

1 JOHN C. CRUDEN
Assistant Attorney General
2 Environment and Natural Resources Division

3 JOSHUA H. VAN EATON (WA-39871)
4 BETHANY ENGEL (MA-660840)
5 NIGEL B. COONEY (MO-59824)
Trial Attorneys

6 U.S. Department of Justice
7 P.O. Box 7611
8 Washington DC 20044-7611
9 Telephone: (202) 514-5474
Facsimile: (202) 514-0097
10 Email: Josh.Van.Eaton@usdoj.gov

11 *Attorneys for Plaintiff United States of America*

12
13 **UNITED STATES DISTRICT COURT**
14 **NORTHERN DISTRICT OF CALIFORNIA**
15 **SAN FRANCISCO DIVISION**

16		)	MDL No. 2672 CRB (JSC)
17	IN RE: VOLKSWAGEN “CLEAN)	
18	DIESEL” MARKETING, SALES	)	UNITED STATES’ NOTICE OF
19	PRACTICES, AND PRODUCTS	)	MOTION, MOTION, AND
20	LIABILITY LITIGATION	)	MEMORANDUM IN SUPPORT OF
21	This Document Relates to:	)	ENTRY OF PARTIAL CONSENT
22	<i>United States of America v. Volkswagen</i>	)	DECREE IN <i>United States of America v.</i>
23	<i>AG, et al.</i> , Case No. 3:16-cv-00295	)	<i>Volkswagen AG, et al. Case No. 2:16-cv-</i>
24		)	<i>10006 (E.D. Mich. 2016)</i>
25		)	Hon. Charles R. Breyer
26		)	Hearing (Preliminary): October 18, 2016
27		)	Time: 8:00 a.m.
28		)	Ct. Rm.: 6 - 17 th Floor

UNITED STATES MOTION FOR
ENTRY OF PARTIAL CONSENT
DECREE, MDL No. 2672 CRB (JSC)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Table of Contents

Table of Exhibits iv

Table of Authorities v

NOTICE OF MOTION AND MOTION 1

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT 2

 I. Introduction 2

 II. Legal Standard 5

 III. Description of the Public Comment Process 6

 IV. The Partial Settlement Provides a Robust and Timely Environmental Remedy for
 Nearly 500,000 Vehicles that are Currently On the Road and Do Not Meet
 Certified Emissions Standards. 8

 A. The Settlement is Fair. 8

 1. The Settlement is the Product of a Court-Ordered Settlement
 Process Conducted by the Settlement Master. 9

 2. The Settlement Takes into Account but is Separate from the
 Related Settlements with the Federal Trade Commission and
 Plaintiff Steering Committee. 10

 B. The Settlement is Reasonable and Advances the Purposes of the Clean Air
 Act. 11

 1. The Emissions Modification Recall Remedy Provides a Feasible
 Technical Solution to the Problem of Excess Emissions in a
 Reasonable Timeframe. 12

 2. The Buyback Recall is an Appropriate Remedy for Vehicles that
 Cannot be Made to Meet their Certified Emissions Standard in a
 Reasonable Timeframe. 15

 3. The Environmental Mitigation Trust Provides for Mitigation of
 Past and Future Excess NOx Emissions. 17

 4. The ZEV Investment Commitments Address the Environmental
 Injury Caused by Improper Marketing and Sale of “Clean Diesel”
 Vehicles. 18

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

- V. Having Reviewed the Public Comments, the United States Supports, and the Parties Have Agreed to, a Number of Minor Changes to the Proposed Consent Decree as Reflected in the Attached Partial Consent Decree as Amended. 20
- VI. None of the Comments Received During the Period for Public Comment Warrant Disapproval of the Proposed Consent Decree. 21
 - A. Settling Defendants’ Obligations Under the Proposed Consent Decree are Independent of the Related Settlements; Objections and Opt-Outs to the Class Action Settlement Do Not Justify Rejecting the Consent Decree... 21
 - B. The NOx Mitigation and ZEV Investment Components of the Proposed Consent Decree Appropriately Remedy the Environmental Harm Caused by Settling Defendants’ Conduct. 23
 - C. The Proposed Consent Decree Does Not Resolve Issues Relating to Either the 3.0 Liter Vehicles or Civil Penalty. 24
- VII. Conclusion 24

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Table of Exhibits

1. Proposed Partial Consent Decree as Amended
2. Redline Edits to Appendix D of Proposed Partial Consent Decree
3. Index of Comments Received by Department of Justice
4. Comments Received by Department of Justice (Exhibits 4a – 4h)
5. Department of Justice Response to Comments

Table of Authorities

Cases

Citizens for Better Env't v. Gorsuch, 718 F.2d 1117 (D.C. Cir. 1983) 6

In re Bluetooth Headset Prod. Liab. Litig., 654 F.3d 935 (9th Cir. 2011) 9

Officers for Justice v. Civil Serv. Comm'n, 688 F.2d 615 (9th Cir. 1982) 6

Speed Shore Corp. v. Denda, 605 F.2d 469 (9th Cir. 1979)..... 6

United States v. Azko Coatings of Am., Inc., 949 F.2d 1409 (6th Cir. 1991) 6, 22

United States v. Cannons Eng'g Corp., 899 F.2d 79 (1st Cir. 1990) 6, 9, 14, 22

United States v. Chevron U.S.A. Inc., 380 F. Supp. 2d 1104 (N.D. Cal. 2005)..... passim

United States v. City of Miami, Fla., 664 F.2d 435 (5th Cir. 1981) 14

United States v. Colorado, 937 F.2d 505 (10th Cir. 1991)..... 10

United States v. McInnes, 556 F.2d 436 (9th Cir. 1977) 6

United States v. Montrose Chem. Corp., 50 F.3d 741 (9th Cir. 1995) 5, 6, 14, 21

United States v. Oregon, 913 F.2d 576 (9th Cir. 1990)..... 5, 9, 23

United States v. Seymour Recycling Corp., 554 F. Supp. 1334 (S.D. Ind. 1982)..... 22

United States v. Wallace, 893 F. Supp. 627 (N.D. Tex. 1995) 8

Statutes

CAA § 209, 42 U.S.C. § 7543 4

Regulations

28 C.F.R. § 50.7 6

40 C.F.R. § 86.1843-01..... 3

40 C.F.R. § 86.1848-10(c)(6)..... 4

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on October 18, 2016, at 8:00 a.m., or at such other date as may be agreed upon, in Courtroom 6 of the United States District Court for the Northern District of California, located at 450 Golden Gate Avenue, San Francisco, California, Plaintiff the United States of America (“United States”) will and hereby does move this Court to enter, as a final judgment in this matter, the Partial Consent Decree¹ as amended and submitted to this Court as a Proposed Order and attached to this Motion as Exhibit 1. After the United States, in consultation with the Environmental Protection Agency (“EPA”), reviewed comments submitted by the public on the proposed Consent Decree lodged with this Court on June 28, 2016 (Dkt. No. 1605-1), the United States on behalf of EPA; the People of the State of California, by and through the California Air Resources Board (“CARB”) and Kamala D. Harris, Attorney General of the State of California (collectively, “California”); and Volkswagen AG, Audi AG, Volkswagen Group of America, Inc., and Volkswagen Group of America Chattanooga Operations, LLC (“Settling Defendants”) (collectively, the “Parties”), agreed to revisions in response to those comments, and the United States now moves the Court to enter the Partial Consent Decree as amended.² The revisions are shown in red-line format in Exhibit 2. The Parties do not believe a second public comment period is required, because the revisions, which modify certain minor aspects of the Environmental Mitigation Trust Agreement, do not alter the obligations or substance of the lodged Consent Decree.

As set forth below in the Memorandum in Support of this Motion, the Court should sign

¹ As discussed in Section V of the United States’ Memorandum in Support, the Parties have agreed on a number of minor changes to Appendix D of the proposed Decree. The complete Decree as presented by the United States for the Court’s signature is attached here as Exhibit 1.

² California’s and Settling Defendants’ agreement to the changes in the proposed Decree is reflected in separate filings each of those Parties will make in support of entry of the Partial Consent Decree as amended.

1 and enter the proposed Partial Consent Decree as amended (hereinafter “Consent Decree” or
2 “Decree”), because it is fair, reasonable, consistent with the goals of the Clean Air Act, and in
3 the public interest. Settling Defendants and California have consented to entry of the Decree
4 without further notice. Decree at ¶ 97. Accordingly, the United States now respectfully requests
5 that the Court approve and enter the proposed Consent Decree.

6 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT**

7 **I. Introduction**

8 By now this Court is well familiar with the key facts of this case that have led to a
9 widespread environmental injury spanning all 50 states and implicating hundreds of thousands of
10 vehicles. In January of this year, the United States filed its complaint in the Eastern District of
11 Michigan alleging that Settling Defendants had installed illegal defeat devices in nearly 600,000
12 light duty “TDI” diesel vehicles, impairing the vehicles’ emission control systems and causing
13 emissions to exceed EPA standards. With respect to nearly 500,000 2.0 liter vehicles, the United
14 States alleged that defeat device software detects when the car is being tested for compliance
15 with EPA emissions standards and turns on full emissions controls only during that testing
16 process. This results in cars that meet emissions standards in the laboratory and at the test site,
17 but emit oxides of nitrogen (“NOx”) at levels up to 40 times the EPA-compliant level during
18 normal on-road driving.

19 The scope of the Clean Air Act violations alleged by the United States in this case is
20 unprecedented. Indeed, at this Court’s initial hearing convening this multidistrict litigation
21 proceeding, the Court noted the immediate problems posed by such egregious and widespread
22 environmental noncompliance across the entire fleet of TDI vehicles:

23 THE COURT: [Y]ou have a class of people, somewhere in the neighborhood of 500- to
24 600,000 customers who have a vehicle that, one, is not in compliance, as the Court
25 understands it, with federal and state law; and, two, has a questionable value in terms of
26 whether it can be traded in or resold; and, three, is presently polluting the air. . . . Now,
27 what does that mean? It means that you have at least a half million people who have an
28 immediate problem as to what to do about their vehicle . . . So I think that this case has
to have significant attention to immediate resolutions of these cases.

1 manufacturer's application for certification" 40 C.F.R. § 86.1848-10(c)(6).

2 In this case, Settling Defendants manufactured and installed software in the subject
3 vehicles with functions and/or calibrations that render the vehicles' emission controls inoperable
4 unless the vehicles are undergoing prescribed emissions testing. These software functions and
5 calibrations were neither described nor justified in the Settling Defendants' applicable COC
6 applications, and cause the vehicles to not conform in all material respects to the specifications
7 described in the COC applications. The undisclosed software functions and/or calibrations
8 constitute defeat devices, resulting in excess emissions and numerous violations of the Clean Air
9 Act ("CAA").

10 The United States' Complaint alleges violations under multiple subparagraphs of Section
11 203 of the CAA, 42 U.S.C. § 7522; namely, 1) importing and selling uncertified vehicles in
12 violation of 42 U.S.C. § 7522(a)(1); 2) manufacturing, selling or installing a defeat device in
13 violation of 42 U.S.C. § 7522(a)(3)(B); 3) tampering by rendering inoperative the certified
14 pollution control system in violation of 42 U.S.C. § 7522(a)(3)(A); and 4) failing to report
15 information required by EPA to determine whether Defendants acted in compliance with motor
16 vehicle emissions standards in violation of 42 U.S.C. § 7522 (a)(2)(A).

17 *Terms of the Partial Settlement.* The proposed 2.0 liter partial settlement partially
18 resolves the United States' claims for injunctive relief with respect to the nearly 500,000 vehicles
19 equipped with 2.0 liter engines. The Decree also partially resolves the 2.0 liter vehicle claims for
20 injunctive relief asserted by California under its environmental and unfair competition laws,
21 recognizing CARB's unique status under the Clean Air Act as a co-regulator that sets and
22 enforces its own standards for mobile emission sources. *See* CAA § 209, 42 U.S.C. § 7543.
23 Under this Decree, Settling Defendants³ are required to achieve a recall of at least 85 percent of
24

25
26 ³ Defendants Dr. Ing. h.c. F. Porsche AG and Porsche Cars North America, Inc., while named in
27 the United States' Complaint, are not among the Settling Defendants, as the proposed Decree
28 does not resolve any claims relating to these Defendants.

1 the affected 2.0 liter vehicles by June 30, 2019 (both nationally and in California), either by
2 removing the vehicles from the roads of the United States or modifying them in accordance with
3 the terms of the Decree. To accomplish this recall, Settling Defendants must offer every owner
4 and lessee of an operable affected vehicle the option of a buyback or lease termination.
5 Additionally, if Settling Defendants submit a proposal for modifying the vehicles to improve
6 emissions performance in accordance with the required performance and design requirements,
7 and EPA and CARB approve the modification, Settling Defendants must offer owners and
8 lessees the option of an emissions modification. The choice between a buyback or an approved
9 modification is entirely up to the affected owner or lessee. If Settling Defendants do not achieve
10 the 85 percent recall rate, Settling Defendants must make additional contributions into the
11 environmental mitigation trust described below.

12 In addition to the recall, Settling Defendants will pay \$2.7 billion over three years to fully
13 remediate the excess NOx emissions from the affected 2.0 liter vehicles. These payments will be
14 used to establish a mitigation trust that will be administered by a mitigation trustee, with
15 allocations to specific state, territorial, and tribal government beneficiaries to use for specific
16 NOx mitigation actions. Lastly, the proposed Decree will require Settling Defendants to invest
17 an additional \$2 billion to promote the use of zero emission vehicles (“ZEVs”) and ZEV
18 technology.

19 As a partial settlement of the United States’ claims, the Consent Decree does not resolve
20 any claims with respect to the defendants’ 3.0 liter subject vehicles, or with respect to civil
21 penalties or injunctive relief measures to prevent future violations of this kind.

22 **II. Legal Standard**

23 Approval of a proposed consent decree is within the informed discretion of the district
24 court. *United States v. Oregon*, 913 F.2d 576, 580 (9th Cir. 1990). The court reviews the decree
25 to determine whether it is fair, reasonable, and consistent with the objectives of the statute at
26 issue. *United States v. Montrose Chem. Corp.*, 50 F.3d 741, 743 (9th Cir. 1995). A court may
27

1 not modify a proposed consent decree before entry; it must either approve or reject the settlement
2 agreed upon by the parties. *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 630 (9th
3 Cir. 1982).

4 The court's review is informed by the "overriding public interest in settling and quieting
5 litigation." *United States v. McInnes*, 556 F.2d 436, 441 (9th Cir. 1977); *see also Speed Shore*
6 *Corp. v. Denda*, 605 F.2d 469, 473 (9th Cir. 1979) ("Settlement agreements conserve judicial
7 time and limit expensive litigation."). In reviewing a consent decree, the court "need not inquire
8 into the precise legal rights of the parties nor reach and resolve the merits of the claims or
9 controversy, but need only determine that the settlement is fair, adequate, reasonable and
10 appropriate under the particular facts and that there has been valid consent by the concerned
11 parties." *Citizens for Better Env't v. Gorsuch*, 718 F.2d 1117, 1126 (D.C. Cir. 1983) (internal
12 citation omitted). Especially when reviewing a consent decree involving a federal agency, as is
13 the case here, a district court "must refrain from second-guessing the Executive Branch."

14 *Montrose Chem. Corp.*, 50 F.3d at 746 (quoting *United States v. Cannons Eng'g Corp.*, 899 F.2d
15 79, 84 (1st Cir. 1990)). The court's "deference is particularly strong where the decree has been
16 negotiated by the Department of Justice on behalf of an agency like EPA which is an expert in its
17 field." *United States v. Chevron U.S.A. Inc.*, 380 F. Supp. 2d 1104, 1111 (N.D. Cal. 2005)
18 (citing *United States v. Azko Coatings of Am., Inc.*, 949 F.2d 1409, 1436 (6th Cir. 1991)).

19 **III. Description of the Public Comment Process**

20 *Comments Received by the Department on the Decree.* The Department of Justice must
21 hold a 30-day comment period on certain proposed consent decrees and must withdraw from the
22 proposed decree if the comments disclose facts or considerations which indicate that it is
23 inappropriate, improper or inadequate. 28 C.F.R. § 50.7. The Department must file the
24 comments with the court, *id.*, to help the court ensure that the settlement is in the public interest.
25 Here, the Department held the required 30-day public comment period from July 6, 2016 through
26 August 5, 2016, allowing citizens an adequate opportunity to present their views. 81 Fed. Reg.
27

1 44051 (July 6, 2016).

2 The Department received a total of 1,195 comments during the public comment period
3 from private citizens, state and local government offices and agencies, businesses, and
4 institutions and associations. An index of all comments is attached to this motion as Exhibit 3.
5 The comments are also grouped into eight batches and are included in their entirety in Exhibits
6 4a through 4h⁴. The Department of Justice, in consultation with EPA, prepared a “Response to
7 Comments” that groups the comments into general topics, provides a description of the major
8 issues raised by commenters, and gives a narrative response for each topic. *See* Exhibit 5.
9 Additionally, the broad themes that are raised by the comments as a whole are addressed in Part
10 VI of this memorandum.

11 The largest number of comments received by the Department (549) were submitted on
12 behalf of or in connection with IdleAir, a company that provides truck stop electrification
13 (“TSE”) services to long-haul truck drivers and allows drivers to operate the electric components
14 of their vehicle (heating, air conditioning, radio, etc.) without having to idle the engine. These
15 commenters advocated for TSE to be expressly included as an available mitigation project under
16 the Environmental Mitigation Trust.⁵ Another large group of comments (463) came from
17 affected Volkswagen and Audi vehicle owners and lessees who offered their comments on the
18 buyback, lease termination, and emissions modification aspects of the proposed settlement.
19 These comments were diverse in the topics addressed, but the majority were centered on the
20 dollar amount and calculation of the consumer compensation packages provided in the related
21 proposed settlements filed by the Federal Trade Commission (“FTC” and “FTC Settlement”) and
22 the Plaintiff Steering Committee on behalf of consumer claimants (“PSC” and “Class Action
23

24 _____
25 ⁴ Comments received from private individuals have had personally identifying information
26 redacted in compliance with Fed. R. Civ. P. 5.2.

27 ⁵ The United States has responded to these comments collectively in Comment Response No. 19
28 of the Response to Comments document. *See* Exhibit 5 at 20.

1 Settlement”) (collectively, the “Related Settlements”).⁶ The remaining comments received by
2 the Department came from individuals and various public, private, non-profit, and for-profit
3 entities and offices and addressed multiple aspects of the proposed decree -- focusing primarily
4 on the Environmental Mitigation Trust and ZEV Investment components, but also commenting
5 on the buyback, lease termination, and emissions modification elements as well.

6 *Comments Received by the Court.* In addition to the comments submitted directly to the
7 Department via the formal public comment process, the Department also reviewed 674
8 comments that were submitted directly to the Court and distributed by the Court to all parties.
9 As the Court is already familiar with these comments, they are not included in the attached index
10 and collection of comments. Although these comments submitted to the Court were not directly
11 submitted to the Department of Justice as official public comments on the Consent Decree, the
12 attached Response to Comments document addresses the issues raised by comments submitted to
13 the Court to the extent those comments overlap with similar comments submitted directly to the
14 Department.

15 **IV. The Partial Settlement Provides a Robust and Timely Environmental Remedy for**
16 **Nearly 500,000 Vehicles that are Currently On the Road and Do Not Meet Certified**
17 **Emissions Standards.**

18 A. The Settlement is Fair.

19 In assessing the propriety of a proposed consent decree, courts typically first examine
20 procedural fairness, and make a determination as to whether the negotiation process was “fair
21 and full of adversarial vigor.” *Chevron*, 380 F. Supp. 2d at 1111 (citation omitted). Procedural
22 fairness calls for consideration of the “candor, openness, and bargaining balance” of the
23 negotiations. *United States v. Wallace*, 893 F. Supp. 627, 632 (N.D. Tex. 1995).
24

25
26 ⁶ The United States has responded to these comments collectively in Comment Responses No. 1
27 through 9 of the Response to Comments document. *See* Exhibit 5 at 1-8.

1 members of the Plaintiff Steering Committee to discuss issues of mutual concern. Over the
2 course of many weeks and many lengthy settlement negotiations, the Parties worked toward a
3 comprehensive settlement that addresses the technical aspects of fixing the affected vehicles,
4 consumer issues involving how to get the in-use vehicles modified or removed from the road,
5 and environmental concerns surrounding the harm caused by the vehicles and the required
6 environmental remediation.

7 The United States, California, and Settling Defendants announced their initial agreement
8 in principle at the Court's April 21 hearing, and subsequently continued their intensive
9 negotiations to reduce the agreement in principle to the terms of the proposed Decree filed with
10 the Court on June 28. Throughout the negotiations, settlement discussions were conducted in
11 good faith and at arm's length by experienced counsel on all sides. The proposed Consent
12 Decree reflects the strength of the Parties' negotiating positions and the efforts of all Parties to
13 reach a just and equitable resolution with regard to the 2.0 liter vehicles. The proposed
14 settlement is not the "product of collusion." *Chevron*, 380 F. Supp. 2d at 1111; *United States v.*
15 *Colorado*, 937 F.2d 505, 509 (10th Cir. 1991).

16 2. The Settlement Takes into Account but is Separate from the Related
17 Settlements with the Federal Trade Commission and Plaintiff Steering
18 Committee.

19 One unique aspect of the proposed Consent Decree is its overlap with and relation to two
20 other significant settlements in the multidistrict litigation – those Related Settlements by the
21 FTC, the federal agency that enforces the nation's consumer protection laws, and by the PSC,
22 representing individual vehicle owners and lessees bringing private civil actions in this MDL.
23 The United States' and California's Consent Decree is separate from these Related Settlements
24 and can be entered by this Court as a standalone agreement or simultaneously with the Related
25 Settlements. *See* Discussion at Section VI.A, *infra*. Both of the Related Settlements provide
26 consumer relief for car owners and lessees who were injured by Settling Defendants' marketing,
27 sale, and lease of the affected vehicles. The proposed Consent Decree acknowledges that

1 Settling Defendants may fulfill the buyback and lease termination requirements of the Decree by
2 carrying out detailed obligations in the Related Settlements. The FTC and PSC agreements
3 contain robust measures that ensure Settling Defendants will administer a fair, transparent, and
4 effective consumer program, under Court oversight, to remove the offending vehicles from the
5 roads of the United States. The FTC in particular, as a partner federal agency fulfilling its
6 mandate to protect consumers, has drawn on its considerable expertise to ensure that the
7 consumer remedies provided by the Related Settlements are fair and robust, and will represent
8 full compensation for the many consumers injured by Settling Defendants' conduct.

9 Although the three settlements are separate, and each settlement resolves a different set of
10 claims, the settlements are intended to be complementary of one another and to collectively
11 provide comprehensive environmental and consumer relief. Settling Defendants' obligations
12 under the three settlements ensure that any modification made to the subject vehicles is done
13 with the approval of the appropriate regulators, EPA and CARB. In addition, any consumer
14 compensation that is paid to affected vehicle owners and lessees is done in accordance with
15 terms agreed to by the FTC (the federal agency with a statutory mandate to serve the cause of
16 consumer protection) and by the PSC (representing the interests of those vehicle owners and
17 lessees who were directly affected by Settling Defendants' conduct), thus ensuring that any
18 payments made to vehicle owners in satisfaction of the Consent Decree buyback requirement are
19 fair and appropriate. Ultimately, the substantial payments Settling Defendants will make to the
20 Environmental Mitigation Trust, combined with the Consent Decree requirement that 85% of all
21 vehicles be modified or removed from the road if Settling Defendants are to avoid substantial
22 supplemental mitigation payments, works to ensure that all three agreements achieve an effective
23 and lasting solution to the environmental problems posed by these vehicles.

24 B. The Settlement is Reasonable and Advances the Purposes of the Clean Air Act.

25 As discussed above, the central objective of the proposed Consent Decree is to modify or
26 remove from the roads of the United States the nearly 500,000 2.0 liter subject vehicles that
27

1 currently do not meet emissions standards and that emit substantial amounts of NO_x in excess of
2 allowable limits. To achieve this objective, the Decree sets an aggressive requirement of
3 removing from operation at least 85% of 487,532 vehicles nationally (and 85% of all 70,814
4 vehicles in California) by no later than June 30, 2019, with additional mitigation payments
5 triggered if Settling Defendants fail to reach these recall rates. Decree App. A at Sec. VI. These
6 substantial mitigation payments (\$85 million for every percentage point short of the national
7 85% recall rate, and \$13.5 million for every percentage point short of the California 85% recall
8 rate) operate as a strong incentive for Settling Defendants to work quickly and diligently to
9 address the problem of excess emissions caused by the subject vehicles. *Id.* As described below,
10 Settling Defendants can receive credit toward the 85% capture requirement in two ways: by
11 offering to vehicle owners and lessees and performing an approved emissions modification that
12 will substantially reduce the NO_x emissions of the affected vehicles; or by executing a buyback
13 or lease termination for the affected vehicles and removing the vehicles from the road entirely
14 unless and until the vehicles receive an EPA/CARB-approved emissions modification.

15 1. The Emissions Modification Recall Remedy Provides a Feasible Technical
16 Solution to the Problem of Excess Emissions in a Reasonable Timeframe.

17 Appendix B of the proposed Consent Decree sets forth the technical requirements that
18 Settling Defendants must meet to receive approval from EPA and CARB to offer an emissions
19 modification to affected vehicle owners and lessees. The requirements are extremely detailed
20 and technical in nature, and include specified emission limits, onboard diagnostic system
21 requirements, application process requirements and deadlines, and provisions that govern the
22 means by which EPA and CARB will review submissions from the Settling Defendants and
23 monitor and enforce compliance. Decree App. B at Sec. III. All defeat devices must be removed
24 from the vehicles as part of the emissions modification. App. B. at ¶ 3.1.3. Any emissions
25 modification approved by EPA and CARB will require extensive testing by Settling Defendants
26 (both before and after the submission of any proposal) and may include both software changes
27 and new hardware. If approved, EPA and CARB estimate that an emissions modification will

1 reduce NOx emissions from the vast majority of vehicles by approximately 80 to 90 percent
2 compared to their original condition. U.S. EPA, *Volkswagen Clean Air Act Partial Settlement*
3 (2016), available at [https://www.epa.gov/enforcement/volkswagen-clean-air-act-partial-](https://www.epa.gov/enforcement/volkswagen-clean-air-act-partial-settlement)
4 settlement. Settling Defendants must provide consumers with an emissions modification
5 disclosure that has been approved by EPA and CARB and that contains a clear and accurate
6 description regarding all impacts of the emissions modification on the vehicle, including
7 emissions levels as compared with the limits to which the vehicles were originally certified, and
8 any impacts on fuel economy or vehicle maintenance. App. A at ¶ 3.2; App. B at ¶ 4.3.8.
9 Settling Defendants must also provide an extended warranty covering the emissions control
10 system and engine long block for any modified vehicle. App. B. at ¶ 3.9.

11 Although the proposed Consent Decree sets aggressive deadlines that Settling Defendants
12 must meet in order to complete the required testing and submit an application for an approved
13 emissions modification, the availability of such a modification to consumers is not guaranteed.
14 Only a modification that meets the demanding requirements of Appendix B will be approved. If
15 such a modification is approved, Settling Defendants must offer it to all affected vehicle owners
16 and lessees, free of charge and in perpetuity. That is, an approved emissions modification is a
17 form of vehicle recall that will always be available to any affected consumer, regardless of when
18 he or she obtained the vehicle or elects to receive the modification, and regardless of whether the
19 affected consumer is a member of any private class action settlement. App. A at ¶¶ 5.1 – 5.2.
20 Additionally, once an emissions modification is approved, the modification serves as a limitation
21 on Settling Defendants' ability to export, sell, or lease any affected vehicle. No affected vehicle
22 may be exported, sold, or leased by Settling Defendants unless and until it has received an
23 approved emissions modification. App. A at ¶ 7.2. In the event that no modification is approved
24 for a given class of vehicles, Settling Defendants are prohibited from selling, leasing, or
25 exporting the vehicles entirely.

26 Appendix B's requirements for an approved emissions modification also intersect with
27

1 Liter TDI Settlement, Decl. of Edward M. Stockton, Dkt. No. 1784-1, Aug. 26, 2016 at 15.
2 Thus, the Related Settlements make clear that the buyback commitments undertaken by Settling
3 Defendants meet or exceed the threshold requirement of a Retail Replacement Value contained
4 in the Consent Decree. Because the payments to consumers under the Related Settlements
5 exceed this threshold, the Consent Decree allows Settling Defendants to satisfy their Clean Air
6 Act buyback obligation by complying with the Related Settlements. App. A at ¶ 4.1.

7 3. The Environmental Mitigation Trust Provides for Mitigation of Past and
8 Future Excess NOx Emissions.

9 The proposed Consent Decree requires Settling Defendants to establish a NOx Mitigation
10 Trust and fund it with three annual payments of \$900 million, for a total amount of \$2.7 billion.
11 Decree at ¶ 14. The first payment is due within 30 days of this Court's entry of the Decree. *Id.*
12 Funds placed in the mitigation trust will be used for projects that reduce NOx – the major excess
13 pollutant from these vehicles and a significant public health concern. The form of the Trust is set
14 forth in Appendix D, though the operative Trust Agreement will not be finalized until a Trustee
15 is formally selected and approved by the Court upon motion by the United States. Decree at
16 ¶ 17. The United States will accept Trustee recommendations from states, Puerto Rico, the
17 District of Columbia and Indian tribes, in a process that is set forth in Section IV.D of the
18 proposed Consent Decree.

19 Once the Trust is established, those same governmental entities may apply to become
20 beneficiaries of the Trust by making certain certifications to the Court, including a waiver of
21 injunctive claims for mitigation arising from the 2.0 liter vehicles. App. D at ¶ 4.2 and
22 Attachment D-3. Beneficiaries will perform mitigation projects in accordance with the
23 requirements set forth in the Trust Agreement. Appendix D includes an initial allocation of
24 funds among all potential beneficiaries, App D at Attachment D-1, which will be adjusted by the
25 Trustee upon determination of which potential beneficiaries participate in the program. App. D
26 at ¶ 5.0. The allocation is based primarily on the number of 2.0 liter vehicles registered in each
27 jurisdiction, with a minimum funding allocation of \$7.5 million for each beneficiary and certain
28

1 allowances for a Tribal account and administrative costs. The Trust Agreement provides for
2 transparency of funding requests and financial reporting by the Trustee and the beneficiaries,
3 App. D at ¶ 5.2 and 5.3, and for the Court’s ongoing jurisdiction over disputes. App. D at ¶ 6.1.
4 Beneficiaries can select from a list of approved mitigation projects that are cost effective and
5 have a nexus to the excess NOx emissions caused by the violations. Eligible mitigation actions
6 can include projects to reduce NOx from heavy duty diesel sources near population centers, such
7 as large trucks that make deliveries and service ports, school and transit buses, and freight
8 switching railroad locomotives. App. D at Attachment 2. Actions may also include, subject to
9 certain limitations, charging infrastructure for light duty zero emission passenger vehicles. *Id.*
10 Under the terms of the Trust, beneficiaries have the flexibility to choose which projects on the
11 list of eligible mitigation actions are the best options for their jurisdictions.

12 As mentioned above, if Settling Defendants fail to achieve a recall rate of 85% by June
13 30, 2019 between both the buyback and any emissions modification, Settling Defendants must
14 augment the mitigation fund by \$85 million for each 1% that the vehicle recapture rate falls short
15 of the mandated goal nationally and \$13.5 million for each 1% that the rate falls short in
16 California. EPA expects that the amount that Settling Defendants are required to initially
17 contribute to the trust fund is sufficient to fund projects to fully mitigate the total, lifetime excess
18 NOx emissions from the 2.0 liter vehicles. By requiring Settling Defendants to commit a
19 minimum of \$2.7 billion over three years to the mitigation trust, the proposed Consent Decree
20 ensures that Settling Defendants appropriately mitigate all past and future excess NOx pollution
21 caused by the 2.0 liter vehicles that do not meet emissions standards.

22 4. The ZEV Investment Commitments Address the Environmental Injury
23 Caused by Improper Marketing and Sale of “Clean Diesel” Vehicles.

24 Appendix C of the proposed Consent Decree, entitled “The ZEV Investment
25 Commitment,” requires Settling Defendants to invest \$2 billion over a 10-year period to support
26 the increased use of zero emission vehicle (“ZEV”) technology in the United States, including
27 the development and maintenance of ZEV charging infrastructure. Decree App. C at Parts II, III.

1 Appendix C commits Settling Defendants to two separate planning processes: one governing
2 \$1.2 billion in nationwide ZEV Investments, excluding California, that will be overseen by EPA;
3 and the other governing ZEV Investments totaling \$800 million that will be implemented in the
4 State of California and overseen by CARB. Settling Defendants are required to solicit input
5 from State, local, and Tribal governments for suggestions on the development of a national
6 investment plan. Thereafter, Settling Defendants will prepare separate National and California
7 ZEV investment plans for EPA and CARB approval. In connection with the National investment
8 plan, Settling Defendants can make three types of creditable investments: installing and
9 maintaining charging infrastructure, programs or actions to increase public exposure and access
10 to ZEVs, and brand-neutral education and public outreach. App. C ¶ 2.1. The California plan
11 contains similar requirements for a defined list of allowable investments and ensures that the
12 California investments are developed and implemented with appropriate input from CARB. The
13 California plan also allows for development of investments relating to heavy-duty ZEV charging
14 infrastructure, vehicle scrap and replace programs, and the development of a California “Green
15 City” initiative. App. C ¶¶ 1.10, 3.1.

16 To establish what investment costs can be credited against the \$2 billion obligation,
17 Settling Defendants must prepare a National and a California Creditable Cost Guidance in
18 accordance with the definitions and cost principles set forth in Consent Decree Attachment C-1,
19 subject to EPA and CARB approval, respectively. App. C ¶¶ 2.2, 3.2. A certified public
20 accountant retained by Settling Defendants, subject to the United States’ approval, must review
21 and attest to the accuracy and consistency of the costs with the approved guidances before EPA
22 or CARB will credit the claimed costs against Settling Defendants’ total obligations. App. C
23 ¶ 2.7. To ensure transparency, the Settling Defendants are required to submit annual reports of
24 the investments to EPA and CARB, and post the non-confidential part of the reports on a public
25 website. The annual reports will detail the progress of the ZEV projects and include Settling
26 Defendants’ costs for which they are seeking credit against the total obligation. App. C ¶¶ 2.9,
27

1 3.6.

2 The ZEV Investment Commitment in Appendix C of the proposed Consent Decree is a
3 form of injunctive relief that appropriately addresses part of the environmental injury caused by
4 Settling Defendants' deceptive marketing of the subject vehicles as "green." Although the
5 Environmental Mitigation Trust provides sufficient remediation for the excess tons of NOx
6 pollution in the air attributable to Settling Defendants' conduct, the ZEV Investment
7 Commitment targets the broader environmental injury caused by consumers' unwitting purchase
8 of vehicles that were thought to provide a host of environmental benefits, but instead did not. By
9 requiring Settling Defendants to invest \$1.2 billion nationally outside of California, and \$800
10 million in California over the next ten years, the proposed Consent Decree ensures that Settling
11 Defendants will take appropriate steps to promote truly environmentally-friendly vehicle
12 technologies to remedy the harm caused by Settling Defendants' conduct.

13 **V. Having Reviewed the Public Comments, the United States Supports, and the Parties**
14 **Have Agreed to, a Number of Minor Changes to the Proposed Consent Decree as**
15 **Reflected in the Attached Partial Consent Decree as Amended.**

16 The United States carefully reviewed the comments it received on the proposed Consent
17 Decree. Based on that review, the United States recommends (and the other parties to the
18 Consent Decree have also agreed to) a discrete number of changes to Appendices D and D-2 to
19 the Consent Decree. The changes are presented in redline strikeout form in Exhibit 2, and are
20 discussed in further detail in Section III of the Summary of Public Comments filed herewith. In
21 summary, the agreed changes include:

- 22 • The addition at subparagraph 2.1.1.2 of Appendix D of a default methodology for
23 distributing technical assistance funds to tribal beneficiaries.
- 24 • An extension of time at subparagraph 4.1 of Appendix D, from 30 to 90 days, for
25 non-tribal beneficiaries to submit their Beneficiary Mitigation Plans.
- 26 • A clarification at subparagraph 4.2.6 of Appendix D and the related Paragraph 6
27 of Appendix D-3 to make the waiver of claims by tribal beneficiaries effective
28 only upon receipt of funds.
- New language in subparagraph 5.2.15 to clarify the difference between a "match"

1 as used in the Diesel Emissions Reduction Act, and a “cost share.”

- 2 • Certain expansions and clarifications to the list of Eligible Mitigation Actions and
3 related definitions at Appendix D-2.

4 After reviewing the relevant public comments, the United States, in consultation with
5 EPA and CARB, are proposing these agreed changes to the mitigation trust with the agreement
6 of the other Parties to better further the objectives of the trust and the Consent Decree as a whole.
7 Nothing in these edits alters the fundamental structure of the trust, which is still fair, reasonable,
8 and furthers the objectives of the Clean Air Act. *Montrose Chem. Corp.*, 50 F.3d at 743.

9 **VI. None of the Comments Received During the Period for Public Comment Warrant
10 Disapproval of the Proposed Consent Decree.**

11 The United States received nearly 1,200 comments on the Consent Decree during the 30-
12 day public comment period. In Exhibit 5 to this motion (Response to Comments), the comments
13 are summarized and presented with narrative responses that address the particular issues raised.

14 The Response to Comments groups the comments into 33 broad categories that are each
15 addressed in detail and are organized following the general structure of the Consent Decree
16 appendices, responding to comments on buyback and emissions modification related issues
17 (Appendices A and B), the ZEV Investment Commitment (Appendix C), the Environmental
18 Mitigation Trust (Appendix D), and a fourth section that addresses miscellaneous comments.

19 A. Settling Defendants’ Obligations Under the Proposed Consent Decree are
20 Independent of the Related Settlements; Objections and Opt-Outs to the Class
Action Settlement Do Not Justify Rejecting the Consent Decree.

21 As discussed above, the proposed Consent Decree contains four key elements that are
22 addressed in four separate appendices to the Decree: 1) a buyback and lease termination
23 program to remove the subject vehicles from the roads of the United States; 2) standards for a
24 potential emissions modification that, if undertaken by Settling Defendants and approved by
25 EPA and CARB, will be offered to vehicle owners and lessees and will allow owners and lessees
26 to keep their car while substantially reducing emissions; 3) a plan for Settling Defendants to
27 invest \$2 billion nationwide and in California in ZEV technologies; and 4) provisions for a \$2.7

1 billion environmental mitigation trust that will fund a series of projects to offset the excess NOx
2 emissions attributable to the subject vehicles. None of these elements is dependent on the
3 Related Settlements being implemented or approved by this Court.

4 The proposed Consent Decree acknowledges that Settling Defendants may satisfy their
5 obligation to perform a buyback recall by implementing the buyback terms of the Related
6 Settlements. But even if either or both of those settlements were to be rejected by this Court,
7 Settling Defendants would still be in a position to satisfy their obligations under the Consent
8 Decree. That is, Settling Defendants would still have the capacity to modify or remove from the
9 roads of the United States at least 85% of the subject vehicles (or make required mitigation
10 payments for failing to do so). By the terms of the Decree, Defendants would be under the
11 supervision of this Court to ensure that vehicle owners were offered a fair and reasonable price
12 for their vehicle, i.e. – the Retail Replacement Value. Consequently, and notwithstanding the
13 fate of the Related Settlements, the buyback provisions of the proposed Decree are still fair,
14 reasonable, and consistent with the objectives of the Clean Air Act for all the reasons stated here.
15 *See United States v. Montrose Chem. Corp.*, 50 F.3d 741, 743 (9th Cir. 1995).⁷

16 Claims for economic damages, consumer damages, or damages associated with fraud or
17 deceptive advertising are not germane to this Clean Air Act vehicle recall – whether those claims
18 are resolved via the Related Settlements or remain to be litigated, Settling Defendants are still
19 capable of carrying out their obligations under the proposed Consent Decree. The Consent
20 Decree is a Clean Air Act settlement that provides injunctive relief intended to make the
21 environment whole. By instituting a buyback and lease termination program, a program to
22 modify vehicles in accordance with appropriate standards, and programs to perform sufficient
23

24 ⁷ The United States fully supports entry of the FTC Settlement and the Class Action Settlement
25 because both settlements represent a reasonable method for Settling Defendants to satisfy part of
26 their obligations under the Consent Decree, and both settlements provide a fair and reasonable
27 resolution of the claims asserted in those cases. This Court should enter the Related Settlements
28 simultaneously with the Consent Decree.

1 environmental remediation, the proposed Decree is an appropriate and fair resolution of this
2 portion of the United States' and California's claims, and demonstrates that the regulating
3 agencies have considered all the relevant evidence and acted in the public interest. *See United*
4 *States v. Azko Coatings of Am. Inc.*, 949 F.2d 1409, 1426 (6th Cir. 1991); *United States v.*
5 *Cannons Eng'g Corp.*, 899 F.2d 79, 90 (citing *United States v. Seymour Recycling Corp.*, 554 F.
6 Supp. 1334, 1340 (S.D. Ind. 1982) (urgency of abating danger to public must be considered)).

7 B. The NOx Mitigation and ZEV Investment Components of the Proposed Consent
8 Decree Appropriately Remedy the Environmental Harm Caused by Settling
9 Defendants' Conduct.

10 Many commenters wrote to offer proposed changes or objections to various terms in the
11 ZEV Investment and Mitigation Trust components of the proposed Decree. These comments are
12 summarized and addressed at length in the Response to Comments. As a general matter,
13 commenters argued that the ZEV Investments should be targeted in various prescribed ways
14 (either directly in furtherance of one particular technology or environmental program, or away
15 from a competing technology or program that commenters argued should not be encouraged).
16 Commenters on the mitigation trust similarly argued for or against different types of mitigation
17 projects, and some took issue with different aspects of the structure of the trust itself.

18 As is shown in the attached Response to Comments, none of the comments received
19 demonstrates that the settlement as a whole is unfair, unreasonable, or inconsistent with the
20 objectives on the Clean Air Act. Although the precise details of any environmental injunctive
21 relief plan or mitigation strategy can be debated on the merits, the ZEV investment and
22 mitigation trust components of this settlement show that the EPA and CARB have struck a
23 reasonable balance that is consistent with the objectives of the Clean Air Act and California law.
24 The Decree represents a "reasonable factual and legal determination" for what is necessary to
25 address the environmental harm caused by the 2.0 liter vehicles at issue in this case. *See*
26 *Chevron*, 380 F. Supp. 2d at 1111 (quoting *United States v. Oregon*, 913 F.2d 576, 581 (9th Cir.
27 1990)).

1 C. The Proposed Consent Decree Does Not Resolve Issues Relating to Either the 3.0
2 Liter Vehicles or Civil Penalty.

3 The proposed Consent Decree resolves the United States’ and California’s claims for
4 injunctive relief – other than injunctive relief measures to prevent future violations – relating to
5 nearly half a million 2.0 liter vehicles. While the Decree addresses the largest and most
6 immediate environmental problems posed by Settling Defendants’ approximately 500,000 2.0
7 liter vehicles, the Decree does not address the nearly 90,000 3.0 liter vehicles that remain on the
8 roads of the United States while emitting substantial amounts of NOx in violation of relevant
9 standards. It does not address structural injunctive relief measures to ensure that Settling
10 Defendants do not repeat these types of Clean Air Act violations in the future. Nor does the
11 Decree fully hold Settling Defendants accountable for noncompliance through the imposition of
12 a substantial civil penalty.

13 As the United States has represented to this Court, the 3.0 liter vehicles have been a high
14 priority for the technical teams at EPA and CARB ever since the issues relating to these cars
15 were uncovered nearly a year ago. A technical solution that reduces the emissions of these
16 vehicles poses unique challenges that the regulators continue to study and work to resolve.

17 In addition to seeking environmental injunctive relief for the 2.0 liter and 3.0 liter
18 vehicles, the United States will continue to vigorously pursue its claims for civil penalties to
19 fully hold all Defendants accountable in connection with the claims alleged in the United States’
20 Complaint.

21 **VII. Conclusion**

22 The proposed Consent Decree is the product of vigorous, arms-length negotiations that
23 have produced an aggressive plan to: 1) timely remove nearly half a million noncompliant
24 vehicles from the roads of the United States; 2) modify in an environmentally responsible
25 manner those vehicles that will remain in use or return to the road, and 3) adequately fund a NOx
26 mitigation trust and undertake ZEV investments that will remediate the environmental harm
27 caused by Settling Defendants’ conduct. For all the reasons presented in this motion, the
28

1 proposed Decree represents a reasonable, fair and equitable partial resolution of the United
2 States' and California's claims for injunctive relief relating to the 2.0 liter subject vehicles that is
3 consistent with the objectives of the Clean Air Act. This Court should approve the proposed
4 Consent Decree.

5 Respectfully submitted,

6 Dated: September 30, 2016

7 JOHN C. CRUDEN
8 Assistant Attorney General
9 Environment and Natural Resources Division
10 United States Department of Justice

11 *s/Nigel B. Cooney*

12 _____
13 NIGEL B. COONEY
14 JOSHUA VAN EATON
15 BETHANY ENGEL
16 GABRIEL ALLEN
17 LESLIE ALLEN
18 PATRICK BRYAN
19 DANICA GLASER
20 RUBEN GOMEZ
21 ANNA GRACE
22 SHEILA McANANEY
23 ROBERT MULLANEY
24 ERIKA WELLS
25 IVA ZIZA

26 Counsel for the United States
27 Environmental Enforcement Section
28 Environment and Natural Resources Division
United States Department of Justice
601 D Street N.W.
Washington, D.C. 20004
(Ph) 202-514-3145
(Fax) 202-616-2427
Nigel.cooney@usdoj.gov

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of September, 2016, I electronically filed a copy of the foregoing using the CM/ECF system, which sent a notification of such filing to all counsel of record.

s/Nigel Cooney _____
Nigel Cooney
U.S. Department of Justice