. *See Local Number 93*, 478 U.S. at 525.

framework, the court cannot approve the backwards looking ZEV plan because it conflicts with limitations on the court's jurisdiction established by the statutory provision on which the pleadings are based.

In this case, the government's complaint was brought pursuant to Sections 204 and 205 of the Clean Air Act. Section 204 provides that "district courts of the United States shall have jurisdiction to restrain violations";[21] Section 205 sets forth civil penalties for violations.[22] Yet according to the EPA's notice of the proposed settlement, the partial consent decree "does not address the government's claims … for civil penalties."[23] The VW-EPA settlement, moreover, stipulates that the United States "reserves all claims, rights, and remedies against Settling Defendants with respect to … civil penalties,"[24] *i.e.*, the Section 205 aspects of the original complaint. As such, the authority for the proposed partial consent decree flows only from the government's claim under Section 204.

Section 204 provides that "district courts of the United States shall have jurisdiction to restrain violations." This is not a plenary grant. Instead, the court's discretion to fashion equitable remedies is limited to "restraining violations." The Supreme Court agreed with this analysis when it interpreted "restrain" in a similar jurisdictional provision in another of EPA's enabling laws, the Resource Conservation and Recycling Act, as confining courts' discretion to the issuance of prohibitory or forward-looking injunctions—*i.e.*, measures that "restrain" a responsible party from

21. Clean Air Act § 204(a); 42 U.S.C. § 7523(a).
22. Clean Air Act § 205 *et seq.*; 42 U.S.C. § 7524 *et seq.*
23. 81 Fed. Reg. 44051 (July 6, 2016).
24. Proposed Partial Consent Decree at 39, Para. 75(d).

further violating the Clean Air Act.[25] The D.C. Circuit likewise has interpreted "restrain" in a similar statutory context as being "only aimed at future actions."[26] Moreover, the EPA historically has requested injunctive relief under Section 204 to prevent subsequent violations, rather than addressing past violations.[27]

Therefore, Section 204 is limited to authorizations for prospective relief. By contrast, mitigation projects like the ZEV plan are backward-looking. As explained by the EPA in internal guidelines, the purpose of "mitigation actions" in consent decrees is to "redress harm." More to the point, the EPA expressly disclaims that the settlement "addresses the governments' claims … for prospective injunctive relief to prevent future violations."[28]

In sum, the proposed partial consent decree flows from a pleading based on Clean Air Act Section 204, which endows courts with the equitable jurisdiction to "restrain violations." As interpreted by the Supreme Court and the U.S. Courts of Appeals, a jurisdictional grant to "restrain" violations is limited to prospective remedies. And because the National ZEV Investment Plan is avowedly aimed at past violations, it conflicts with Section 204. More generally, it defies common sense that the court could somehow "restrain" a Clean Air Act violation by approving a

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25. Meghrig v. KFC Western, Inc., 516 U.S. 479, 488 (1996).

26. United States v. Philip Morris USA, Inc., 396 F.3d 1190, 1199 (D.C. Cir. 2006); *see also* United States v. Carson, 52 F.3d 1173 (2d Cir. 1995).

27. *See*, *e.g.*, United States v. Holtzman, 762 F.2d 720 (2d Cir. 1985) (enjoining defendant from importing vehicles in the future); United States v. Shaffer Muffler, Inc., Civ. A. no. C-86-240, 1989 WL 200887 (S.D. Tex. 1989) (enjoining defendant from installing defeat devices in the future).

28. 81 Fed. Reg. 44051 (July 6, 2016).

settlement stipulation for a ten-year investment plan in speculative automotive technologies.

III. Because the National ZEV Investment Plan is at heart no different than legislative proposals that Congress refused to enact, a partial consent decree that imposes this program violates the separation of powers and would be impermissible lawmaking by the executive and judicial branches.

During the 2011 State of the Union Address, President Obama pledged to put one million electric vehicles on the road.[29] To this end, the White House requested from Congress $300 million to invest in ZEV infrastructure.[30] Congress demurred.[31] In 2016, the President once more sought federal spending to support increased usage of ZEVs through a program called the "21st Century Transportation Initiative."[32] Again, Congress refused.[33]

Instead of acting on the President's proposals, Congress passed its own plan that the President signed into law. The 2015 Fixing America's Surface Transportation Act (FAST) Act directs the Secretary of Transportation to establish "National electric

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29. White House Office of the Press Secretary, Remarks by the President in State of the Union Address, January 25, 2011 available: https://www.whitehouse.gov/the-press-office/2011/01/25/remarks-president-state-union-address.

30. White House Office of the Press Secretary, *FACT SHEET: President Obama's Plan to Make the U.S. the First Country to Put 1 Million Advanced Technology Vehicles on the Road*, Jan. 25, 2011, *available at* https://www.whitehouse.gov/sites/default/files/other/fact-sheet-one-million-advanced-technology-vehicles.pdf.

31. Neither Chamber of the 113th Congress voted on legislation resembling the President's proposal.

32. This time, the President sought to fund "clean transportation infrastructure" by imposing a $10 a barrel oil tax. *See* White House Office of the Press Secretary, *FACT SHEET: President Obama's 21st Century Clean Transportation System*, Feb. 4, 2016, *available at* https://www.whitehouse.gov/the-press-office/2016/02/04/fact-sheet-president-obamas-21st-century-clean-transportation-system.

33. No one expects the Congress to levy a $10 per barrel oil tax.

vehicle charging and hydrogen, propane, and natural gas fueling corridors."[34] Rather than direct infrastructure investments, as sought by the Obama administration, the FAST Act program is limited to "identify[ing] the near- and long-term need for, and location of" fueling and charging infrastructure "at strategic locations along major national highways."[35] More importantly, the Congress's plan is far more inclusive; whereas the President's proposals focused on ZEVs, the FAST Act program includes alternative hydrocarbon fuels such as propane and natural gas.

Having failed to persuade Congress, the administration now seeks to co-opt the judiciary's injunctive and contempt powers to advance the President's failed legislative agenda. The proposed partial consent decree would give EPA control of $1.2 billion in ZEV investments, which is four times what the administration unsuccessfully sought for effectively the same purpose in the wake of the President's 2011 State of the Union Address. Furthermore, the settlement would conflict with rather than complement Congress's plan. The FAST Act goal to promote infrastructure for a diversity of alternative technologies is undermined by a shadow program that promotes only ZEV technologies. Another tension between the settlement and FAST Act is the fact that the two parallel tracks would create duplicative administrative processes. Under the FAST Act, the Secretary of the Transportation must solicit input from States and other stakeholders regarding the need for infrastructure;[36] likewise, the settlement stipulates that VW must undertake an EPA-approved "national ZEV

34. FAST Act § 1413 *et seq.*; 23 U.S.C. § 151 *et seq.*
35. FAST Act § 1413(a); 23 U.S.C. § 151(a).
36. FAST Act § 1413(b)(1); 23 U.S.C. § 151(b)(1).

outreach plan" to solicit input from States and other stakeholders regarding the need for infrastructure. Such wasteful redundancy is irrational. It is further an intra-executive-branch power-grab: Congress and the President agreed to locate this decision-making authority within the Transportation Department, and the EPA now seeks to use an enforcement proceeding to sidestep Congress's preferences and usurp its Cabinet rival.

There are other separation of powers concerns raised by the settlement. For example, the Miscellaneous Receipts Act derives from and vouchsafes Congress's power over appropriations.[37] With one inapplicable exception, the law requires that whenever a government agent or official receives money "from any source," he or she "shall deposit the money in the Treasury as soon as practicable." It is a violation of this law for the settlement decree to transfer monies functionally within the government's control to third-parties as the ZEV plan proposes to do.[38]

In light of the foregoing, the court cannot approve this consent decree without countenancing the usurpation of the Congress's lawmaking and appropriations power.[39] Of course, it would be the executive branch that ultimately gains practical

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37. 31 U.S.C § 3302(b).

38. *See* United States v. Morgan Stanley, 881 F. Supp. 2d 563, 569 (S.D.N.Y. 2012); Maritime Administration—Disposition of Funds Recovered from Private Party for Damage to Government Building (5/16/02) Comp. Gen. Dec. No. B-287738, *available at* http://www.gao.gov/assets/680/676784.pdf. *See also*, Derek S. Lyons, C. Borden Gray, Adam R.F. Gustafson, & James R. Conde, Comments In re: Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation, Case No: MDL No. 2672 CRB (JSC), and D.J. Ref. No. 90-5-2-1-11386, July 27, 2016.

39. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (invalidating an executive order ending a steel strike as being an impermissible exercise of lawmaking power that the Constitution reserves for Congress).

power at the expense of the legislative branch. Were the court to uphold the National ZEV Investment Plan, it would establish a constitutionally dubious incentive for the President to try to implement his or her legislative priorities through consent decree. The court should refrain from disrupting the separation of powers in this manner.[40]

IV. The partial consent decree is bad public policy because it calls into question the government's negotiating priorities; it is inefficient central planning; and it roils the separation of powers.

The ZEV plan is bad public policy. For starters, the Justice Department is required to negotiate "fair[ly] and full of adversarial vigor,"[41] but its commitment to doing so is called into question when it nakedly gives priority to presidential policy proposals that have been rejected by Congress.

In a related manner, and as explained above, this decree would create an unwelcome incentive for the executive branch to encroach on the legislative branch's power by negotiating the president's legislative goals into consent decrees and thus circumventing the appropriations process.

More broadly, the ZEV plan is an exercise in inefficient industrial policy. No one knows if zero emission vehicle technology ultimately will succeed, and the assumption that the government can effectively nurture a nascent industry to profitability through market distortions should be met with skepticism.

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40. *See, e.g.*, Kasper v. Bd. of Election Commissioners, 814 F.2d 332, 340 (7th Cir. 1987) ("judges should be on the lookout for attempts to use consent decrees to make end runs around the legislature").

41. United States v. Telluride Co., 849 F. Supp. 1400, 1402 (D. Colo. 1994) (citations and internal quotations omitted).

Indeed, it defies common sense that an environmental regulator, with no experience as a carmaker or a venture capitalist, could wisely exercise approval authority of a $1.2 billion investment in emerging automotive technologies. In support of this contention, it is worth noting the dismal results of the Obama administration's first investment into ZEV infrastructure, a $115 million stimulus grant to ECOtality to install electric vehicle chargers in home garages.[42] Within 3 years, ECOtality went bankrupt, stranding 13,000 charging docks.[43] Investors subsequently sued company officials for fraud.[44]

Bureaucrats are both poorly situation and poorly incentivized to pick winners and losers successfully, and political considerations—favors for political supports or geographic locations with influential legislators—can overwhelm efficiency considerations.[45]

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42. Debra Kahn, *Officials Celebrate San Francisco's Charging up to Handle Electric Cars*, ENERGY AND ENVIRONMENT DAILY, Feb. 11, 2011.

43. Jim Motavalli, *Electric Car Charger Company, Ecotality, Goes Bankrupt*, THE HUFFINGTON POST, Oct. 15, 2013, *available at* http://www.huffingtonpost.com/2013/10/13/electric-car-charger_n_4086326.html.

44. Jacob Batchelor, *Defunct ECOtality's Brass Hid Woes with DOE, Investors Say*, LAW360, June 12, 2015, *available at* http://www.law360.com/articles/667066/defunct-ecotality-s-brass-hid-woes-with-doe-investors-say.

45. *See*, *e.g.*, Shanta Devarajan, *Three Reasons Why Industrial Policy Fails* (Brookings Institute Future Development 2016), *available at* https://www.brookings.edu/2016/01/14/three-reasons-why-industrial-policy-fails/; Howard Pack & Kamal Saggi, *The Case for Industrial Policy: A Critical Survey*, World Bank (2006) (surveying the academic literature on industrial policy and concluding that "there appears to be little empirical support for an activist government policy"), *available at* https://openknowledge.worldbank.org/bitstream/handle/10986/8782/wps3839.pdf.

CONCLUSION

For the foregoing reasons, the court should not approve the national ZEV investment component of the proposed partial consent decree.

August 5, 2016

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