

# A CONSENT DECREE ABROAD: EXTRATERRITORIAL ENFORCEMENT OF AN EPA CONSENT DECREE IN *UNITED STATES v. VOLVO POWERTRAIN CORP.*

MARC C. PALMER \*

**Abstract:** Although not as prominent in the public eye as automobile engines, emissions from non-road engines contribute significantly to global air pollution. In 2005, the United States Government fined Volvo Powertrain Corp. seventy-two million dollars for manufacturing non-road engines at its foreign subsidiary because these engines were not in compliance with emissions standards and therefore violated a consent decree between Volvo Powertrain Corp. and the federal government. In *United States v. Volvo Powertrain Corp.*, the United States Court of Appeals for the D.C. Circuit upheld an interpretation of the consent decree and financial penalty put forth by the lower court. This Comment argues that the D.C. Circuit Court of Appeals was correct in holding Volvo Powertrain liable for the emissions violations of its subsidiaries' engines. Volvo Powertrain subjected itself to United States jurisdiction by requesting certificates of emissions compliance from the Environmental Protection Agency for the engines manufactured abroad by their foreign subsidiary.

## INTRODUCTION

A strong link exists between air pollution and human mortality.<sup>1</sup> This increased mortality risk was first discovered in the landmark Harvard University Six City study and is quantified as a two-to-three-year shorter life span, due mostly to exposure to fine particulate concentrations.<sup>2</sup> In the years following this study, more stringent Environmental Protection Agency (EPA) regulations have consistently driven down fine particulate concentrations across the United States.<sup>3</sup>

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\* Staff Writer, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW, 2016–2017.

<sup>1</sup> Laren Feldscher, *Landmark Air Pollution Study Turns 20*, HARV. SCH. PUB. HEALTH, <https://www.hsph.harvard.edu/news/features/six-cities-air-pollution-study-turns-20/> [<https://perma.cc/65C4-PWM3>].

<sup>2</sup> *Id.* Fine particulate concentrations mean particles smaller than 2.5 microns in diameter. *Id.*

<sup>3</sup> *Id.* The six cities were selected at random, and included Watertown, Massachusetts; Harri-man, Tennessee; specific census tracts of St. Louis, Missouri; Steubenville, Ohio; Portage, Wisconsin; and Topeka, Kansas. Douglas W. Dockery et al., *An Association Between Air Pollution and Mortality in Six U.S. Cities*, 329 NEW ENG. J. MED. 1753, 1754 (1993). In 2011, the Environmental Protection Agency (“EPA”) estimated that its control of particulate air pollution saved

Despite the significant strides in emission reductions from stricter regulation, engine and automobile manufacturers have violated these regulations.<sup>4</sup> Most widely publicized was the recent Volkswagen diesel emissions scandal, in which Volkswagen intentionally equipped vehicles with software designed to subvert emissions tests.<sup>5</sup> While road vehicles are key contributors to global air pollution, a significant amount of air pollution stems from non-road engines and non-road vehicles.<sup>6</sup>

In 1998, the EPA alleged that several engine manufacturers violated the Clean Air Act by installing defeat devices on engines intended for emissions testing.<sup>7</sup> Defeat devices suppress emissions readings, allowing engines producing exhaust over the EPA limit to pass emissions tests.<sup>8</sup> The manufacturers settled with the United States, and each manufacturer agreed to enter into a consent decree.<sup>9</sup> The consent decrees included a provision called the “non-road engine pull-ahead” that required the manufacturers to satisfy future EPA emissions standards ahead of schedule (i.e. in 2005 the manufacturers had to meet 2006 targets) for nitrogen oxide (“NOx”).<sup>10</sup> Volvo Powertrain Corp. (“Volvo Powertrain”) was one of the manufacturers that entered into such a decree with the Government.<sup>11</sup>

In September 2005, following an anonymous tip from a competitor in the marketplace, federal officials began an investigation of non-road engines manufactured by Volvo Penta, a foreign subsidiary of Volvo Powertrain based in Poland.<sup>12</sup> The investigation revealed that the engines did not meet the con-

160,000 lives in 2010 alone, and that regulations will save 230,000 lives per annum by 2020. *Id.*; Feldscher, *supra* note 1.

<sup>4</sup> Guilbert Gates et al., *Explaining Volkswagen’s Emissions Scandal*, N.Y. TIMES (Mar. 16, 2017), <http://www.nytimes.com/interactive/2015/business/international/vw-diesel-emissions-scandal-explained.html> [<https://perma.cc/XZ4H-7Y25>].

<sup>5</sup> *See id.*

<sup>6</sup> *See* ENVTL. PROT. AGENCY, EPA/600/8-90/057F, HEALTH ASSESSMENT DOCUMENT FOR DIESEL ENGINE EXHAUST 1–2 (2002) [hereinafter HEALTH ASSESSMENT DOCUMENT]. Data from 1998 indicates that diesel exhaust contributed to six percent of the total ambient two point five micron fine particulate matter. *Id.*

<sup>7</sup> *United States v. Volvo Powertrain Corp. (Volvo II)*, 758 F.3d 330, 333 (D.C. Cir. 2014). A “defeat device” is a device employed by an automobile manufacturer intended to circumvent a federal or state emissions test. *See* 42 U.S.C. § 7522(a)(3)(b) (2012).

<sup>8</sup> *Volvo II*, 758 F.3d at 333.

<sup>9</sup> *Id.* at 334. A consent decree is a court decree that all parties agree to. *Consent Decree*, BLACK’S LAW DICTIONARY (10th ed. 2014).

<sup>10</sup> *Volvo II*, 758 F.3d at 334. This agreement, called the non-road engine pull-ahead, was a key component to the EPA strategy of aggressively pursuing emissions reductions. *Id.* at 335. Nitrogen Oxide was the main target of the non-road pull-ahead as it is the prime contributor to harmful air pollution. *Id.*

<sup>11</sup> *Id.* at 334.

<sup>12</sup> *Id.* at 334, 336. The terms “non-road engines” and “non-road vehicles” are broad and define a variety of equipment. ENVTL. PROT. AGENCY, 12A-2001, NONROAD ENGINE AND VEHICLE EMISSION STUDY-REPORT, at i, v (1991). These terms can even apply to small equipment like lawnmow-

sent decree requirements entered into by Volvo Powertrain and the Government in 2005.<sup>13</sup> Even though the engines were not manufactured in the United States, or marketed for sale therein, the Government sent a letter demanding approximately seventy two million dollars in penalties and interest.<sup>14</sup>

Volvo Powertrain filed suit in the United States District Court for the District of Columbia, seeking judicial review of the Government's demand letter.<sup>15</sup> The District Court entered a judgment for seventy two million dollars against Volvo Powertrain.<sup>16</sup> The United States Court of Appeals for the District of Columbia Circuit, in *United States v. Volvo Powertrain Corp.*, assessed the District Court's conclusions *de novo*.<sup>17</sup> The D.C. Circuit upheld the District Court's decision, and ordered enforcement of the payment.<sup>18</sup> In June of 2015, the United States Supreme Court rejected a petition for certiorari filed by Volvo Powertrain thereby refusing to review the decision of the lower court.<sup>19</sup>

This Comment argues that the D.C. Circuit appropriately interpreted the consent decree by requiring Volvo Powertrain to pay a civil penalty for certifying engines that did not meet emissions standards.<sup>20</sup> The Comment reasons that the determination of the financial penalty was correctly upheld pursuant to the court's equitable discretion.<sup>21</sup> In addition, this Comment argues that this case highlights the reach of the EPA and its regulations not only to domestic manufacturers, but also to manufacturers and their operations abroad.<sup>22</sup>

## I. FACTS AND PROCEDURAL HISTORY

In 1998, the United States brought enforcement actions against several truck engine manufacturers, alleging that the fuel injection systems used in

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ers and chains saws, recreational equipment, farm equipment and construction machinery. *Id.* It is important to note that locomotives and aircraft are not included in the characterization of "non-road engines and "non-road vehicles" as the Clean Air Act provides for them separately. *Id.* at v n.11. Volvo Truck Corp. later went through a corporate transition and became Volvo Powertrain Corp. *Volvo II*, 758 F.3d at 339.

<sup>13</sup> *Volvo II*, 758 F.3d at 336–37.

<sup>14</sup> *Id.* at 337.

<sup>15</sup> *United States v. Volvo Powertrain Corp. (Volvo I)*, 854 F. Supp. 2d 60, 64 (D.D.C. 2012), *aff'd*, 758 F.3d 330 (D.C. Cir. 2014).

<sup>16</sup> *Volvo II*, 758 F.3d at 337, 343.

<sup>17</sup> *Id.* at 337. The United States Court of Appeals for the D.C. Circuit had previously held that the proper standard of review of a District Court's interpretation of a consent decree is *de novo* review. *Nix v. Billington*, 448 F.3d 411, 414 (D.C. Cir. 2014).

<sup>18</sup> *Volvo II*, 758 F.3d at 334.

<sup>19</sup> *Volvo Powertrain Corp. v. United States*, 135 S. Ct. 2833 (2015) (mem.).

<sup>20</sup> See *infra* notes 75–107 and accompanying text.

<sup>21</sup> See *infra* notes 75–107 and accompanying text.

<sup>22</sup> See *infra* notes 75–107 and accompanying text.

these truck engines violated the Clean Air Act.<sup>23</sup> The truck engines' fuel injection systems were operated by computer software, which was programmed to operate differently at highway speeds than the standardized conditions of emissions testing.<sup>24</sup> This improved the fuel economy of the engines but caused them to emit nitrogen oxide ("NOx") at levels above the legal limit.<sup>25</sup> The Government argued that the purpose of the fraudulent fuel injection system was "to bypass, defeat, or render inoperative" the engines' emissions control system.<sup>26</sup> The fuel injection system therefore violated the Clean Air Act as a "prohibited defeat device."<sup>27</sup>

Although the manufacturers denied that their systems used prohibited defeat devices, after nearly a year of negotiations the manufacturers agreed to enter into a series of consent decrees with the United States.<sup>28</sup> Under the decrees, the manufacturers were required to meet new emissions standards for heavy-duty diesel engines before the standards took general effect.<sup>29</sup> The manufacturers also agreed to a provision called the "non-road pull-ahead," which accelerated the implementation of stricter emissions standards for non-road compression-ignition engines.<sup>30</sup>

Volvo Truck Corporation ("Volvo Truck") entered into one of these consent decrees in 1998.<sup>31</sup> As part of a 2001 Volvo corporate restructuring, Volvo Powertrain Corp. acquired production facilities from Volvo Truck, and assumed Volvo Truck's responsibilities under the consent decree.<sup>32</sup> Shortly thereafter, Volvo Powertrain's facility in Skövde, Sweden commenced production of non-road engines for Volvo Penta, a corporate subsidiary.<sup>33</sup>

In 2005, Volvo Penta requested the EPA certify that exhaust from eleven engine models manufactured at the Skövde facility conform with the emissions standards for model year 2005 non-road engines.<sup>34</sup> The EPA requires

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<sup>23</sup> *United States v. Volvo Powertrain Corp. (Volvo I)*, 854 F. Supp. 2d 60, 63 (D.D.C. 2012), *aff'd*, 758 F.3d 330 (D.C. Cir. 2014).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*; see 42 U.S.C. § 7522(a)(3)(B) (2012).

<sup>27</sup> *Volvo I*, 854 F. Supp. 2d at 63.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* The decrees signed by different manufacturers were similar to one another and ensured that no manufacturer would gain a competitive advantage over the others. *Id.*

<sup>30</sup> *Id.* The non-road engines had not been a part of the alleged violation, but were included in the consent decrees in an attempt to further reduce the levels of atmospheric air pollution. *Id.* at 64. EPA literature indicates that a significant amount of air pollution stems from non-road engines and non-road vehicles. HEALTH ASSESSMENT DOCUMENT, *supra* note 6, at 1–2.

<sup>31</sup> *Volvo I*, 854 F. Supp. 2d at 63.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 63–64. As part of the non-road pull ahead, non-road engines in 2005 should have complied with the 2006 EPA emissions targets. *See id.* at 63.

this certification in order to sell an engine in the United States.<sup>35</sup> After testing, the EPA issued certificates of compliance.<sup>36</sup> Thereafter, Volvo's competitor Caterpillar Inc., suggested to the Government that under the consent decree, Volvo Penta engines needed to conform to the more stringent model year 2006 standards via the non-road pull-ahead.<sup>37</sup> In July 2008, the Government issued a letter alleging that Volvo Powertrain had violated its consent decree and demanded penalties of approximately seventy-two million dollars.<sup>38</sup> Volvo Powertrain denied the allegations, and after attempting to resolve the dispute, petitioned the United States District Court for the District of Columbia for review.<sup>39</sup>

When the parties entered into the consent decree in 1998, the District Court retained jurisdiction to resolve future disputes.<sup>40</sup> The District Court held that the consent decree governed all non-road engines produced by Volvo Powertrain and its corporate subsidiaries.<sup>41</sup> However, since the consent decree was between Volvo Truck and the Government, and not Volvo Powertrain and the Government, the District Court held that it had discretion to grant equitable relief for violation of the decree.<sup>42</sup> Using the penalty provision in the consent decree as guidance, the court calculated that Volvo Powertrain would owe \$65,759,212 in stipulated penalties under the formula, in addition to \$6,247,125 in interest, creating a total payment due of \$72,006,337.<sup>43</sup>

Volvo Powertrain appealed the court's judgment to the United States Court of Appeals for the D.C. Circuit, arguing that the consent decree did not apply to the Volvo Penta engines even though the engines were manufactured "at a facility owned or operated by" Volvo Powertrain.<sup>44</sup> The D.C. Circuit agreed with the lower court, citing that the consent decree imposed liability on Volvo Powertrain for its affiliates' and subsidiaries' engines.<sup>45</sup> In addition, the D.C. Circuit stated that there had been no abuse of the equitable discretion of the lower court in determining the financial remedy.<sup>46</sup>

While claiming that none of the engines in question were subject to the consent decree, Volvo Powertrain argued in the alternative that at most it should face liability for those engines actually imported into the United

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<sup>35</sup> *Volvo I*, 854 F. Supp. 2d at 63–64; see 40 C.F.R. § 89.105 (2016).

<sup>36</sup> *Volvo I*, 854 F. Supp. 2d at 64.

<sup>37</sup> *United States v. Volvo Powertrain Corp (Volvo II)*, 758 F.3d 330, 336 (D.C. Cir. 2014).

<sup>38</sup> *Volvo I*, 854 F. Supp. 2d at 64.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 65.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 73.

<sup>44</sup> *Volvo II*, 758 F.3d at 334 (referring to the specific language of the consent decree).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

States.<sup>47</sup> The D.C. Circuit determined that regardless of whether any of the engines actually entered the United States, the 8354 engines met the criterion of a compression ignition engine and held that Volvo Powertrain subjected itself to United States jurisdiction by seeking certificates of compliance.<sup>48</sup> The court's conclusion avoided confronting any issues of extraterritoriality.<sup>49</sup>

Volvo Powertrain also argued that that the consent decree's stipulated penalty provision does not apply when an entity not specifically named seeks a certificate of conformity.<sup>50</sup> The D.C. Circuit, unpersuaded by this rationale, upheld the lower court's remedy as an exercise of its equitable discretion.<sup>51</sup> In *Federal Trade Commission v. Trudeau*, the Seventh Circuit Court of Appeals held that a district court must explain and support its calculation method when exercising equitable discretion to determine a financial penalty.<sup>52</sup> Applying this persuasive authority, the D.C. Circuit decided that the lower court had sufficiently explained its calculation.<sup>53</sup>

The court further pointed to the fact that the penalty imposed by the lower court was in line with a penalty previously paid by Caterpillar for similar violations.<sup>54</sup> Volvo Powertrain tried to distinguish itself from Caterpillar, claiming that Caterpillar consciously certified engines in violation of the consent decree, while Volvo Powertrain was unsure of the requirements of the consent decree.<sup>55</sup> The D.C. Circuit was not swayed by this argument and instead reasoned that Volvo Powertrain could have asked the District Court for a ruling to determine if the engines manufactured by Volvo Penta were bound by the consent decree, instead of assuming that the decree did not apply.<sup>56</sup>

## II. LEGAL BACKGROUND

Under the Clean Air Act, the Environmental Protection Agency (EPA) administrator must set standards for emissions of air pollutants from engines if the emissions create or exacerbate air pollution that jeopardizes

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<sup>47</sup> *Id.* at 341.

<sup>48</sup> *Id.* at 341–42.

<sup>49</sup> *Id.* at 342.

<sup>50</sup> *Id.* at 343.

<sup>51</sup> *Id.*

<sup>52</sup> *Fed. Trade Comm'n v. Trudeau*, 579 F.3d 754, 772 (7th Cir. 2009). The penalty must be “a reasonable approximation of losses, gains, or some other measure the court finds appropriate.” *Id.* at 773.

<sup>53</sup> *Volvo II*, 758 F.3d. at 343.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *See id.* at 344–45.

human health and the environment.<sup>57</sup> Provisions of the Clean Air Act regulate hydrocarbon, carbon monoxide, oxides of nitrogen, and particulate matter emissions from engines.<sup>58</sup> Violations of the Clean Air Act were the reason why Volvo, and other companies, entered into the consent decrees in 1998.<sup>59</sup>

The United States Court of Appeals for the D.C. Circuit looked to prior case precedent for guidance on interpreting and applying the consent decree.<sup>60</sup> In *Segar v. Mukasey*, the court held that the Drug Enforcement Administration engaged in discriminatory employment practices and entered into a series of stipulations to resolve the matter.<sup>61</sup> In response to a challenge to the enforceability of the stipulations, the *Mukasey* court reasoned that the stipulations were equivalent to a consent decree, and determined that the provisions were unambiguous and enforceable.<sup>62</sup> In their analysis, the *Mukasey* court held that the consent decree was essentially a contract, and that the general principles of contract law and interpretation applied.<sup>63</sup>

The Court of Appeals for the District of Columbia Circuit also relied on *Cook v. City of Chicago* for guidance.<sup>64</sup> In *Cook*, an employee sought damages for the city of Chicago's violation of a consent decree established after a civil rights action.<sup>65</sup> The employee had been given a preference in future hiring for a director position, and the consent decree required the city to notify her of any directorship vacancies.<sup>66</sup> After the city failed to comply with the conditions set by the decree, the court awarded Mrs. Cook back wages, and because the consent decree did not stipulate consequences of the breach, the court used its equitable discretion to award Mrs. Cook damages.<sup>67</sup> *Cook* ultimately held that if the consequences of breaching a consent decree are not outlined, a court has equitable discretion to fashion a remedy for violation.<sup>68</sup>

In addition, the D.C. Circuit looked to other cases to assist in its interpretation of the consent decree in question in *United States v. Volvo Power-*

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<sup>57</sup> Clean Air Act, 42 U.S.C. § 7408(a)(1)(A) (2012); see *United States v. Volvo Powertrain Corp.* (*Volvo II*), 758 F.3d 330, 330 (D.C. Cir. 2014).

<sup>58</sup> 42 U.S.C. § 7521(a)(3)(A)(i); see *Volvo II*, 758 F.3d at 335.

<sup>59</sup> See *Volvo II*, 758 F.3d at 335.

<sup>60</sup> *Id.* at 344–45 (citing *Segar v. Mukasey*, 508 F.3d 16, 17–18 (D.C. Cir. 2007)).

<sup>61</sup> 508 F.3d at 17–18.

<sup>62</sup> *Id.* at 18, 21.

<sup>63</sup> *Id.* at 21–22.

<sup>64</sup> See 758 F.3d at 343 (citing *Cook v. City of Chicago*, 192 F.3d 693, 694 (7th Cir. 1999)).

<sup>65</sup> 192 F.3d at 694.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 698.

*train Corp.*<sup>69</sup> The United States Court of Appeals for the Seventh Circuit previously held in *Federal Trade Commission v. Trudeau* that a district court must document its records and explain its rationale in selecting a calculation method when imposing a monetary penalty.<sup>70</sup> The penalty must be “a reasonable approximation of losses, gains, or some other measure the court finds appropriate.”<sup>71</sup>

Finally, the D.C. Circuit ordered financial penalties for violating a consent decree in *United States v. Caterpillar, Inc.*<sup>72</sup> The consent decree, and subsequent infractions, stemmed from violations of the Clean Air Act.<sup>73</sup> That court determined the monetary penalty by using the stipulated penalty formula described in the consent decree.<sup>74</sup>

### III. ANALYSIS

In *United States v. Volvo Powertrain Corp.*, the United States Court of Appeals for the District of Columbia Circuit ultimately issued four important holdings.<sup>75</sup> The court rejected Volvo Powertrain’s request to apply contempt standards to determine if a violation of the consent decree occurred.<sup>76</sup> The D.C. Circuit declined to apply that standard, citing that the standard would not have a meaningful effect on the outcome of the case.<sup>77</sup>

The court then focused on reviewing the District Court’s interpretation of the consent decree according to the principles of contract law.<sup>78</sup> The court examined how a reasonable person in the position of the parties would have interpreted the consent decree.<sup>79</sup> It quoted the language of the consent decree:

all heavy-duty diesel and non-road compression-ignition engines  
“manufactured at any facility owned or operated by VTC on or  
after January 1, 1998, for which a Certificate of Conformity is  
sought, must meet all applicable requirements of this Decree, re-

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<sup>69</sup> See *Trudeau*, 579 F.3d at 773; *United States v. Caterpillar Inc.*, 227 F. Supp. 2d 73, 90 (D.D.C. 2002).

<sup>70</sup> 579 F.3d at 773.

<sup>71</sup> *Id.*

<sup>72</sup> 227 F. Supp. 2d at 90.

<sup>73</sup> *Id.* at 77 (citing 42 U.S.C. § 7522(a)(1) (2012)).

<sup>74</sup> See *id.* at 86–89.

<sup>75</sup> See 758 F.3d 330, 338–46 (D.C. Cir. 2014).

<sup>76</sup> *Id.* at 337–38. The contempt standard requires “clear and convincing evidence” to demonstrate that a consent decree provision was violated. *Id.* at 338.

<sup>77</sup> *Id.* The court reasoned that “clear and convincing evidence” requirement of the contempt standard would be irrelevant in this case because there is no question as to the number of engines manufactured, or the fact that the engines failed to meet emissions requirements. *Id.*

<sup>78</sup> *Id.* at 339.

<sup>79</sup> *Id.*

ardless of whether VTC still owned, owns, operated, or operates that facility at the time the engine is manufactured.”<sup>80</sup>

The D.C. Circuit reasoned that since Volvo Powertrain is the successor to Volvo Truck Corp., it must follow that the Volvo Penta engines were indeed manufactured at a facility owned and operated by Volvo Powertrain.<sup>81</sup> Therefore, the engines were subject to all the requirements of the consent decree.<sup>82</sup>

The D.C. Circuit also held that there was no abuse of discretion in the District Court’s equitable remedy for damages stemming from Volvo Powertrain’s violation of the consent decree.<sup>83</sup> Finally, the court dismissed Volvo Powertrain’s argument that it should not be held liable for interest that accrued before the issuance of the written demand for penalties.<sup>84</sup> The D.C. Circuit reasoned that since Volvo Powertrain did not question the interest payment during the informal dispute resolution negotiations, Volvo Powertrain failed to preserve its right to challenge the interest payment in the courts.<sup>85</sup>

On its face, *Volvo Powertrain Corp.* appears to be an expansion of the regulatory power of the Environmental Protection Agency (“EPA”).<sup>86</sup> Volvo Powertrain was forced to pay civil penalties for engines that were never offered for sale, sold, or imported within the borders of the United States.<sup>87</sup> The EPA’s grant of authority from Congress does not confer to the EPA the ability to enforce United States emissions standards on engines that never enter the United States<sup>88</sup> Similarly, the Clean Air Act cannot impose penalties on parties in violation of its provisions abroad.<sup>89</sup> In addition, the consent decree contains no language stating that Volvo Powertrain agreed to the EPA’s exercise of extraterritorial enforcement.<sup>90</sup>

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<sup>80</sup> *Id.*

<sup>81</sup> *Id.* As noted previously, the corporate structure of Volvo Truck Corp changed shortly after entering the consent decree. *Id.* at 336. Volvo Powertrain and Volvo Construction became parties to the consent decree, and Volvo Penta remained a subsidiary of Volvo Powertrain. *Id.*

<sup>82</sup> *Id.* at 340.

<sup>83</sup> *Id.* at 334. The D.C. Circuit found that the consent decree’s stipulated penalty provision was sufficiently clear and was an appropriate tool to determine penalty payments for Volvo Powertrain. *Id.* at 345.

<sup>84</sup> *Id.* at 345–46.

<sup>85</sup> *Id.* at 346.

<sup>86</sup> *Id.* at 334 (finding that the lower court did not abuse its discretion in ordering Volvo Powertrain to pay a financial penalty stemming from violation of the consent decree).

<sup>87</sup> *See id.* at 341.

<sup>88</sup> *See* 42 U.S.C. § 7401(b)(1) (2012); Final Principal Brief for Appellant at 40, *Volvo II*, 758 F.3d 330 (No. 12-5234), 2013 WL 2446138.

<sup>89</sup> *See* Final Principal Brief for Appellant, *supra* note 88 at 20, 40. The Clean Air Act does not explicitly allow for extraterritorial enforcement of the United States’ environmental policies. *See* 42 U.S.C. § 7401(b)(1); Final Principal Brief for the Appellant, *supra* note 88 at 20, 40.

<sup>90</sup> *See* Final Principal Brief for Appellant, *supra* note 88 at 40–41.

These claims persuasively argue that the federal government was overreaching by trying to enforce the consent decree.<sup>91</sup> Nevertheless, the D.C. Circuit correctly dismissed these arguments because Volvo Penta sought certificates of compliance for the 3456 engines it manufactured that model year.<sup>92</sup> EPA compliance regulations apply to all engines for which a manufacturer seeks a certificate of conformity, regardless of whether the engines are ever imported and sold in the United States.<sup>93</sup> Thus, the D.C. Circuit correctly ruled that by requesting a certificate of conformity, Volvo Penta subjected itself to United States jurisdiction and the engines were subject to the requirements of the EPA.<sup>94</sup>

*Volvo Powertrain Corp* is a decision rooted in the facts of the specific case.<sup>95</sup> Volvo Penta had no obligation to seek EPA certificates of conformity for the engines at issue in the instant case.<sup>96</sup> As such, Volvo Powertrain would not be in violation of the consent decree if Volvo Penta declined to seek these certificates.<sup>97</sup> Furthermore, the consent decree's non-road pull ahead advances the principal goals of the Clean Air Act by accelerating emissions reductions.<sup>98</sup> An EPA certificate of conformity allows an engine to be sold or imported into the United States.<sup>99</sup> Once issued, it is unlikely that either the manufacturer or the Government could track the location and use of each engine.<sup>100</sup> Thus, in order to ensure that all Volvo Powertrain engines potentially entering the U.S. met the appropriate requirements, it was necessary for the consent decree to be linked to the submission of a request for a certificate of conformity.<sup>101</sup>

Opponents to the court's ruling in *Volvo Powertrain Corp.* warned in an amicus brief that corporations will now be hesitant to enter into consent decrees as they are unsure of their possible interpretations and global reach.<sup>102</sup> Some amici argued that the ruling will be deleterious to the usage of consent decrees in environmental enforcement actions, as fears of financial uncertainty surrounding the decrees could lead to alternative settle-

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<sup>91</sup> *See id.*

<sup>92</sup> *See Volvo II*, 758 F.3d at 342–43.

<sup>93</sup> *See id.*; 40 C.F.R §§ 89.115(d), 89.117 (2016).

<sup>94</sup> *See Volvo II*, 758 F.3d at 342–43; 40 C.F.R § 89.115(a).

<sup>95</sup> *See Volvo II*, 758 F.3d at 343.

<sup>96</sup> *See id.* at 342–43.

<sup>97</sup> *See id.*

<sup>98</sup> *See* 42 U.S.C. § 7401(b)(1) (2012); Brief for the United States in Opposition at 16, *Volvo II*, 758 F.3d 330 (No. 14-748), 2015 WL 2170431.

<sup>99</sup> *See* Brief for the United States in Opposition, *supra* note 98, at 16.

<sup>100</sup> *See id.*

<sup>101</sup> *See id.* at 17.

<sup>102</sup> Brief of *Amici Curiae* The National Association of Manufacturers et al., in Support of Defendant-Appellant at 3–4, *Volvo II*, 758 F.3d 330 (No. 12-5234), 2012 WL 6636399.

ments.<sup>103</sup> These fears do not reflect that the holding of *Volvo Powertrain Corp.* is closely linked to the specific facts in the case.<sup>104</sup> Volvo Powertrain subjected itself to United States jurisdiction by seeking the EPA certificates of compliance, thus triggering the violation of the consent decree.<sup>105</sup> While critics of the decision may claim government agency overreach, the holding is cabined to the specific facts and circumstances of the case.<sup>106</sup> Nevertheless, the holding of *Volvo Powertrain Corp.* should put businesses on notice as to the type of activities that could trigger enforcement of a consent decree provision.<sup>107</sup>

### CONCLUSION

The United States Court of Appeals for the District of Columbia correctly upheld the District Court's interpretation and application of the consent decree between Volvo Powertrain Corporation and the Government. On the surface, *United States v. Volvo Powertrain Corp.* appears to be an overreach by the Environmental Protection Agency (EPA), using the Clean Air Act as a vehicle to promote U.S. environmental policies abroad. After close examination of the D.C. Circuit's holdings, it is clear that Volvo Powertrain subjected itself to U.S. jurisdiction by requesting certificates of compliance from the EPA for the non-road compression-ignition engines manufactured at the Volvo Penta facility. *Volvo Powertrain Corp.* sends a clear message to corporations to clearly understand the scope and reach of the consent decrees that they enter into.

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<sup>103</sup> See *id.* at 3.

<sup>104</sup> See *Volvo II*, 758 F.3d at 343.

<sup>105</sup> See *id.*

<sup>106</sup> See *id.*

<sup>107</sup> See *id.*

