



January 31, 2017

President Donald J. Trump  
1600 Pennsylvania Avenue NW  
Washington, D.C. 20050

CC: Acting Attorney General Dana J. Boente  
U.S. Department of Justice  
950 Pennsylvania Avenue NW  
Washington, D.C. 20530

CC: Acting Administrator Catherine McCabe  
Environmental Protection Agency  
1200 Pennsylvania Avenue NW  
Washington, D.C. 20460

Dear President Trump,

We the undersigned respectfully request that the Environmental Protection Agency investigate the possibility that the executive power of your office has been unconstitutionally limited due to a recent judicial settlement negotiated by the Obama administration and Volkswagen (VW).

On October 25th, a U.S. District Court in California entered a consent decree to partially resolve multiple claims against VW for the company's installation of "defeat devices" designed to cheat air quality rules in more than 500,000 vehicles sold in the U.S.<sup>i</sup> The consent decree remedies a number of legitimate claims, providing relief for car owners, the state of California and the Federal Trade Commission. But the settlement also includes a dubious stipulation that VW work with the EPA to invest \$1.2 billion to foster electric vehicle infrastructure.

This \$1.2 billion investment in electric vehicles has no basis in the Clean Air Act.<sup>ii</sup> Instead, its origins can be traced to a failed legislative proposal by your predecessor. In his 2011 State of the Union address, President Obama promised to put one million electric vehicles on the road by 2015.<sup>iii</sup> To this end, the White House twice requested federal spending to support increased usage of zero-emissions vehicles.<sup>iv</sup> Both times, Congress refused.<sup>v</sup> Having been twice spurned by lawmakers, the Obama administration leveraged the VW settlement to achieve what it couldn't get from Congress. In so doing, the Obama administration committed your administration to implement his unsuccessful legislative agenda.

Under the terms of the settlement, your administration's involvement in the implementation of the electric vehicle infrastructure investment is pervasive. By February 22<sup>nd</sup>, VW is required to submit a draft investment plan to the EPA. Then, VW and the EPA are supposed to engage in extensive discussions, after which the company would submit a final plan to the EPA for review. Subsequent to EPA review and approval of the investment plan, VW is required to submit annual investment proposals, which are subject to agency approval. The agency is required to impose financial penalties if the company fails to comply with any EPA-approved measure.<sup>vi</sup>

Plainly, oversight of the VW plan would require significant EPA resources, and this commitment intrudes on your office's Article II responsibility to execute the laws. The Obama administration was not constitutionally permitted to use judicial settlements to exercise the discretionary authority of future presidents.<sup>vii</sup>

EPA's extensive involvement in the electric vehicle infrastructure plan also would infringe on Congress's constitutional prerogatives. Congress has neither delegated authority nor appropriated funds to the EPA to administer a \$1.2 billion investment scheme in electric vehicle infrastructure. As such, any EPA oversight of the electric vehicle investment plan represents an end-run around Congress's lawmaking power.

In light of these serious constitutional concerns, we request the following:

- 1) The EPA should promptly investigate how much of the agency's resources have been spent or will be spent on overseeing the electric vehicle infrastructure component of the partial settlement reached with VW; and,
- 2) The EPA should reassess its underlying commitment and authority to oversee VW's electric vehicle infrastructure plan.

If the results of this investigation lead your administration to have second thoughts about the settlement, we note that the consent decree includes a severance clause which would allow the parties to remove the electric vehicle investment without disrupting consumer relief. The \$1.2 billion would instead be deposited into the U.S. Treasury.

Sincerely,

**William Yeatman**  
Senior Fellow  
Competitive Enterprise Institute

**Thomas Pyle**  
President  
American Energy Alliance

**Brent Gardner**  
Chief Government Affairs Officer  
Americans for Prosperity

**Craig Richardson**  
President  
Energy & Environment Legal Institute

**Adam Brandon**  
President & CEO  
FreedomWorks

**George Landrith**  
President  
Frontiers of Freedom

**Andrew Langer**  
President  
Institute for Liberty

**David Ridenour**  
President  
National Center for Public Policy Research

**David Williams**  
President  
Taxpayers Protection Alliance

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<sup>i</sup> Partial Consent Decree, In Re: Volkswagen “Clean Diesel” Marketing, Sales Practices, and Products Liability Litigation, 3:15-md-02672-CRB, Document 1973, October 25, 2016 <https://www.epa.gov/sites/production/files/2016-10/documents/amended201partial-cd.pdf>.

<sup>ii</sup> William Yeatman, Executive Lawmaking in EPA-Justice Department-Volkswagen Settlement, by William Yeatman, Yale J. on Reg.: Notice & Comment (Oct. 1, 2016), <http://yalejreg.com/nc/executive-lawmaking-in-epa-justice-department-volkswagen-settlement-by-william-yeatman/>.

<sup>iii</sup> 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>.

<sup>iv</sup> 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>; In the 114<sup>th</sup> Congress, President Obama 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>.

<sup>v</sup> Neither the 113<sup>th</sup> nor the 114<sup>th</sup> Congress voted on anything resembling President Obama’s proposals.

<sup>vi</sup> These procedural requirements are set forth in appendix C of the Partial Consent Decree.

<sup>vii</sup> There is no Clean Air Act requirement for EPA to manage a massive investment in electric vehicle infrastructure; rather, it is the Obama administration’s consent to the settlement that animates this commitment of resources. It follows that EPA’s participation is voluntary, i.e. discretionary. Moreover, the allocation of limited resources in the face of competing statutory priorities is a quintessentially executive function that is permissibly cabined by a previous president only in the case of non-discretionary duties.