EXHIBIT 4B

Comments Received by Department of Justice

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August 5, 2016

The Honorable John C. Cruden
Assistant Attorney General
Environment and Natural Resources
U.S. Department of Justice
P.O. Box 7611
Washington, DC 20004-7611

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

Dear Mr. Cruden:

On behalf of the Center for American Progress, I am writing to provide comments on *Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation*. The Center for American Progress is an independent nonpartisan policy institute that is dedicated to improving the lives of all Americans, through bold, progressive ideas, as well as strong leadership and concerted action.

CAP supports the proposed settlement. In March, CAP released our recommendations for addressing the harms associated with the Volkswagen defeat devices, entitled "Fixing the Foul Play: Mitigating the Environmental and Public Health Damage Caused by the Volkswagen Emissions Scandal." A copy of these recommendations is attached. We are encouraged that the proposed consent decree incorporates many of the commonsense recommendations that we made.

In particular, we would like to support the elements of the proposed consent decree that promote electrification in the light duty transportation sector. Some will argue that the consent decree should be modified to promote increased use of various fossil fuels that might be able to deliver some air quality benefits over gasoline internal combustion engines. We urge that the final consent decree maintain the focus of the proposed consent decree on promoting the deployment of electric vehicles and not dilute these efforts with provisions that might promote the use of fossil fuels. Encouraging fossil fuel use would be short-sighted given the large carbon emissions reductions that must be achieved in this sector in the coming years.

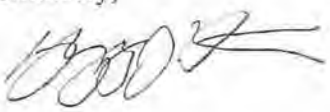
In December 2015, more than 190 national governments, including the government of the United States, came together to adopt the Paris climate agreement which establishes a global action plan to put the world on track to avoid dangerous climate change. These governments committed to an ongoing effort of increasingly deeper emissions reductions aimed at keeping total warming of the planet "to *well below* 2°C above preindustrial levels." The parties also agreed "to pursue

efforts to limit the temperature increase to 1.5°C above preindustrial levels, recognizing that this would significantly reduce the risks and impacts of climate change."

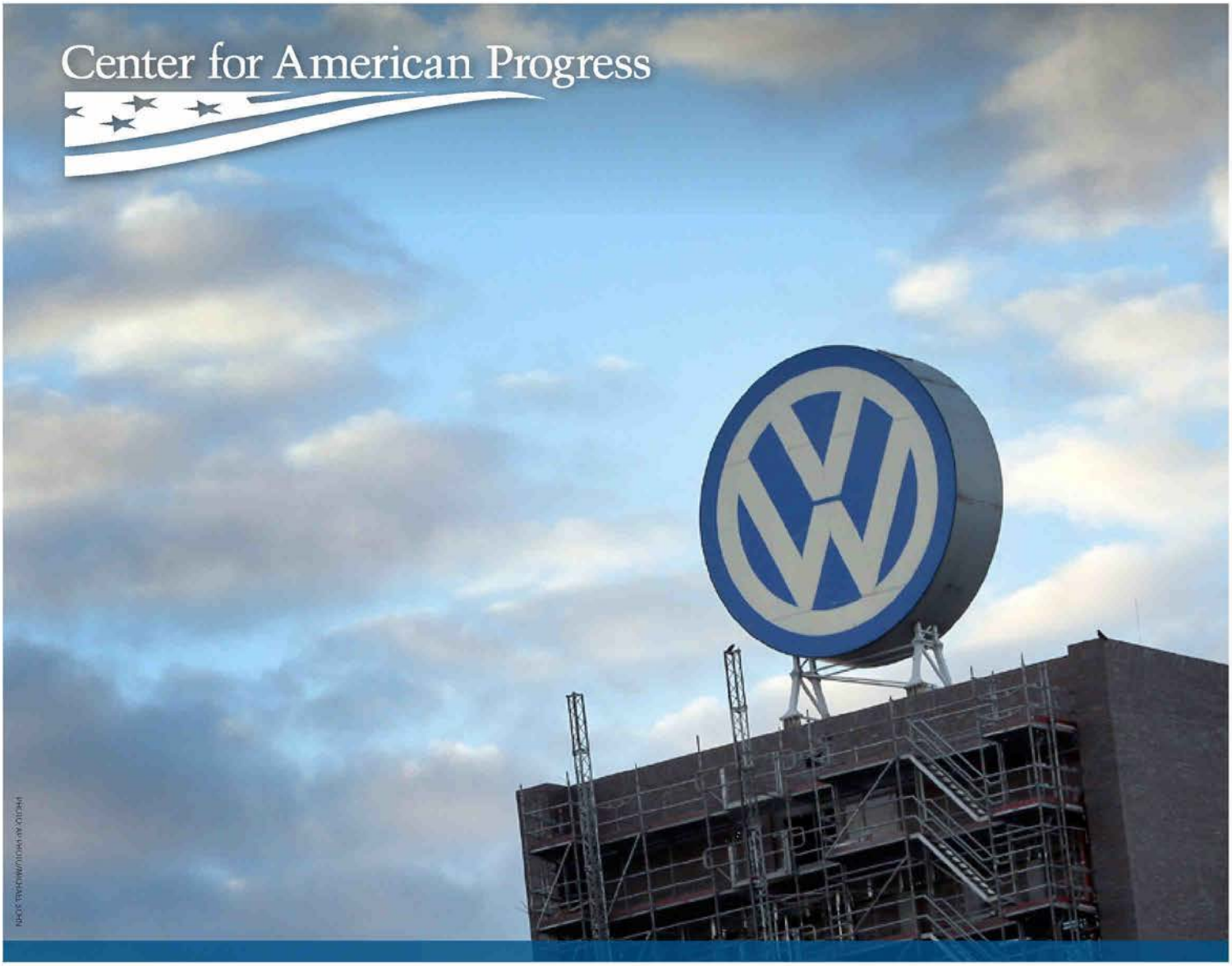
According to the authoritative International Energy Agency, achieving significant greenhouse gas emissions reductions and limiting global warming to less than 2°C necessitates "a major contribution from the transport sector." In conducting global modeling of these reductions, IEA found that meeting the goal of less than 2°C of warming requires the global deployment of 150 million electric vehicles by 2030 and nearly 1 billion by 2050. Given that the United States accounts for nearly a quarter of global vehicle purchases, it is imperative that the United States take every opportunity to promote the electrification of light-duty cars and trucks.

The proposed consent decree offers a one-time opportunity to appropriately focus funds on the essential goal of vehicle electrification. CAP urges that this focus be maintained in the final consent decree.

Sincerely,



Greg Dotson
Vice President for Energy Policy
Center for American Progress



Fixing the Foul Play

Mitigating the Environmental and Public Health Damage Caused by the Volkswagen Emissions Scandal

By Greg Dotson, Alison Cassady, and Myriam Alexander-Kearns March 2016

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Introduction and summary

State and federal agencies continue to investigate Volkswagen's alleged efforts to cheat on emissions tests in the United States. As the investigations come to a close, the U.S. Environmental Protection Agency, or EPA, should consider how to resolve this scandal in a way that both mitigates the public health and environmental damage caused by Volkswagen's actions and builds momentum toward a cleaner transportation sector.

On January 4, 2016, the Department of Justice, or DOJ, on behalf of the EPA, filed a civil complaint against Volkswagen and two of its subsidiary companies, Audi and Porsche, in federal court. In the complaint, the DOJ alleges that the company installed software in certain light-duty diesel passenger vehicles that allows those vehicles to circumvent emissions testing, violating the Clean Air Act. The DOJ states that Volkswagen installed this device in approximately 499,000 2.0-liter and 85,000 3.0-liter vehicles.[1] The California Air Resources Board, or CARB, which first started examining these allegations in 2014, also is pursuing enforcement action.[2]

The defeat device in question detects when the vehicle is undergoing emissions testing. During this testing, the vehicle activates full emissions controls for pollution from nitrogen oxides, or NOx. During normal driving conditions, however, the vehicle emits more nitrogen oxides than allowed by law. By using this software, Volkswagen allegedly was able to claim that its diesel vehicles met tough air pollution standards while also delivering high fuel economy to its customers.

The EPA estimates that 2.0-liter diesel vehicles with this software emitted up to 40 times the legal amount of NOx pollution into the air, while 3.0-liter diesel vehicles emitted up to nine times the allowed levels.[3] Nitrogen oxides are a key component of soot and smog, exposure to which can trigger asthma attacks and cause premature death.

In parallel with this federal court action, the EPA and CARB have asked Volkswagen to develop a plan to retrofit the vehicles that have defeat devices so that they comply with all air quality standards. The agencies will require Volkswagen to recall and repair the defective vehicles, assuming the company can develop a remedial plan that the agencies approve.[4] The timing and scope of any such recall remains uncertain, as the company and agencies have not yet agreed on a plan that satisfies regulators' concerns about vehicle performance, safety, and emissions compliance.[5] A top CARB official said that it "may not be possible" to return the cars to their "certified configuration" and has publicly raised the possibility of allowing the vehicles to stay on the road.[6] On March 24, 2016, Volkswagen missed a court deadline to provide a plan to bring the cars into compliance. The company now has until April 21 to deliver a solution.

In addition to continuing to pursue a recall plan, the EPA and the DOJ will spend the coming weeks and months working to determine how to penalize Volkswagen for the company's alleged violations and, in some way, make up for the damage that the extra emissions from the defective vehicles imposed on human health and the environment.

If the EPA's allegations are true, then Volkswagen has been flagrantly violating the law for years, defrauding consumers, harming public health, and degrading the environment. Just as importantly, the company appears to have taken policymakers and the public down a false road by promising that diesel vehicles could meet the multiple objectives necessary for a modern vehicle fleet, including low tailpipe emissions and better fuel economy.

The Center for American Progress recommends that the EPA and the DOJ pursue a three-pronged approach to resolve these alleged violations:

- Require Volkswagen to mitigate or offset the NOx emissions attributable to its past or ongoing violations by replacing or retrofitting diesel engines in publicly operated vehicle fleets with cleaner technology. The EPA often includes mitigation actions as part of final settlements with companies regarding violations of the Clean Air Act, Clean Water Act, and other statutes.

- Assess large civil penalties for these violations in order to dissuade other carmakers from violating the law in the future. The Clean Air Act sets a maximum penalty of $37,500 for each vehicle with the illegal software. Consequently, Volkswagen could face more than $18 billion in monetary penalties.

- Work with Volkswagen to develop a significant Supplemental Environmental Project, or SEP, to clean up the U.S. transportation sector. Volkswagen would be motivated to work with the EPA to create a SEP, which could offset a portion of the civil penalties while achieving concrete pollution reductions. The SEP should direct a substantial amount of funds, perhaps calculated on a per-car basis, to create a fund for state and local governments, as well as private-sector entities, to implement projects to reduce pollution from on-road vehicles and increase deployment of zero-emission electric vehicles.

By taking this approach, the EPA could deliver NOx pollution reductions that exceed the excess emissions released by the defective Volkswagen vehicles while helping redirect and accelerate the nation's transition to a cleaner transportation sector. By ensuring that the penalties, mitigation action, and SEP total in the billions of dollars, this approach also would deter other automakers from violating the Clean Air Act in the future.

The health and environmental effects of Volkswagen's actions

By allegedly claiming that vehicles used clean diesel technology, Volkswagen sold millions of defective cars under the premise of offering a less-polluting alternative to gasoline without compromising performance or driving experience.[7]

In reality, many of these cars were releasing up to 40 times more pollution than the Clean Air Act emissions standards allow.[8] Domestically, this means that the vehicles in question emitted an extra 10,392 metric tons to 41,571 metric tons of nitrogen oxides each year.[9] Assuming that the affected models internationally incur similar mileage as cars driven in the United States, these cars released between 237,161 metric tons and 948,691 metric tons of previously unknown NOx emissions worldwide each year.[10]

The Environmental Protection Agency has been limiting NOx emissions under the Clean Air Act since the 1970s by setting standards for nitrogen dioxide, or NO2, as a representative for all compounds in the NOx family, since it is the most common.[11]

Exposure to NOx is harmful to human health. Studies show that individuals exposed to NOx are at risk of respiratory issues, including asthma attacks.[12] NOx also is a precursor to other dangerous air pollutants. In the presence of sunlight, NOx and volatile organic compounds react chemically to form ozone. Exposure to ozone can cause shortness of breath and aggravate existing respiratory illnesses, including asthma.[13] In addition, NOx reacts with ammonia and moisture to form fine particles, which when inhaled lodge in the lungs and can trigger asthma attacks and cause premature death in people with heart and lung disease.[14] Even generally healthy people without chronic lung conditions experience inflammation of the airways when exposed to these pollutants. Children and the elderly are the most vulnerable.[15]

Emissions from the road have negative health effects on people all over the country—not just drivers. EPA studies have shown that concentrations of NO2 are higher near roadways, with increases of 30 percent to 100 percent compared with

concentrations away from roadways.[16] Sixteen percent of housing units in the United States sit within 300 feet of a major highway, airport, or railroad, so approximately 48 million Americans reside in areas with these higher concentrations of NO2.[17]

Researchers from the Massachusetts Institute of Technology and Harvard have evaluated the public health effects of the affected Volkswagen cars on public health in the United States.[18] Between 2008 and 2015, they estimate that all affected Volkswagen vehicles in the United States traveled 40.5 billion kilometers in total, resulting in a release of 36.7 million kilograms of excess NOx emissions.[19] The researchers conclude that exposure to this excess NOx pollution over this seven-year period will shorten the lives of 59 individuals, costing an estimated $450 million in mortality costs, and will result in more hospital admissions for cardiac and respiratory conditions.[20] The researchers also examined the potential health effect of allowing all of the defective vehicles to stay on the road without any other program to mitigate NOx emissions from the transportation sector. Under these circumstances, the study estimates that the excess emissions from the Volkswagen vehicles could shorten the lives of an additional 140 people.[21]

Although the health effects are the most urgent concern, NOx emissions also harm the natural environment. Nitrogen emissions contribute to algal blooms in water bodies and acid rain, both of which threaten the health and viability of ecosystems.[22]

The EPA's options for responding to the Volkswagen violations

As the agencies responsible for implementing and enforcing the Clean Air Act, the Environmental Protection Agency and the Department of Justice are tasked with responding to Volkswagen's violations of the act in such a way that dissuades other companies from breaking the law and, to the maximum extent possible, mitigates the harm caused by the excess pollution released by the faulty vehicles. The federal government has a number of tools at its disposal to achieve this outcome, including forcing a recall of the defective Volkswagen vehicles; requiring the company to implement a pollution mitigation plan; assessing significant civil penalties; and working with Volkswagen to develop a Supplemental Environmental Project to achieve additional emissions reductions.

Force a recall of defective Volkswagen vehicles

From the beginning, the EPA and the California Air Resources Board have been working with Volkswagen to identify a way to retrofit the defective cars to ensure that they comply with air pollution standards.[23]

The timing and scope of any such recall remain uncertain. When announcing the civil complaint, the EPA also stated that ongoing recall discussions with Volkswagen have not yet produced "an acceptable way forward."[24] To date, an acceptable recall plan has not been identified for either 2.0-liter vehicles or 3.0-liter vehicles. On January 12, 2016, CARB rejected Volkswagen's proposed recall plan for the 2.0-liter vehicles sold in California between 2009 and 2015 that allegedly violated state clean air standards, arguing that it lacked sufficient detail in many areas. On February 2, 2016, Volkswagen submitted a recall plan for the 3.0-liter vehicles sold in California, but no evaluation of the acceptability of this plan has yet been rendered.[25] On March 24, Volkswagen missed a court-ordered deadline to deliver a plan to bring the defective cars into compliance with emissions standards. The judge gave the company an extension until April 21, 2016, after which point the matter could go to trial if no solution has been identified.[26]

At a state legislative hearing on the Volkswagen scandal in March 2016, Todd Sax, division chief of CARB's enforcement division, warned that it "may not be possible" to return the cars to their "certified configuration" and publicly raised the possibility of allowing the vehicles to stay on the road.[27] He also said that the agency, working with the EPA, will have to "decide what the best approach is to dealing with these vehicles, and one of the options potentially would be to accept something less than a full fix."[28]

A recall would be a multibillion dollar venture for Volkswagen. The company has estimated the cost of recalling the vehicles as being at least $9.5 billion on top of fines and penalties.[29] The agencies will continue to work with Volkswagen to identify a potential recall plan that satisfies regulators' concerns about vehicle performance, safety, and emissions.[30]

In addition to the expense, a recall poses significant logistical challenges that may reduce its effectiveness at achieving emissions reductions and ensuring compliance on a timely basis. Some experts suggest that retrofitting will involve installing a multigallon urea tank that mixes urea into exhaust to render the nitrogen oxides harmless. In addition, more than 300,000 of the affected cars in the United States could require hardware fixes.[31] After these retrofits are installed, owners could experience a decrease in engine power and fuel economy.[32]

As a result, even if Volkswagen engineers a solution, some owners may choose not to retrofit their vehicles. According to the National Highway Traffic Safety Administration, on average, only 70 percent of vehicles subject to safety recalls are fixed within 18 months.[33] The Government Accountability Office found that the recall completion rate varies significantly by year, ranging from 55 percent to 75 percent.[34] It is reasonable to assume that this recall success rate could be even lower for defects that are not safety related, as in the case with the Volkswagen vehicles.

Some states, such as California, require proof of retrofits before issuing a vehicle registration, making recalls an effective way to implement the retrofits.[35] However, more than half of states require either no emissions testing at all or vary requirements by county or municipality, making it difficult to enforce the recall and retrofits. Some states that do require regular emissions testing only mandate it every two years.[36] This means that if consumers are reluctant to participate in a recall of their Volkswagen vehicles, the mechanisms to help ensure participation in a recall are uneven among the states and unlikely to assure broad and consistent participation.

This assumes that Volkswagen will eventually develop a recall plan for all defective vehicles that passes muster with the EPA and CARB. If it does not, the car company could face pressure to buy back each defective vehicle. This could cost the company $7.3 billion, according to Kelley Blue Book estimates.[37]

Implement pollution mitigation measures

The EPA often includes mitigation actions in settlements for violations of environmental laws in order to minimize the harm caused by illegal conduct. According to the EPA, mitigation actions are "sought by the government to remedy, reduce or offset past (and in some cases ongoing) harm caused by the alleged violations in a particular case."[38] These actions must provide identifiable benefits, such as limiting the amount of future pollutants emitted to address past excesses.[39] Because the purpose of a mitigation action would be to, "as nearly as possible, restore the *status quo ante*," there must be a close connection between the mitigation action and the harm caused by the violation.[40] In general, the EPA is able to demand mitigation action as part of a settlement because a court likely would order such mitigation as injunctive relief if the case were litigated.[41]

In May 2015, for example, the EPA and the DOJ announced a settlement with Marathon Petroleum Corporation over Clean Air Act violations at 10 facilities. As part of the settlement, the consent decree requires Marathon to mitigate the harm caused by its excess emissions by spending $3 million to retire sulfur dioxide credits and install protective seals on 14 fuel storage tanks.[42] As another example, in April 2015, the EPA, the DOJ, and the state of Colorado settled with Noble Energy for violations of the Clean Air Act related to vapor control systems at the company's condensate storage tanks. Noble agreed to spend $4.5 million to retrofit its drilling equipment and improve company processes to reduce ozone-forming emissions.[43]

Assess significant civil penalties

The Clean Air Act sets maximum penalties for violations. Should the EPA and the DOJ decide to settle the case against Volkswagen, the EPA has discretion to determine the appropriate total penalty to assess on top of other measures to mitigate or offset the environmental harm caused by the excess pollution. The EPA has established a policy to guide its actions related to negotiated settlements of violations of the Clean Air Act's vehicle and engine certification requirements, such as those at issue with Volkswagen.[44]

According to the EPA, a penalty should recover "any economic benefit of noncompliance" and "an additional amount to reflect the seriousness of the violation."[45] While EPA policy prescribes a rule of thumb for estimating the economic benefit of violating the Clean Air Act, this approach is not appropriate in cases in which an automaker uses emissions control defeat devices, as these devices allow the automaker to offer consumers vehicles with performance and prices that may not be possible with legal engines or design. In defeat device cases, the EPA conducts a fact-specific inquiry that examines the actual benefits of noncompliance.[46] The additional penalty sum that reflects the seriousness of the violation, known as the "gravity-based" portion of the penalty, is based on specific objective factors and consideration of a variety of factors and circumstances.[47] This analysis would examine the following issues:

- **Actual or potential harm.** This factor focuses on whether the violation results in excess emissions and if so, the magnitude of those emissions.[48] The EPA categorizes a violation as "major"—the most egregious category of violation—if the vehicle in question generates greater emissions than a compliant vehicle.[49] The agency can use its discretion to reduce the penalty if "effective remedial actions are taken promptly," or it can increase the gravity-based portion of the penalty by up to 30 percent if the company takes no or ineffective remedial action.[50]

- **Importance to the regulatory scheme.** This factor examines how important the violated requirement is to achieving the goals of the Clean Air Act.[51]

- **Scaling factors.** EPA policy prescribes that the penalties on a per-engine basis decrease as the number of violating engines increases.[52] For example, the penalty on the 400,000th noncompliant vehicle sold is less than the penalty for the 10th noncompliant vehicle sold. Otherwise, the per-engine gravity-based calculation could result in unreasonably large penalties, perhaps beyond the company's ability to pay without going out of business.

- **Business size.** EPA policy states that for larger companies, a larger penalty is necessary to create an appropriate deterrent.[53]

The EPA also seeks to ensure equitable treatment of the regulated community in assessing civil penalties by considering the violator's degree of willfulness or negligence. For example, the agency looks at how much control the company had over the alleged violation; whether the company took reasonable precau-

tions to prevent the violation; and whether the violation was foreseeable.[54] When the violator has acted with a particular degree of willfulness or negligence, the EPA can increase the gravity-based portion of the penalty by up to 20 percent based on this analysis.[55]

Additionally, the EPA's policy states "that where a party has violated a similar environmental requirement before, this is usually clear evidence that the party was not deterred by the Agency's previous enforcement response."[56] For repeat offenders, the EPA has the discretion to increase the gravity-based portion of the penalty by up to 35 percent for one prior violation and up to 70 percent for more than one prior violation.[57]

Develop a Supplemental Environmental Project

As part of a settlement, the EPA also can work with companies to develop a SEP. According to the EPA's guidance, a SEP is:

> *[An] environmentally beneficial project or activity that is not required by law, but that a defendant agrees to undertake as part of the settlement of an enforcement action. SEPs are projects or activities that go beyond what could legally be required in order for the defendant to return to compliance, and secure environmental and/or public health benefits in addition to those achieved by compliance with applicable laws.*[58]

SEPs differ from the mitigation actions described above in important ways. Foremost, whereas a court likely would order mitigation as injunctive relief if a case were litigated, a SEP is a voluntary project that "results from negotiation between the parties and cannot be secured outside the settlement context."[59] Secondly, SEPs are designed to achieve broadly defined public health or environmental benefits that are not necessarily closely linked to the violation at hand. In contrast, mitigation actions must demonstrate a close nexus to the harm caused by the violation.[60] Finally, the EPA can offer an offending company the option of reducing the civil penalties in exchange for performing a SEP—an option that does not apply to a mitigation action.[61]

The EPA often uses SEPs in combination with civil penalties and other pollution mitigation requirements. In its 2015 settlement with the EPA, for example, Noble Energy agreed to pay a $5 million civil penalty, devote $4.5 million to environmental mitigation actions, and spend $4 million on SEPs, including the replace-

ment of wood stoves in an area with poor air quality and the development of improved testing procedures for vapor control systems.[62] Also in 2015, ASARCO agreed to pay a $4.5 million civil penalty, spend $150 million to install new pollution control technology, and allocate $1 million for a SEP to replace a diesel switch locomotive operated at its Arizona facility with a less-polluting diesel-electric switch locomotive.[63]

Recommendations

The Environmental Protection Agency and the California Air Resources Board are likely to continue to work with Volkswagen to identify a technical fix that allows the diesel-powered vehicles in question to comply with the Clean Air Act. However, it is uncertain whether Volkswagen will be able to identify such a fix and whether most vehicle owners will take their cars in for repair. Either way, the EPA needs to ensure that a final settlement with Volkswagen mitigates the harm caused by the vehicles' excess emissions; deters future illegal conduct; and expedites the transformation of the U.S. transportation sector toward a cleaner, less-polluting, and lower-carbon future.

CAP recommends that the EPA pursue a three-pronged strategy to achieve these important goals. First, the EPA should require Volkswagen to implement a mitigation action with the goal of reducing emissions of nitrogen oxides from diesel engines. Second, the EPA should assess significant per-vehicle penalties that reflect the seriousness of the violations. Third, the settlement should include a Supplemental Environmental Project that funds projects at the state and local levels to clean up the U.S. transportation sector, including initiatives to put more electric vehicles on the road.

This approach can do more than merely offset the additional emissions associated with Volkswagen's noncompliant automobiles. It can deliver a public health and environmental dividend—one that focuses on the penalties associated with each violating vehicle and maximizes the pollution reductions possible from such funds. This would be a fitting consequence for actions that sought to profit from fraudulent claims associated with protecting public health and the environment. Furthermore, a strong settlement also would be in the interest of Volkswagen, whose reputation has suffered and can be resuscitated by making amends for past actions.

Require Volkswagen to mitigate its environmental harm

The EPA should require Volkswagen to undertake mitigation action to offset the environmental and health effects of its violations. Any mitigation action should be linked to the company's violations—meaning that Volkswagen's mitigation effort should offset NOx emissions from the transportation sector. CAP recommends that Volkswagen pay into a fund that would finance projects to reduce NOx emissions from diesel engines.

The Diesel Emissions Reduction Act, or DERA, would provide a good model for such mitigation. Congress established the DERA with the Energy Policy Act of 2005.[64] DERA-funded projects target emissions reductions from diesel vehicles, equipment, and engines. Eligible projects can involve retrofitting diesel equipment and engines to make them cleaner or replacing components or whole engines at the end of life. Under DERA, grant recipients also can invest in technology to increase the fuel efficiency of diesel fleets—such as idle reduction, aerodynamics, or low-rolling resistance tires—which have been demonstrated to reduce NOx emissions and fuel use.[65] DERA grants are available to agencies at the regional, state, and tribal levels, as well as port authorities, with jurisdiction over transportation issues and air quality. Cities, counties, municipalities, and school districts that operate diesel fleets are also eligible.[66]

However, because a settlement agreement cannot provide funds to an agency to supplement its appropriations, Volkswagen cannot provide funds directly to the DERA program.[67] Instead, the EPA and Volkswagen could model the mitigation action on the methodology and approach of the DERA program to ensure an effort that is transparent and effective.

There is clear precedent for this approach. In 2003, for example, Toyota agreed to spend $20 million to clean up public diesel fleet vehicles as part of its settlement with the EPA over violations of the Clean Air Act.[68] Toyota created a "Clean Buses for Kids" program that offered grants to school districts to purchase filters and ultra-low sulfur diesel fuel for buses.[69] While this program utilized the knowledge gained by the DERA program, the EPA did not operate it.

This mitigation action not only will make up for past excess emissions to the extent that such pollution can be offset, but it also will be an important element in addressing future excess emissions from vehicles that escape the recall process or otherwise remain in use.

Assess civil penalties that reflect the seriousness of the violation

Under the Clean Air Act, using a defeat device to exceed emissions standards warrants a maximum fine of $37,500 per affected car.[70] In the civil complaint, the Department of Justice also asks the court to hold Volkswagen liable for up to $3,750 for each defeat device installed in the vehicles and suggests that Volkswagen could face an additional $37,500 in penalties for each day of violation.[71] If required to pay the maximum fine, Volkswagen would face an extraordinary penalty of approximately $18 billion.[72] The actual amount Volkswagen pays could be substantially less, however, as the EPA and the DOJ resolve the charges through a negotiated settlement.

During the settlement process, the EPA will use its discretion to determine the appropriate penalty amount. According to EPA policy, the penalty should recover "any economic benefit of noncompliance" and "an additional amount to reflect the seriousness of the violation."[73]

The EPA first will have to conduct a case-specific inquiry to determine the economic benefit of these violations to Volkswagen.[74] This economic benefit is likely to be substantial, given the large number of defective vehicles at issue. Moreover, Volkswagen allegedly gained a competitive advantage in the marketplace by marketing these diesel-fueled vehicles as meeting strong pollution standards while delivering superior fuel economy and performance.

The EPA then will calculate the "gravity-based" portion of the penalty that reflects the seriousness of the allegations.[75] The EPA has a sound case for assessing significant penalties based on the gravity of Volkswagen's actions. The violations caused actual and potential harm in the form of excess emissions, qualifying the violation as "major" on the EPA's scale of egregiousness.[76] Moreover, because Volkswagen has been slow to identify a satisfactory fix to bring the cars into compliance, the EPA has the discretion to increase the gravity-based portion of the penalty by up to 30 percent.[77]

Adding to the gravity of the violation is the importance of engine certification requirements to achieving the goals of the Clean Air Act.[78] Compliance with engine certification requirements is central and fundamental to controlling emissions from motor vehicles, and Volkswagen appears to have systematically and deceptively violated those requirements. This fact is likely to increase the amount of penalties assessed.

Since Volkswagen is a large multinational corporation worth tens of billions of dollars, a larger penalty is necessary to create an appropriate financial deterrent.[79] The agency also will look at Volkswagen's degree of willfulness in committing the violation. News reports indicate that Volkswagen's CEO knew about the defeat devices in diesel vehicles more than a year before the violation was discovered.[80] As a result, the EPA could increase the gravity-based portion of the penalty by up to 20 percent.[81]

The EPA is likely to consider Volkswagen's track record as well. This is not the first time Volkswagen has run afoul of Clean Air Act requirements by installing devices that turn off pollution controls. In 1974, Volkswagen settled charges that the company failed to properly disclose two temperature-sensing switches that deactivated part of the emissions control systems in about 25,000 vehicles.[82] In light of this history of noncompliance, the EPA could increase the gravity-based portion of the penalty by up to 35 percent.[83]

Given this analysis, the EPA should assess a multibillion dollar penalty for these Clean Air Act violations. Although one commentator has suggested that applying the EPA penalty policy described above would yield a penalty of $3.2 billion, this analysis fails to consider both the economic benefit of noncompliance and the potential application of some of the penalty multipliers.[84] Based on CAP's calculations, the gravity-based portion of the total penalty could amount to at least $5 billion should the parties decide to settle the offenses.[85]

Develop a SEP to expedite the deployment of electric vehicles

In addition to the direct harm to the environment and public health, the Volkswagen emissions scandal misled policymakers and the public about the role of diesel engines in achieving a clean, modern vehicle fleet. Consumers who chose Volkswagen models for the alleged emissions profile could have purchased cleaner vehicles. To address this issue, a settlement with Volkswagen should include a large SEP to help clean up the transportation sector by accelerating the transition to cleaner vehicles, including the deployment of electric vehicles. This will benefit communities most affected by pollution from the transportation sector: those in close proximity to America's network of roads and highways.

Electric vehicles and plug-in hybrid electric vehicles offer drivers the opportunity to reduce their NOx emissions and other pollutants significantly.

Studies show that electric vehicles are, on average, cleaner than gasoline vehicles

A 2015 report by the Union of Concerned Scientists found that from "cradle to grave"—or across the entire life cycle of the vehicle, including manufacturing—battery electric vehicles on the market today produce less than half the greenhouse gases of similar gas-powered vehicles.[86] Similarly, a 2015 study by the Electric Power Research Institute found that nationally, as of 2013, the average plug-in electric vehicle produced the emissions equivalent of a gas-powered vehicle that gets 61 miles per gallon. Regionally across the country, the miles-per-gallon equivalents of these vehicles ranged from 46 miles to 251 miles per gallon.[87] A 2013 study of Maricopa County, Arizona, concluded that compared with a gasoline vehicle in that county, battery electric vehicles reduced NOx emissions by 76 percent. Plug-in hybrids also reduced NOx emissions 30 percent to 48 percent, depending on how many of the miles driven were electric miles.[88]

As the United States transitions to a less carbon-intensive electricity grid with cleaner sources, the emissions benefits created by electric vehicles and plug-in hybrids will compound.[89]

Volkswagen could provide significant funds for a SEP, perhaps calculated on a per-noncompliant-vehicle basis. A substantial portion of the SEP should be devoted to financially incentivizing deployment of electric vehicles and related infrastructure. These incentives, however, should not simply serve as an incentive to purchase electric vehicles manufactured by Volkswagen.

Instead, the EPA and the DOJ could structure the SEP to designate funds to help state and local governments, as well as private-sector entities, increase the deployment of electric vehicles or finance other projects to reduce emissions from the transportation sector. These projects could vary by the existing circumstances and desires of different communities. One state might seek to encourage the retirement of polluting vehicles. Another city might incentivize the replacement of diesel school buses. A private company might seek an incentive to replace a fleet of diesel delivery vans with electric vehicles. The SEP could allocate these funds by state based on population or the number of defective Volkswagen vehicles sold in each state—or some combination thereof. The SEP could include an application process to vet and approve eligible projects, much like the DERA program.

The EPA has experience using settlements to promote electrification of vehicles. In 2015, for example, the EPA and Duke Energy announced a consent decree resolving the company's violations of the Clean Air Act at some of its coal-fired power plants. As part of the settlement, Duke Energy agreed to spend $4.4 million on supplemental environmental mitigation projects, which could include a project to install electric vehicle charging infrastructure or advanced truck stop electrification equipment in North Carolina.[90]

Agreement to the establishment of a SEP in a negotiated settlement is voluntary and would require Volkswagen's consent. Volkswagen, however, has reason to agree to such a SEP. First, if Volkswagen agrees to settle, the negotiated settlement with a SEP will likely yield a lesser civil penalty than if the matter is pursued in court. Second, the emissions scandal has harmed Volkswagen's international reputation, and a SEP that provides substantial funding to clean up the transportation sector could help Volkswagen turn the page on an alleged campaign of fraudulent assertions about the environmental benefits of their products.

Conclusion

The Department of Justice, working with the Environmental Protection Agency and the California Air Resources Board, will hold Volkswagen accountable for its alleged efforts to deceive the government and consumers by installing defeat devices in diesel vehicles, allowing the cars to release dangerous pollutants into the air undetected. While billed as clean diesel vehicles, the nitrogen oxides emitted from their tailpipes have rendered them anything but clean.

CAP recommends that the EPA and the DOJ impose tough monetary penalties on the company in order to deter future violations. The EPA also should require the company to pursue mitigation actions to clean up diesel engines in trucks, buses, and other vehicles already on the road. Finally, the EPA should work with Volkswagen to develop a Supplemental Environmental Project to achieve additional emissions reductions by funding governmental and nongovernmental agencies to deploy more electric vehicles and expedite the transition to a cleaner transportation sector.

While the pollutants from the defective Volkswagen vehicles cannot be returned to the tailpipes, and while the damage to health cannot be reversed, future damage can be mitigated by taking this threefold approach.

About the authors

Greg Dotson is the Vice President for Energy Policy at the Center for American Progress. For more than 18 years, Dotson was the lead environmental and energy staffer for former Rep. Henry A. Waxman (D-CA) and a top staffer on the House Energy and Commerce Committee and the House Committee on Oversight and Government Reform. His major accomplishments include House passage of comprehensive climate change legislation and the enactment of laws on clean energy, pesticide safety, drinking water, and clean air.

Alison Cassady is the Director of Domestic Energy Policy at the Center. Cassady joined CAP after working as a senior professional staff member for former Rep. Henry Waxman (D-CA) in the U.S. House of Representatives, first on the Committee on Oversight and Government Reform and then the Energy and Commerce Committee. Cassady spearheaded the committees' work on unconventional oil and gas development and led one of the first congressional investigations into the practice of hydraulic fracturing. She also developed expertise on climate change, air quality, and nuclear power issues and worked to advance chemical plant security legislation in 2009.

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Subject: Request for Extension to Public Comment Period for Partial Consent Decree under the Clean Air Act
In re: Volkswagen ``Clean Diesel'' Marketing, Sales Practices, and Products Liability Litigation, Case No: MDL No. 2672 CRB (JSC)

We are writing to request a 30 day extension to the public comment period for the Partial Consent Decree under the Clean Air Act, in the matter of Volkswagen ``Clean Diesel'' Marketing, Sales Practices, and Products Liability Litigation, Case No: MDL No. 2672 CRB (JSC). As a representative of the EV charging equipment and services industry, which will be immediately and directly affected by the Partial Consent Decree, we request this additional time to enable careful review of the Consent Decree and analysis of its implications

On June 28, 2016, the Department of Justice lodged a proposed Partial Consent Decree with the United States District Court for the Northern District of California in the lawsuit entitled In re: Volkswagen ``Clean Diesel'' Marketing, Sales Practices, and Products Liability Litigation, Case No: MDL No. 2672 CRB (JSC), partially resolving Clean Air Act and various California claims (including under the California Health and Safety Code) against Volkswagen Group of America, Inc., and others, concerning certain noncompliant 2.0 liter diesel vehicles.

A Federal Register Notice published on July 6, 2016 indicated that the Department of Justice would accept written comments relating to this proposed Partial Consent Decree for thirty (30) days from the date of publication of the Notice (FR Doc No: 2016-1585).

ChargePoint, in collaboration with other stakeholders, is working diligently to review this lengthy and detailed document and to prepare comments. ChargePoint designs, develops and deploys smart EV charging stations, user-friendly software applications and data networking intelligence. ChargePoint operates a network of nearly 30,000 charging spots. ChargePoint has been actively involved in the development of EV policy and programs in California and many other states since 2010. As a result, ChargePoint has a strong interest in helping to ensure that the proposed ZEV investment structure resulting from the Partial Consent Decree will effectively and fairly address the adverse environmental impacts from consumers' purchases of the noncompliant VW vehicles. We also have a strong interest in ensuring that the proposed ZEV investment structure complements existing state and national program intiatives, and preserves incentives for innovation and private investment, which are the critical drivers of this new, but rapidly expanding market.

However, the Partial Consent Decree consists of 225 pages, including appendices, and the proposals it contains (particularly Appendix C, relating to the development and maintenance of ZEV infrastructure investments) are very detailed and complex. The $2 billion budget and scale of the proposed 10 year ZEV investment program are unprecedented, and will have immediate and significant consequences for the market that need to be carefully considered. This infusion of investment dollars into ZEV infrastructure and

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education is very welcome and can, if properly structured and administered, help accelerate the transition to ZEV transportation across the country. At the same time, this very large program could have unintended consequences for existing state programs initiatives, providers of ZEV fueling equipment and network charging services, site hosts, ZEV drivers, local government and ZEV fleet managers, and utility grid operators. We are aware that the Partial Consent Decree was negotiated under pressure of time and by a limited group of stakeholders, which means this comment period will be the only opportunity for the wider population of affected interests to provide input before the Partial Consent Decree becomes final. Given the strong public interest in this Partial Consent Decree, as well as the size and complexity of the multiyear program and its potential impact on the use of ZEV technology in the United States, additional time is needed for the public and stakeholders to prepare comments in response to the Notice.

For these reasons, ChargePoint respectfully requests a 30 day extension of the public comment period.

Sincerely,

DocuSigned by:
Jon Kaplan
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Jonathan Kaplan
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August 5, 2016

John Cruden
Assistant Attorney General
United States Department of Justice
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Re: Comments of ChargePoint, Inc. on Proposed Partial Consent Decree;
In re: Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation,
Case No: MDL No. 2672 CRB (JSC), D.J. Ref. No. 90-5-2-1-11386.

Dear Assistant Attorney General Cruden:

Pursuant to the Department of Justice Notice dated July 6, 2016,[1] ChargePoint, Inc. (ChargePoint) provides comments on Appendix C (ZEV Investment Commitment) of the Partial Consent Decree entered into between the United States, California, and the Settling Defendants in the above-captioned case.[2]

The Partial Consent Decree[3] evidences hard work by all involved and ChargePoint supports and applauds the inclusion of a $2 billion investment earmarked to help accelerate zero emission vehicle (ZEV) adoption. That said, ChargePoint believes that if the goal of a robust national electric vehicle (EV) infrastructure system is to be realized, Appendix C of the Partial Consent Decree should include some important modifications to align this program with consumer and market protections that have been broadly accepted and adopted for other EV infrastructure investment programs across the country. We are concerned with the current draft of Appendix C gives the Settling Defendants a significant role in designing and potentially implementing this very large ZEV investment

[1] Federal Register, Notice of Lodging of Partial Consent Decree Under the Clean Air Act, 81 F.R. 15858 (July 7, 2016).
[2] The Settling Defendants are Volkswagen AG, Volkswagen Group of America, Inc., Volkswagen Group of America Chattanooga Operations, LLC, and Audi AG.
[3] Capitalized terms (unless otherwise indicated) are as defined in the Consent Decree

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program, without providing terms and conditions ensuring that competition, innovation and market forces will shape EV infrastructure investments. In order to address these concerns, we respectfully ask that the Environmental Protection Agency (EPA) and the California Air Resources Board (CARB) support reworking Appendix C to:

- Enable administration of the investment fund with transparency by regulators or a neutral third party
- Include guiding principles to ensure that EV infrastructure investment plan terms and conditions protect competition, customer choice, and incentives for innovation and private investment in EV charging equipment and services;
- Specify that Appendix C investment funds devoted to deployment of EV charging infrastructure should be provided in the form of grants or rebates; and
- Clarify that the Settling Defendants may not use ZEV investment funds to create new business opportunities for their sole benefit.

These recommendations are consistent with the national Guiding Principles to Promote Electric Vehicles and Charging Infrastructure (Guiding Principles) very recently adopted by a broad coalition of government leaders (including EPA and CARB), automakers, charging industry, and others.[4] The Guiding Principles include promoting a "robust market" for EV charging service providers, ensuring customer choice, enhancing competition, innovation, and the development of advanced technology, and attracting and leveraging private investment.

ChargePoint is confident that EPA and CARB will solicit input from interested parties in the implementation process, and take care to ensure that the final plans are consistent with the Guiding Principles. However, as currently drafted, Appendix C is not clearly structured to enable market-neutral infrastructure investments, and does not include explicit terms and conditions protecting competition and innovation in the EV charging infrastructure market. The recommendations identified above would help address these issues.

I. Introduction

ChargePoint is the world's largest and most open EV charging network, with more than 30,000 Level 2 and DC fast charging spots at locations throughout the United States. Every 4.5 seconds, a driver connects to a ChargePoint station, and drivers on the ChargePoint network have driven over

[4] See, FACT SHEET: Obama Administration Announces Federal and Private Sector Actions to Accelerate Electric Vehicle Adoption in the United States.

396.8 million gas free miles. ChargePoint works in close partnership and collaboration with automakers, including the Settling Defendants, to support EV infrastructure initiatives and the development of public policies advancing transportation electrification.

Our company has had the privilege of working closely with the Volkswagen Group and its brands (VW, Audi and Porsche) for several years. Our companies have collaborated on several successful projects, most notably: (i) the deployment of charging infrastructure at VW dealerships, and (ii) a project between VW, BMW, and ChargePoint to deploy nearly 100 DC fast chargers along the east and west coasts of the United States to enable long distance driving along traffic corridors. We consider the Volkswagen Group to be a valuable partner in these efforts, and we look forward to working with the Settling Defendants and other interested parties to ensure that the ZEV Investment Commitment is likewise a success for EV drivers and for consumers.

ChargePoint applauds the United States Department of Justice, EPA, the State of California, CARB, and other Settling Parties for including a $2 billion ZEV Investment Commitment as a condition of the Partial Consent Decree resolving claims presented under the Clean Air Act and California statutes. Dedicating a portion of this settlement payment toward investment in expanded EV charging infrastructure is an appropriate remedy in this case. A significant infusion of funding to support EV infrastructure investment and public education will help accelerate EV adoption nationwide. However, the funding must be administered in a way that enables market expansion and private investment. This is a critical moment in the new era in electric transportation and EV fueling technologies. The size and scope of the ZEV Investment Commitment offers an opportunity, but it also creates risks that merit careful consideration.

II. Background

The ZEV Investment Commitment proposed in the Partial Consent Decree comes at a very important point in our country's transition to a clean transportation future. Foreign and domestic automobile manufacturers are offering a rapidly expanding variety of electric vehicles to consumers, many at prices that for the first time are within the reach of middle class Americans. Consumer interest in purchasing EVs is growing, encouraged and supported by state and federal ZEV rebates and increasing public awareness of the benefits and practicality of clean transportation options.

The markets for EV charging equipment and network services have likewise grown and expanded. Innovative companies, operating under a diversity of business models, are offering a wide array of smart charging products and services to public, commercial and residential customers. Regulators have

recognized that smart charging equipment and services offer multiple benefits to site hosts and to utilities, as managed EV charging can be coordinated with renewable energy production and used to help balance the grid.

Recognizing that widespread public adoption of EVs depends on consumers' ability to access reliable EV charging at home, work and elsewhere, the federal, state and local governments have initiated programs to support investment in EV charging. Initially in a handful of states, these initiatives are now expanding throughout the country as legislators, regulators, local governments, utilities, site hosts and industry work together to meet the growing demand for EVs and EV charging services. States are supporting public/private collaborations, and exploring how investor-owned utilities can play a role in supporting the expansion of EV charging facilities. Cities are stepping up to provide charging services. And a growing number of commercial businesses and apartment building owners and public institutions are investing in EV charging as a service to their employees, tenants, customers and the public.

Automakers, regulators and industry have also begun focusing attention and resources on the need to create fast charging corridors. For example, the U.S. Department of Transportation and California Energy Commission are investing in fast charging infrastructure sited at key locations along key transportation routes, with the objective of eliminating or minimizing "range anxiety" as an obstacle to consumer acceptance of EVs.

Umbrella organizations such as the California PEV Collaborative, the Pacific Coast Collaborative, the Massachusetts ZEV Commission and the Maryland Electric Vehicle Infrastructure Council have been established to facilitate cooperation, avoid waste of public funds and promote best practices.[5] California, Connecticut, Maryland, Massachusetts, New York, Oregon, Rhode Island, and Vermont have entered into a Memorandum of Understanding to cooperate in developing strategies for expanding EV adoption and EV charging.[6] Regulators, industry and utilities are working together on national standards for EV charging equipment and metering. Legislators and regulators are establishing guidelines to protect competitive markets and support basic

[5] See http://www.pevcollaborative.org/, http://www.pacificcoastcollaborative.org/priorities/transportation/Pages/GreenHighways.aspx, http://www.mass.gov/eea/waste-mgnt-recycling/air-quality/ma-zero-emission-vehicle-commission-and-mass-drive-clean-campaign/zero-emission-vehicle-commission.html, http://www.mdot.maryland.gov/newMDOT/Planning/Electric_Vehicle/About_the_Council.html.

[6] http://www.zevstates.us/about-us/

consumer principles like customer choice in charging equipment and services.[7] And regulators in several states are carefully taking the first steps toward allowing investor-owned utilities to play a role in supporting the deployment of EV charging infrastructure, subject to important conditions that protect competitive markets and customer choice.[8]

Most recently, the Obama Administration has announced a new and ambitious package of federal and private sector actions to accelerate EV adoption in the United States. This collaboration, forged by the White House in partnership with the Department of Energy, Department of Transportation, the Air Force and Army, and the EPA, will include up to $4.5 billion in loan guarantees to support commercial-scale deployment of EV charging facilities, creation of federally supported ZEV fueling corridors, support for state and local government EV fleets, and new initiatives to support technology development and dissemination of consumer information on EVs and EV charging. As noted in the introduction to these comments, this groundbreaking Administration initiative included a commitment by a broad coalition of public and private entities to these national Guiding Principles to Promote Electric Vehicles and Charging Infrastructure:

- Drive the market transformation to electric vehicles by making it easy for consumers to charge their vehicles with grid-connected infrastructure that is accessible, affordable, available and reliable, and interconnected with other low-carbon transportation options where feasible.
- Promote electric vehicle adoption by increasing access to charging infrastructure and supporting the development of plug-in electric

[7] See, e.g. Cal. Stats. §740.12(F) ("Widespread transportation electrification should stimulate innovation and competition, enable consumer options in charging equipment and services, attract private capital investments, and create high-quality jobs for Californians, where technologically feasible."); Oregon Senate Bill 1547 (signed March 8, 2016) §20(3)(f) (Requiring consideration of whether investments and expenditures for transportation electrification are "reasonably expected to stimulate innovation, competition and customer choice in electric vehicle charging and related infrastructure and services."); Utah Code Ann. §54-20-103 (Establishing requirement that investment program that "promotes customer choice" and "incentivizes the competitive deployment" of electric vehicle charging infrastructure.); Washington House Bill 1853 (signed May 11, 2015) (Authorizing Public Utilities and Transportation Commission to "promote fair competition in the provision of electric vehicle supply equipment.")

[8] For example, in January 2016 the California Public Utilities Commission authorized Southern California Edison and San Diego Gas & Electric Company to initiate limited term programs that provide site hosts free utility-side upgrades needed to install EV charging, and subsidized EV charging equipment and services, which are selected by the site host. See CPUC Decision 16-01-023, CPUC Decision 16-01-045.

vehicles that are as accessible, available, and convenient as gasoline-powered vehicles.

- Promote a robust market for vehicle manufacturers, utilities, equipment service providers, and support industries that ensure a consistent user experience, customer choice, and allows for a streamlined permitting process.
- Enhance American manufacturing competitiveness, innovation, and the development of advanced technology.
- Attract and leverage private, State, and Federal investment in electric vehicle deployment, infrastructure, research and development, and education and outreach.
- Enable smart charging and vehicle grid integration through solutions such as demand response, and other energy storage and load management strategies.

ChargePoint is a signatory to these principles, along with other companies in our industry, electric utilities such as Con Edison, Pacific Gas and Electric, and Southern Company, automobile manufacturers such as BMW, Ford, GM, and Nissan, and government entities, including EPA and the State of California.[9] ChargePoint has worked consistently and collaboratively to advocate for similar principles and ensure a level playing field for all market participants in the design and implementation of all EV infrastructure programs in the United States.[10]

As we enter this period of accelerated activity and regional coordination in the markets for EVs and EV charging equipment and services, there is a critical need to ensure that all programs channeling investment dollars to enable the purchase of EVs, EV chargers and related services enable open and fair competition and encourage innovation. If winners and losers are determined by program design rather than by customer choice, consumers lose out and the incentive to innovate is lost. ChargePoint's central concern is that Appendix C should embrace these key principles and ensure that they guide all aspects of the ZEV Investment Commitment.

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[9] See fn.3 above.

[10] See, e.g. ChargePoint, Inc. Comments on SB 350 Transportation Electrification Workshop and Application Guidance Straw Proposal (filed May 18, 2016, California Public Utilities Commission); Comments of ChargePoint, Inc. on Electric Vehicle Distribution System Impacts, Pilot Programs and Rates (filed December 5, 2015, Massachusetts D.P.U.); Comments of ChargePoint, Inc. regarding Reforming the Energy Vision (filed July 18, 2014).

III. The Proposed ZEV Investment Programs

The Partial Consent Decree resolves certain claims by the United States and California against the Settling Defendants. The agreement includes remedies for the consumers that purchased 2.0 liter vehicles (Appendices A and B), the $2 billion ZEV Investment Commitment (Appendix C), and a $2.7 billion Environmental Mitigation Trust (Appendix D).

As currently structured, Appendix C authorizes the Settling Defendants to distribute the $2 billion earmarked for ZEV investments through National and California ZEV investment plans, to be implemented over ten years, beginning immediately after the effective date of the agreement. These ZEV investment plans will be "developed by the Settling Defendants," subject to approval by EPA and CARB.[11] The Settling Defendants will be authorized to directly incur costs for the "planning, installation, operation, and maintenance" of ZEV Investments.[12] These authorized investments are defined broadly to include Level 2 charging stations at multi-unit dwellings, workplaces, and public sites, DC fast chargers, new heavy-duty ZEV fueling infrastructure (in California), and ZEV fueling stations.[13] The Settling Defendants are also authorized to initiate and operate brand-neutral education and public outreach programs, public access programs, and a California "Green City" initiative.[14]

In contrast to the environmental mitigation activities authorized in Appendix D, there is currently no provision in Appendix C expressly facilitating independent administration of the $2 billion earmarked for ZEV investments. Instead, Appendix C appears to leave program planning, design, and investment decisions primarily in the hands of the Settling Defendants, subject only to outreach and "meet and confer" obligations, approval by EPA and CARB, and after the fact auditing. The current text provides that the Settling Defendants are "solely responsible for every aspect of selecting National ZEV Investments...as well as the timing and locations... of any National ZEV Investments."[15] The Settling Defendants are required to "solicit input" from interested states, municipal governments, federally-recognized Indian tribes, and federal agencies before submitting the National plan.[16] However, the Consent Decree "does not impose upon Settling Defendants any obligation to act upon or respond to any suggestions received" from these interested parties.[17] A third party auditor will review investment expenditures under the National plan, but there appears to be

[11] Appendix C, §§1.2, 1.6.
[12] Appendix C, §1.4.
[13] Appendix C, §1.10.
[14] Id.
[15] Appendix C, §2.1.
[16] Appendix C, §2.3.
[17] Id.

no acknowledgement of the need for ongoing oversight at the state level, except in California.[18]

The California program provides an active role for CARB in identifying eligible ZEV investments, collaboration and oversight. However, Appendix C authorizes the Settling Defendants to propose the structure of the California plan and identify proposed ZEV investment categories, site priorities and locations, as well as to spend up to 10-14 percent of the settlement funds (depending on investment period) on overhead.[19] 10-14% of $2 billion means as much as $280 million in overhead, suggesting at least the possibility of a very substantial business component to the operation. The requirement that investments be "reasonable" and "necessary" provides a useful benchmark, but one that is vague and framed around the Settling Defendants' "procurement policies" and "established practices."[20]

Appendix C does include a few nominal provisions addressing potential conflicts of interest. For example, eligible charging infrastructure must be able to charge all plug-in ZEVs,[21] and the Settling Defendants are prohibited from using program funds for EV charging installed at or adjacent to dealerships.[22] However, these protections only address situations in which the Settling Defendants might use the settlement funds to competitively benefit themselves over other automobile manufacturers, and not situations in which they might use settlement funds to benefit themselves over providers of EV charging equipment and services.

Appendix C should include provisions to ensure that this remedial program does not effectively undermine competition in the EV charging industry, which is still in a relatively early stage of development. It is critical that the program provide site hosts and project developers a choice of EV charging equipment and services.

To be clear, we do not know at this point whether the Settling Defendants intend to propose an EV infrastructure investment program that is inconsistent with market principles and protections. Further, we do not expect that EPA or CARB would approve such a program. But Appendix C does not clearly protect the marketplace against this outcome, and thus stands as a potential threat to the current healthy climate for private investment in our industry. These program design issues need to be addressed in order to ensure that the ZEV Investment program achieves its purpose of supporting increased use of ZEV technology in

[18] Appendix C, §2.7.
[19] Appendix C-1, p.7.
[20] Appendix C-1, p.2, §1.1.
[21] Appendix C, §2.5.4.
[22] Id.

the United States, while avoiding unintended consequences for the market, consumers and EV drivers.

IV. Recommendations

A. The National and California ZEV Investment funds should be administered with transparency by regulators or a neutral third party.

ChargePoint strongly supports the concept of directing settlement funds toward expanding EV charging and public education promoting adoption of ZEVs. However, it would not be appropriate to give the Settling Defendants broad authority over how to design and administer the National and California programs.

First, the process should enable collaboration with subject matter experts that have experience in designing and administering large EV charging programs of this nature.

Second, the Settling Defendants, as written in the Partial Decree, are presented with an inherent conflict of interest. The Settling Defendants are not public interest organizations; they are for-profit companies whose mission is to make profits for shareholders. While the drafters have included terms addressing the most obvious opportunities for self-dealing, these do not address the larger issue, which is that the Settling Defendants' objectives as automobile manufacturers may not be consistent with the public interest objectives underlying the ZEV Investment Commitment. This is not a criticism of the Settling Defendants, which have an obligation to create and take advantage of business opportunities. Rather, it is a problem of conflicting priorities that cannot be resolved except by limiting the Settling Defendants' role in directing and managing the ZEV funds and/or by ensuring an appropriate level of agency oversight and active involvement in implementation.

The best solution is to reframe Appendix C to provide for transparency and neutral administration of the ZEV investment funds. There are clear benefits to this oversight. This approach would enable the government agencies and non-profits that are already involved in EV infrastructure program administration, public education on ZEVs, and initiatives to support the deployment of EVs in low-income communities to determine the best use of the settlement funds, consistent with conditions of the agreement and local priorities. It would also better ensure coordination with existing initiatives and programs.

B. EV infrastructure investments funded through the National and California ZEV Investment plans must be guided by market principles protecting competition, customer choice and innovation.

As noted above, legislators and regulators around the country have incorporated fundamental market principles and protections to ensure competitive markets and customer choice in laws and administrative rules and decisions authorizing investment of public or ratepayer funds in EV infrastructure. These principles have been embraced by a broad spectrum of stakeholders, including ratepayer advocates and environmental advocacy organizations. These principles are mirrored in the Guiding Principles to Promote Electric Vehicles and Charging Infrastructure included as part of the Obama Administration EV initiative, including competition, customer choice of products and services, and preservation of incentives for innovation and private investment.

These principles are fundamental to continued growth and innovation in EV charging technologies and services. They provide guidance and regulatory security, which is critical to maintaining a healthy environment for private investment. For these reasons, ChargePoint recommends that a set of guiding market principles be incorporated into the ZEV Investment plans, and reflected in the implementation of those plans. Particularly in light of the large size and ten-year span of the ZEV Investment Commitment, it is very important to ensure that program rules provide equal opportunity for companies selling EV charging equipment and services to compete in the market, to test new business models, supply innovative products and services to customers, and participate in EV infrastructure programs. A competitive market drives innovation and ensures cost savings for consumers. This is fundamental.

C. The National and California ZEV Investment program funds should be distributed in the form of direct grants or rebates.

If the Settling Defendants are permitted to "procure" EV charging equipment and services, as Appendix C currently suggests, they potentially could control which equipment and services are chosen. This outcome would be harmful to consumers and undermine competition. Appendix C should be modified to make it clear that the program will protect consumer choice in the selection of EV charging equipment and services.

EV infrastructure funding provided through the ZEV Investment Commitment should be made available to site hosts and project developers in

the form of direct rebates or grants.[23] Rebates enable the employer, parking lot operator, commercial business, institution, or multi-unit residential building that is hosting the EV charger to choose the charging equipment, network services, and operations and maintenance package that are right for that particular site. There should be established minimum specifications for the equipment and services (these are already used in many state programs and are readily available for reference), but no restriction on customer choice. In the case of funding earmarked for DC fast charging on highway corridors (where the site may not be identified until later in the process) the funding should be administered through a competitive grant process that is open to all qualified market participants.

This approach helps facilitate competition, but also is an important means of ensuring that the charging facilities and services are a good fit for the needs and preferences of the site owners and the drivers using the facilities. The Yale Center for Business and the Environment has analyzed different charging products and business models in its report "Financing Electric Vehicle Markets in New York and Other States" and concluded that:

> No single technology or business model available today is exactly right for all charging scenarios. There are pros and cons to each alternative, depending on the location and the driver base that the charging station aims to serve.[24]

Site hosts value having a choice among options for equipment, network service, maintenance plans, options for payment collection, station fees, station accessibility, driver authentication, advertising, and managing data such as usage, energy, and sustainability calculations. Site hosts are the parties best qualified to make choices about the number of charging stations needed now and in the future at the site, and to assess how best to integrate EV charging technology with on-site energy efficiency and energy management, distributed generation such as rooftop solar, and opportunities for participation in demand response programs.

There are very good existing models for this approach. For example, Los Angeles Department of Water and Power (LADWP) offers commercial and MUD customers with a minimum of three parking spaces a rebate of up to $4000 to install qualifying EV charging stations selected by the customer, and additional

[23] As used here, the term "site host" means the owner or operator of the property on which EV charging facilities are located. For example, site hosts may include employers, landlords, commercial business owners, universities or other public institutions, municipalities, or the public/private operators of highway rest stops.
[24] Yale Center for Business and the Environment (2015), "Financing Electric Vehicle Markets in New York and Other States" p.6.

rebates to meet additional site needs.[25] As another example, Southern California Edison Company operates a program that provides at no charge to the site host all of the utility-side infrastructure upgrades needed to enable installation of EV charging at workplaces and MUD locations, and provides a rebate to cover part of the remaining costs, i.e. the charging station, network services, and maintenance.[26] To facilitate deployment of EV charging along major highways, the California Energy Commission (CEC) administers a grant program that enables eligible providers to apply for grants to supply DC fast chargers and Level 2 chargers at locations along California's transportation corridors.[27] Again, the process is open, competitive, and designed to support identified needs and purposes.

Distributing EV infrastructure funding in the form of rebates and grants offers multiple benefits. It enables participation by all qualified providers of EV charging equipment and services. It motivates these market participants to continue innovating to meet customer demands and preferences. It encourages price competition, which benefits consumers and ensures optimal benefit from program funds. It leverages private investment by covering a part, but not all of the cost of the EV charging equipment and services. And finally, it facilitates involvement by the site host, which is vitally important to ensure that EV charging equipment is well matched to the needs of the site and drivers.

These and other lessons from the early years of EV deployment suggest that the better approach is to make the ZEV infrastructure investment funds directly available to employers, MUD owners, commercial site owners, and project developers through a simple and straightforward grant or rebate program. The Appendix C requirement that all EV chargers be covered by maintenance plans is an important condition.[28] However, site hosts should be free to contract directly with a qualified provider for a package of O&M services that meet their needs, subject to reasonable baseline requirements.[29]

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[25] See: https://www.ladwp.com/ladwp/faces/wcnav_externalId/c-sm-ev?_adf.ctrl-state=69eulie4q_29&_afrLoop=478655210045277.

[26] http://www.edison.com/home/our-perspective/charge-ready-a-plan-for-california.html.

[27] http://www.energy.ca.gov/contracts/GFO-15-603/.

[28] See Appendix C §§ 2.5.3, 3.3.2.5.

[29] The requirement in Sections 2.5.4 and 3.3.2.5 of Appendix C specifying a "toll-free number for maintenance issues that will be answered by a live operator who is subject to Settling Defendants' control" needs to be reconsidered or clarified. It seems unlikely that the drafters intend to require that a Volkswagen employee or contractor will be the primary phone contact for EV drivers or site hosts who need help with a non-functioning charging station, but the wording of this requirement is ambiguous. ChargePoint offers 24/7 support services, but its operators are not "under the control" of the site owners or incentive program administrators.

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D. The Settling Defendants should not be permitted to profit from the creation of a new EV charging business or enterprise funded by the National and California ZEV Infrastructure Investment programs.

Appendix C is remedial in nature and should not become the basis of a new business venture for the Settling Defendants. We do not assume that the Settling Parties plan to use the funds to start a new business venture, but in its terms and implementation, Appendix C needs to protect against this possibility. Our concern is that the Settling Defendants could enter an existing competitive market and, because Appendix C mandates expenditure of $2 billion dollars within specified time periods, pick winners and losers through a non-market approach, and without regard to normal market considerations of quality, cost and return on investment.

To address this concern, four conditions should be expressly imposed on the implementation of the investment program as it applies to EV infrastructure:

1. The Settling Defendants should provide equal and full opportunity to participate in the program to all qualified providers of EV infrastructure (including hardware and software) and related services.
2. The EV infrastructure investments may not include equipment, software, or services manufactured, owned, operated or provided by the Settling Defendants.
3. The Settling Defendants should not operate, control or provide charging network services for managing the EV infrastructure.
4. The Settling Defendants should not profit from the Appendix C investments.

In pressing for these restrictions, we do not want our perspective to be misunderstood. ChargePoint has been pleased to partner with VW on infrastructure projects. We value our relationship with VW and with other automakers, and share with them a common interest in promoting EV adoption and the expansion of EV charging facilities and network services to meet the needs of EV drivers. The $2 billion ZEV investment funds will help serve these objectives, but the Settling Defendants should not be allowed to use these funds for directly self-interested purposes, e.g. by engaging in new business enterprises through the ZEV Investment program.

V. Conclusion

In conclusion, ChargePoint is very supportive of the Settling Parties' inclusion of the ZEV Investment Commitment in the Partial Consent Decree. For the reasons discussed above, ChargePoint recommends that Appendix C be

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modified and implemented to (1) enable administration of ZEV investment funds with transparency by regulators or a neutral third party, (2) include guiding principles protecting competition, customer choice, and incentives for innovation and private investment, (3) specify that investment funds devoted to EV charging infrastructure be provided in the form of grants or rebates, and (4) clarify that the Settling Defendants may not use ZEV investment funds to create new business opportunities for their sole benefit. We appreciate your consideration of these comments and recommendations.

Sincerely,

Colleen Quinn
Vice President, Government Relations and Public Policy

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August 5, 2016

VIA U.S. MAIL AND ELECTRONIC MAIL

John C. Cruden
Assistant Attorney General
Environmental and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611
Washington, DC 20044-7611
pubcomment-ees.enrd@usdoj.gov

Re: 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

Dear Mr. Cruden:

These comments are being submitted on the proposed Consent Decree in the above-referenced litigation, on behalf of the Cherokee Nation (herein, the "Nation"). The Nation is acknowledged by the United States Government as a federally recognized Indian Tribe, and is the largest such tribe. The Nation's boundaries encompass all or part of fourteen counties in what is now the northeastern part of Oklahoma. We appreciate your recognition that Indian Tribes play an important role in protecting the environment, and thank you in advance for your consideration of these comments.

I. History of Negotiations and Summary of Comments to Improve the Consent Decree

On June 26, 2013, the President set forth "a national policy to ensure that the Federal Government engages in a true and lasting government-to-government relationship with federally recognized tribes in a more coordinated and effective manner, including by better carrying out its trust responsibilities." Exec. Order 13647 (June 26, 2013). The Nation, however, was neither consulted nor invited to participate in the settlement negotiations, even those concerning the type of environmental projects that would be eligible for mitigation proposals. The Nation only saw the Consent Decree after it was completed and accordingly did not have a chance to provide input concerning the mitigation projects that would be viable and desirable on Indian lands. This falls far short of exercising the United States' responsibility to federally recognized tribes in the "coordinated and effective manner" established by the President. And, consultation or – at a

minimum – notification on a government-to-government basis would not affect the ability of the Attorney General to settle cases on behalf of the United States. *See, id.*, Section 4(a)(i).

Many Indian Tribes do not have the same needs, resources or infrastructures as the states. There are few large-scale opportunities for conversion or replacement of diesel engines; there is not as much "in-house" expertise in terms of planning, engineering and executing projects; and there are few, if any, railroads, ferries and other infrastructure with large diesel equipment. As discussed in more detail below and in the attached report by Dr. Frank Ackerman of Synapse Energy Economics, Inc., a well-respected expert on energy economics and related environmental issues, we seek modifications of the Consent Decree that recognize these different circumstances, including changes which provide for the following:

1. Allowing for a broader range of mitigation projects with fewer restrictions, including renewable energy projects such as solar, wind and hydroelectric power; efficiency projects that reduce pollution and fossil fuel use, such as replacement of older wood stoves; and less restrictions on the conversion or replacement of diesel engines with alternatives such as electric, hydrogen, or compressed natural gas (including lifting restrictions on building the facilities necessary for such projects). This proposal could be more suitable on tribal lands and in many circumstances would displace larger sources of nitrogen oxides (NO_x) and result in more significant reductions of NO_x emissions and other equally harmful pollutants.

2. Reducing the number of annual funding cycles to one, thereby allowing for larger, more efficient and sustainable long-term projects.

3. Providing for the appointment of a separate Trustee for eligible Indian tribe projects, eliminate the reverter of Indian mitigation funds to the general fund, and replace Settlement Appendix D, 5.0.5.2.3 (which provides for a per capita distribution).

4. Allowing for an appropriate percentage of the mitigation funds to be used for technical assistance and administrative expenditures.

5. Clarify the waiver provision and ensure that Indian Tribes are given a comparable percentage of any penalty payments or fines.

II. Recognition of Tribal Interests and Coordination with Tribal Governments has been Inadequate

As a preliminary matter, we seek more meaningful coordination, including recognition of and compliance with the Federal Government's stated commitments. Executive Order 13175 specifies that each Agency must have an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications. Exec. Order No. 13175 (Nov. 6, 2000). In 2011, EPA developed a policy to comply with that Executive Order. Its statement could not be more clear:

> EPA's policy is to consult on a government-to-government basis with federally recognized tribal governments when EPA actions and decisions may affect tribal interests. Consultation is a process of meaningful communications and coordination between EPA and tribal officials prior to EPA taking actions or implementing decisions that may affect tribes.

EPA Policy on Consultation and Coordination with Indian Tribes (May 4, 2011), Section I.[1] Moreover, "Consultation should occur early enough to allow tribes the opportunity to provide meaningful input that can be considered prior to EPA deciding whether, how, or when to act on the matter under consideration." *Id.* at Section V.C.[2]

In light of this policy, the Nation submitted a letter seeking an extension of the public comment period on July 25, 2016. The letter noted that the time frame was inadequate to allow meaningful analyses of the issues presented by the Decree and the programs implemented by it. On July 29, 2016, the DOJ determined not to extend the public comment period and stated that, "We will treat your letter as a public comment." The DOJ's initial response did not comport with Executive Order 13175 or the EPA's Policy, and does not reflect the meaningful consideration appropriate for a government-to-government request affecting important tribal interests.[3]

Likewise, while we appreciate the DOJ Office of Tribal Justice's July 7, 2016 invitation to consult on the process for distributing the Tribal Allocation Subaccount, consulting with the Nation beginning on August 8, 2016 - after comments on the Consent Decree are due - makes the consultation potentially meaningless and fails to strengthen the Nation's management over resources and impacts on its land. We are also concerned about the limited scope of the input sought from the Nation. The only issues on which the Nation is invited to consult are:

- A method for allocating annual funding in the Tribal Allocation Subaccount for Eligible Mitigation Actions;
- A method for providing technical assistance to the tribes; and
- A method for recommending candidates to serve as the Trustee.[4]

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[1] The 2011 Policy reaffirms the principles set forth in the 1984 "EPA Policy for the Administration of Environmental Programs on Indian Reservations," which "remains the cornerstone for EPA's Indian Program and 'assure[s] that tribal concerns and interests are considered whenever EPA's actions and/or decisions may affect' tribes (1984 Policy, p. 3, principle no. 5)." 2011 Policy at Section II.

[2] The U.S. Department of Justice has similar policy, discussing the "government-to-government relationship" between "the Federal Government and the governments of federally recognized Tribes." DOJ Policy Statement 0300.01 (August 29, 2013).

[3] On August 3, 2016, two days before the end of the comment period, DOJ provided some rationale for its refusal in response to an inquiry by counsel for the Nation. None of the issues set forth in these comments were discussed, nor was any justification provided for ignoring the core principals of the Executive Orders regarding tribal relations or EPA's Tribal Policy.

[4] We note that the DOJ has not yet provided the "framing paper" setting forth the issues to be discussed at the first "telephonic consultation" on August 8, 2016.

The Nation is not being consulted regarding the very programs for which it will be required to qualify. Moreover, the Nation is not being consulted regarding significant issues relating to the distribution of the funds, including whether the Eligible Mitigation Actions and payment schedule as designed will accomplish the overall goals of the Consent Decree in Indian Country.

We are hoping for a more collaborative approach to this process moving forward.

III. Recommended Modifications to the Consent Decree

1. Expand the List of Qualified Mitigation Projects and Remove Limitations

The Consent Decree sets forth a very narrow list of qualified mitigation projects, primarily dealing with efforts to modify and/or replace existing diesel-powered equipment.[5] While Indian Tribes have diverse needs, few of them have the established infrastructure or transportation systems to take advantage of these specific projects in a way that will truly advance the Consent Decree's goal to "[F]ully mitigate the total, lifetime excess NO_x emissions from the 2.0 Liter Subject Vehicles[.]" Decree, Appx. D. We agree with the stated goal, but believe it would be more appropriately achieved using a flexible approach, rather than a one-size-fits-all solution.

We have identified examples of potential mitigation projects that would better fit the needs of Indian Tribes and the conditions on the ground, while reducing the amount of NO_x emissions to which tribal citizens are exposed. These include:

- Development of solar, wind and hydroelectric power.
- Installing energy efficient upgrades to tribal housing and buildings.
- Expanding infrastructure to deliver natural gas to tribal lands for use as an alternative fuel in tribal vehicles.
- Conversion of wood fired stoves.
- Establishing monitoring stations to track NO_x on tribal lands.

We believe all parties would be better served with language giving Indian Tribes the ability to submit proposals for a broader range of mitigation projects consistent with the goals of the partial consent decree.

We also request giving a designated Tribal Trustee the authority to approve alternative environmental mitigation projects that meet the Consent Decree's stated goal while effectively considering the diverse needs and means within Indian Country.

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[5] These include: Freight Trucks, Buses, Locomotives, Ferries/Tugs, Ocean Going Vessels Shorepower, Airport Ground Support Equipment, Forklifts, and Zero Emission Vehicle Supply Equipment. See Decree, Appx. D-2.

2. Reduce the Number of Rounds and the Length of the Mitigation Payment Period

In order to ensure that Indian Tribes are able to implement more impactful mitigation projects, we recommend reducing the number of annual funding cycles to one rather than six as anticipated by the Consent Decree. *See* Decree, Appx D, Section 5.0.5.2.1. There are 567 Federally recognized Indian Tribes,[6] and each may have projects to propose. Dividing the approximately $50 million available between all the interested tribes and further dividing them into six rounds or funding cycles might yield *de minimis* awards and prevent more worthwhile and environmentally beneficial projects. We are concerned that spreading the payments over six annual funding cycles will result in smaller, short-term projects rather than a meaningful, long-term investment in NO_x mitigation.

3. Appoint a Tribal Trustee, Eliminate the Reverter of Indian Mitigation Funds, and Provide the Tribal Trustee with Authority to Distribute Funds in Case Eligible Requests by Tribes Exceed Available Funding

Tribal interests and viable mitigation projects differ significantly from those of the states and cannot be knowledgeably addressed by the proposed Trustee. Therefore, we request the appointment of a designated Tribal Trustee to effectively consider the diverse needs within Indian Country.

Of particular concern is that the Nation is already being asked to waive their right to seek injunctive relief or to bar certain vehicles from tribal lands in exchange for a promise that their mitigation proposals will be considered. However, the Nation and other tribes stand to lose some or all of the money allocated for their benefit in the event their funding requests are rejected or diluted. *See* Decree, Appx. D, Section 5.0.5.2.1. In fact, there is no guarantee that the Trustee will approve any Tribal proposals or fund any Tribal mitigation projects. And if tribal projects are approved, there is no guarantee they will be funded at an adequate level.

Rather than including a provision that would return any uncommitted funds to the non-tribal Beneficiaries, we ask the EPA to commit to working with Indian Tribes pursuant to EPA Tribal Policy to assure a fair and complete distribution of the mitigation funds currently allocated for tribal projects.

We are also very concerned with Settlement Appendix D, Section 5.0.5.2.3, which provides that funds are to be allocated on a per capita basis if the funds applied for are greater than the funds available. Among other things, this provision could result in a tribe that expended significant resources on submitting a detailed technical application receiving the same amount of funds on a per capita basis as another tribe that expended no resources on submitting a one-line application of intent to receive funds. Instead, we request that the Tribal Trustee be given the authority on allocating funds in the case where applied for funds exceed available funds.

[6] http://www.bia.gov/WhoWeAre/index.htm

4. Request to Expand the Administrative Expense Allocation

Tribes have significantly less "in house" expertize and administrative capabilities relative to the states and will need to rely to a greater extent on paid professionals in developing and implementing projects, including engineering, technical, administrative, accounting and legal assistance. Accordingly, we request greater flexibility to use the allocated trust funds for technical, professional and administrative assistance. Currently, the Consent Decree provides for two additional expenditures from the Tribal Allocation Subaccount, totaling 15%:

- 5% to be directed towards technical assistance to enable tribes to prepare funding request for Eligible Mitigation Actions. Decree, Appx. D, Section 2.1.1.

- 10% for actual administrative expenditures associated with implementing Eligible Mitigation Actions. Decree, Appx. D-2 at 10.

While this amount is helpful to defray the cost of proposing and implementing mitigation projects, it does not fully recognize the realities of tribal expertise and administration.

As compared with the states, tribes have smaller staffs with fewer existing projects in place. Many tribes will need to conceive, develop, and implement many of the mitigation programs from scratch, and we are hopeful the tribes will need to consider more than simply what trucks to buy or which vehicles need replacement engines. Without the flexibility to allocate necessary resources to professional assistance and administering the programs, tribes will be forced to spend their allocated money on short-term projects rather than laying the foundation for a long-term, self-sustaining mitigation effort that would better accomplish the stated goal of the decree.

Accordingly, we propose that those amounts be increased to provide that awards under the Tribal Allocation Subaccount can expend up to 15% (an increase of 10%) towards technical assistance to enable tribes to prepare funding requests for Eligible Mitigation Actions and up to 15% (an increase of 5%) for actual administrative expenditures associated with implementing Eligible Mitigation Actions.

5. The Waiver Must be Clarified and Indian Tribes Should Receive a Portion of any Penalties or Fines Allocated to Participating States

The Nation is concerned about the waiver of claims clause contained in section 4.2.6 of Appendix D to the Consent Decree. Specifically, it appears that they are asked to release their claims for injunctive relief and the right to bar 2.0 Liter Subject Vehicles from Indian land without receiving the same consideration as other states. That clause should be clarified by including or referencing the reservation of rights language contained in the Consent Decree so that all beneficiaries of the mitigation fund, including the Nation, are entitled to a reservation of rights equivalent to that held by the U.S. and California.

Further, and to the extent any stipulated penalty or other penalty payments are collected in connection with this consent decree and are distributed to participating states, Indian Tribes should

receive a comparable percentage of these penalties. Discretion should be vested in the Tribal Trustee to determine the proper use of those funds.

Thank you for your consideration of the Cherokee Nation's comments. Please do not hesitate to contact me with any questions.

Sincerely,

Sara E. Hill

Sara E. Hill
Secretary of Natural Resources
Cherokee Nation

Attachment

cc: Phillip Brooks, Director of Air Enforcement Division
United States Environmental Protection Agency

Synapse
Energy Economics, Inc.

Statement on Proposed Terms of the VW Settlement for Indian Tribes

DR. FRANK ACKERMAN

PRINCIPAL ECONOMIST, SYNAPSE ENERGY ECONOMICS

AUGUST 5, 2016

I am an economist, specializing in the economics of energy, climate change and other environmental problems. I have written numerous books, research articles, and professional reports for government agencies and for non-governmental organizations. I have testified on the economics of electric utilities in regulatory hearings in several states, and on the economics of climate policy in hearings in Congress in Washington DC, and in the European Parliament in Brussels, Belgium.[1]

The purpose of this comment is to discuss the proposed terms of the VW settlement, as it affects Indian tribes. Although the settlement offers roughly $50 million to Indian tribes to mitigate emissions of nitrogen oxides (NOx), it imposes an unnecessarily restrictive definition of eligible mitigation actions.[2] A broader definition of mitigation actions could encompass multiple measures, recognized in other government documents as reducing NOx emissions. This could lead to more effective mitigation, and would make a more enduring contribution to the economic and social development of Indian country.

The eligible mitigation actions, as proposed in the settlement, consist almost entirely of replacement of old diesel engines with newer, cleaner alternatives. Large and medium trucks, buses, locomotives, ferries and tugboats, equipment in ocean ports and airports, and forklifts can be repowered or replaced with cleaner alternatives. In addition, 15 percent of the funds received by each tribe can be spent on equipment for electric vehicle charging or hydrogen fuel cell refueling. And funds can be used for the non-federal match under the Diesel Emission Reduction Act (DERA), an existing federal program that supports a similar range of options for replacing old diesel engines.[3] That is the entire list of eligible mitigation actions in the proposed settlement.

Old diesel engines are an important source of NOx emissions – but not the only source. If the goal is to emit less NOx, or more generally to reduce pollution, then the list of eligible mitigation actions should include anything that leads to verifiable emission reductions. Some alternative emission

[1] My CV is available at http://www.synapse-energy.com/sites/default/files/resume-ackerman.pdf.

[2] See Department of Justice Consent Decree, Appendix D-2, available at https://www.vwcourtsettlement.com/en/.

[3] DERA also includes funding for replacement of off-road diesels in construction, mining and other industries, in addition to the types of vehicle and equipment upgrades that are eligible mitigation actions under the VW Settlement.

reduction measures, which EPA has included in its analyses of NOx, may be more relevant on Indian reservations, and more valuable to the tribes.

One of the most extensive analyses of NOx emissions appears in EPA's Regulatory Impact Assessment (RIA) for ozone standards, published in 2008.[4] NOx is one of the precursors of ground-level ozone, and control of ozone requires control of NOx emissions. NOx control strategies considered in the ozone RIA include:[5]

- emission controls at selected heavy industries
- emission controls at power plants
- emission controls at municipal waste and medical waste incinerators
- decreased use of older, polluting wood stoves
- upgrading space heaters and water heaters, and switching to cleaner heating fuels
- adoption of low-emission light vehicles; and
- replacing old, large diesel engines.

Although diesel engines were important, they did not account for a majority of baseline NOx emissions, or of the opportunities for near-term NOx reduction identified by EPA.[6]

Several of EPA's suggested measures may be relevant for NOx emission reduction on Indian reservations. Older wood stoves and fireplaces may still be significant sources of NOx in some areas (although some reservations have already replaced these with newer heating systems). In such cases, newer heating systems can reduce NOx and other air pollution, and improve the quality of life for Indian households.

Power plants are important sources of NOx emissions, particularly coal-burning plants, and to a lesser extent, older natural gas plants that have not installed modern pollution controls. These emissions can be reduced by adoption of energy efficiency measures and development of renewable energy sources on reservations – even if the power plants are located elsewhere.

Energy efficiency measures, such as LED lighting, better insulation, and more efficient heating systems will reduce the demand for electricity, often at very low cost. When such measures are adopted on a reservation, less electricity is generated by the utility, or the regional power pool, that supplies energy to the reservation. If the reduction in generation occurs at a coal-burning plant or an older gas plant, one result is a reduction in NOx emissions.

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[4] EPA, "Final Ozone NAAQS Regulatory Impact Analysis", https://www3.epa.gov/ttnecas1/regdata/RIAs/452_R_08_003.pdf.

[5] *Ibid.*, Tables 2.2 and 3.2.

[6] *Ibid.*, Figure 3.10 and Table 3.3.

Therefore, in areas dependent on coal-burning power plants, energy efficiency is an important strategy for NOx reduction. The power plant may be located far from the reservation, but the change in the plant's emissions is caused by the adoption of efficiency measures on the reservation. Moreover, efficiency measures often make buildings more comfortable, providing an added benefit to residents.

For exactly the same reason, development of renewable energy on reservations can reduce NOx emissions at power plants. Many reservations have excellent wind and solar resources, implying low costs for development of renewable energy. Some also have potential for expansion of hydroelectric or biomass energy. Every kilowatt-hour of renewable energy generated on a reservation displaces a kilowatt-hour of electricity generated in a power plant. Thus for reservations that are currently receiving electricity from coal-burning power plants, renewable energy will reduce NOx emissions from electricity generation, just as energy efficiency does. Renewable energy development will, in addition, create new enterprises and jobs that will contribute to economic growth on reservations.

Another opportunity for NOx reduction concerns low-emission light vehicles (cars and light trucks). The list of eligible mitigation activities in the proposed settlement includes only a modest allocation to low-emission vehicle infrastructure – and limits that infrastructure to electric vehicles and hydrogen fuel cell vehicles. On a number of reservations, compressed natural gas (CNG) vehicles are a more realistic low-emission alternative. The goal of reducing NOx emissions from vehicles could be pursued by expanding CNG infrastructure and vehicle use, which seems more likely to succeed than selling Teslas in Indian country.

In summary, there are a number of areas where actions taken on reservations could reduce NOx emissions. Such actions extend far beyond the upgrades or replacements of old diesel engines that are called for in the proposed settlement terms. Replacing older wood stoves or fireplaces with newer heating systems; promoting energy efficiency and development of renewable energy; and expansion of CNG infrastructure could all lead to NOx reductions. They would, at the same time, strengthen the economic and social development of the reservations.

For all of these reasons, I recommend that that the proposed settlement terms should be modified to accept a much broader definition of eligible mitigation actions, at least for Indian Tribes, including a wide range of measures that lead to verifiable reductions in NOx emissions. Many of these alternatives will be more readily available and of greater benefit to the tribes than the current narrow focus on large diesel engines.

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PROFESSIONAL EXPERIENCE

Synapse Energy Economics Inc., Cambridge, MA. *Principal Economist*, 2012 – present.

Consults on issues of energy economics, environmental impacts, climate change policy, and environmental externalities valuation.

Massachusetts Institute of Technology, Cambridge, MA. *Lecturer, Department of Urban Studies and Planning*, 2014 – present.

Teaches graduate seminars on "Electricity, Economics, and Environment" and "Climate Economics and Policy."

Stockholm Environment Institute – US Center, Somerville, MA. *Senior Economist and Director of Climate Economics Group*, 2007 – 2012.

Wrote extensively for academic, policy, and general audiences, and directed studies for a wide range of government agencies, international organizations, and nonprofit groups.

Tufts University, Global Development and Environment Institute, Medford, MA. *Senior Researcher*, 1995 – 2007.

Editor of GDAE's *Frontier Issues in Economic Thought* book series, a coauthor of GDAE's macroeconomics textbook, and Director of the institute's Research and Policy program. Taught courses in the Tufts Department of Urban and Environmental Policy and Planning.

Tellus Institute, Boston, MA. *Senior Economist*, 1985 – 1995.

Responsible for research and consulting on aspects of economics of energy systems and of solid waste and recycling.

University of Massachusetts, Amherst, and Boston, MA. *Visiting Assistant Professor of Economics*, 1982 – 1984.

Dollars and Sense, Somerville, MA. *Editor and Business Manager*, 1974 – 1982.

EDUCATION

Harvard University, Cambridge, MA
Doctor of Philosophy in Economics, 1975

Swarthmore College, Swarthmore, PA
BA in Mathematics and Economics, 1967

AFILLIATIONS

Economics for Equity and the Environment (E3 Network), Portland, OR
Co-founder and steering committee member, 2007 – present

Center for Progressive Reform, Washington, DC
Member scholar, 2002 – present

BOOKS

Ackerman, F., E. A. Stanton. 2014. *Climate Change and Global Equity*. London: Anthem Press.

Ackerman F., E. A. Stanton. 2013. *Climate Economics: The State of the Art*. London: Routledge.

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Ackerman, F. 2009. *Financing the Climate Mitigation and Adaptation Measures in Developing Countries.* Prepared as G-24 Discussion Paper No. 57 for United Nations Conference on Trade and Development. Previously published as Stockholm Environmental Institute (SEI-US) Working Paper WP-US-0910.

TESTIMONY (RECENT)

New York State Department of Environmental Conservation (DEC #3-5522-00011/0004 and #3-5522-00011/00030): Direct and rebuttal testimony regarding permanent fish protection outages at Indian

Point Energy Center. On behalf of Riverkeeper, Scenic Hudson, and Natural Resources Defense Council. June 26, 2015 and August 10, 2015.

Commonwealth of Kentucky, Kentucky Public Service Commission (Case No. 2013-00199): Direct testimony regarding the Application of Big Rivers Electric Corporation for a General Adjustment in Rates. On behalf of Ben Taylor and the Sierra Club. October 28, 2013.

State of Nevada, Public Utilities Commission of Nevada (Docket No. 13-07021): Direct testimony regarding the proposed merger of NV Energy, Inc. and MidAmerican Energy Holdings Company. On behalf of the Sierra Club. October 24, 2013.

Commonwealth of Kentucky, Kentucky Public Service Commission (Case No. 2012-00535): Direct testimony regarding the Application of Big Rivers Electric Corporation for a General Adjustment in Rates. On behalf of Ben Taylor and the Sierra Club. May 24, 2013.

State of Indiana, Indiana Utility Regulatory Commission (Cause No. 44217): Direct testimony regarding Duke Energy Indiana's Certificates of Public Convenience and Necessity. On behalf of Citizens Action Coalition, Sierra Club, Save the Valley, and Valley Watch. November 29, 2012.

United States Congress House Committee on Energy and Commerce (Hearing on "The American Clean Energy and Security Act of 2009"): Direct testimony titled "Climate Change: The Costs of Inaction" explaining the economic implications for the United State of natural disasters and resource demands as a result of global climate change. April 22, 2009.

United States Congress House Committee on Energy and Commerce, Subcommittee on Energy and Environment (Hearing on "The Climate Crisis: National Security, Public Health, and Economic Threats"): Direct testimony titled "Climate Change: The Costs of Inaction" explaining the economic implications for the United State of natural disasters and resource demands as a result of global climate change. February 12, 2009.

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Resume dated October 2015

From: IdleAir TSE Partners
To: ENRD, PUBCOMMENT-EES (ENRD); info@idleair.com
Sent: 8/3/2016 2:37:32 PM
Subject: 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

John C. Cruden Esq.
Assistant Attorney General
Environment and Natural Resources Division
U.S. Department of Justice

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.

Dear Mr. Cruden:

Our organization writes to request that the final settlement between the U.S. government and Volkswagen provide maximum flexibility for States and Native American tribes to consider allocating some of their funds to truck stop electrification (TSE). Specifically, we ask that the settlement expressly list truck stop electrification as an eligible mitigation activity within Appendix D2, along with the nine other activities that already include various forms of diesel retrofits and the marine equivalent of truck stop electrification. While TSE is eligible for funding under the DERA program option, we are concerned that some States and Tribes will decline or minimize use of the DERA option. Moreover, should Congress decide not to provide funding for the DERA program, there would be limited opportunity to invest in TSE.

Too often, drivers idle their engines during overnight stays in order to maintain a safe and comfortable interior environment. The practice takes place on a large scale and has a disproportionate impact on disadvantaged communities (see https://www.idleair.com/tse-environmental-justice/) where truck stops and fleet terminals tend to be located. DERA's own guidelines flag the communities surrounding truck stops for programmatic priority. The Argonne National Laboratory estimates that rest-period idling wastes about 1B gallons of diesel and results in the emission of about 55,000 tons of nitrogen oxides released annually in the US (see http://www.afdc.energy.gov /uploads/publication/hdv_idling_2015.pdf). The EPA rates Truck Stop Electrification as the single most cost effective activity to mitigate mobile sources of NOX emissions (less than one third of the cost per ton achieved through diesel retrofits). See page 13 (https://www3.epa.gov/otaq/stateresources/policy/general/420b07006.pdf). Truck Stop Electrification, an EPA SmartWay verified technology, provides long-haul truck drivers an alternative to idling their diesel engines during their overnight stays. Significant NOX mitigation can be achieved through 1) installation of new TSE locations; and 2) TSE vouchers for truck drivers to encourage more truckers to use existing TSE facilities.

Again, we urge you to specifically list TSE infrastructure and TSE vouchers as eligible mitigation activities under Appendix D2 of the settlement. This would afford beneficiaries maximum flexibility to achieve the settlement's goal of improving air quality in disadvantaged communities by reducing harmful diesel emissions.

Thank you for your consideration.

Sincerely,

Fran Olsen Sharp
Title: VW TDI Owner
Organization: Chirping Frogs Farm
Email: Chirping.Frogs.Farm@gmail.com
Additional Comments: I feel that there are excessive fines on VW. VW should be fined for what they did, but they should not be paying for everyone else to upgrade / improve their diesel related vehicles. This is not OK. This

option above is certainly something that needs to be done to decrease the emissions / NOX, but this should NOT be the responsibility of VW for their indiscretion related to emissions testing.

CITY OF PHILADELPHIA

DEPARTMENT OF PUBLIC HEALTH
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Deputy Health Commissioner

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August 5, 2016

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RE: Proposed Partial Consent Decree – *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

Dear Mr. Cruden:

The City of Philadelphia has reviewed the proposed partial Consent Decree ("CD") reached between the U.S. Environmental Protection Agency ("EPA") and California Air Resources Board ("CARB") and California Attorney General's Office, and Volkswagen Group of America, Inc. and its affiliates ("Volkswagen"), filed with the United States District Court in the Northern District of California in the above referenced case, and published for public comment in the Federal Register on July 6, 2016.[1] The City appreciates the opportunity to comment on the draft partial CD before it is finalized. The City is pleased at EPA and California's efforts to reach a constructive settlement that attempts to mitigate the environmental damage to air quality caused by Volkswagen's manufacture and sale of non-Clean Air Act compliant 2.0 Liter diesel vehicles throughout the country. In particular, the City is pleased at the EPA and California's efforts to address the negative environmental and health impacts that Volkswagen's actions had on all states, territories, tribes, and municipalities.

In the City of Philadelphia, the Department of Public Health, Air Management Services ("AMS") is charged with implementing an effective air quality program to monitor and reduce the environmental

[1] Notice of Lodging of Proposed Partial Consent Decree Under the Clean Air Act, 81 Fed. Reg. 44,051 (Jul. 6, 2016).

permitting regulations.[2] Philadelphia is the fifth largest city in the country, and has a population of more than 1.5 million people.[3] The greater Philadelphia area includes approximately 6 million people, many who commute into and around the City by car each day.[4] Much of the City's population is low income and/or minority, which is why the larger part of Philadelphia is designated as an environmental justice area.[5]

The City specifically supports the comments of the National Association of Clean Air Agencies ("NACAA"). Additionally, the City will comment on (i) the Form of Environmental Mitigation Trust Agreement, Appendix D, of the proposed partial CD, and (ii) the need to change the terms of the Environmental Mitigation Trust Agreement to properly account for the disparate impact that Volkswagen's CAA violations have on urban and environmental justice areas.

Appendix D. Form of Environmental Mitigation Trust Agreement

1. **Appendix D-2. Section 1(d)-(e), 2(d), 3(d), 4(d), 6(d). The Mitigation Trust should increase the funding allocation allowable for non-governmental vehicles and equipment to be repowered or replaced to 75% of cost.** In Philadelphia, potential Eligible Mitigation Actions include repowering or replacing diesel equipment owned by private parties that are tenants of a local or state government entity like the Philadelphia Regional Port Authority. Such private parties have repeatedly indicated that they are not willing to repower or replace existing diesel equipment under low percentage matches. For example, if the cost to replace an existing forklift is $25,000, then partial contribution of $5,000 is insufficient incentive to encourage them to invest themselves in the cleaner equipment. By increasing the allocation of funding available to 75% of cost for non-governmental diesel vehicles or equipment to be repowered or replaced through Eligible Mitigation Actions, the Mitigation Trust provides reasonable incentive to encourage private entities to engage in mitigation measures and reduce their NOx emissions.

2. **Appendix D-2, Section 10, Diesel Emission Reduction Act (DERA) Option. The Mitigation Trust should change the terms of Section 10 to clarify that Mitigation Trust funds received by an individual state, territory, or tribe, are not to be managed as part of the DERA program, but are instead an allowable match for DERA.** The current language of Section 10 appears to provide states, territories, and tribes with a mechanism for simply increasing the funds allocated to their existing DERA programs by applying Mitigation Trust funds to that program. To the extent those funds may be used for other purposes than those outlined in the Mitigation Trust, this contradicts the

[2] The City of Philadelphia has received EPA delegation to implement the federal National Emissions Standards for Hazardous Air Pollutants ("NESHAP") and New Source Performance Standards ("NSPS") programs. *See* 50 Fed Reg. 34,140 (Aug. 23, 1985); 48 Fed. Reg. 31,638 (Jul. 11, 1983); *see also* 67 Fed. Reg. 4181 (Jan. 29, 2002); 77 Fed. Reg. 16,029 (Mar. 19, 2012); 68 Fed. Reg. 15,059 (Mar. 28, 2003). Philadelphia operates an approved PADEP Air Pollution Control Program, including implementation of the Title V permitting program for stationary sources in the City. *See* PADEP, Agreement for Implementation of the Philadelphia County Air Pollution Control Program (Jul. 1, 2015).

[3] U.S. Census Bureau, Annual Estimates of the Resident Population for Incorporated Places of 50,000 or More (May 2016), http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk.

[4] U.S. Census Bureau, Annual Estimates of the Resident Population: April 1, 2010 to July 1, 2015 - United States -- Metropolitan and Micropolitan Statistical Area (Mar. 2016), http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk.

[5] *See* Pa. Dep't of Envt'l Prot.,eMap PA (click "Areas of POI – Environmental" and "Environmental Justice Areas), http://www.depgis.state.pa.us/emappa/ (last visited Jul. 27, 2016); *see also* Pa. Dep't of Envt'l Prot., Office of Environmental Justice, http://www.dep.pa.gov/PublicParticipation/OfficeofEnvironmentalJustice/Pages/PA-Environmental-Justice-Areas.aspx (last visited Jul. 27, 2016).

purpose and intent of the Mitigation Trust, and may prompt states to simply ramp up the existing state DERA program and grant-making mechanism, rather than to engage in collaborative development of Eligible Mitigation Action proposals to submit to the Trust. The language of Section 10, should therefore be changed as follows:

> "Beneficiaries may use Mitigation Trust f~~F~~unds for their non-federal match or overmatch pursuant to Title VII, Subtitle G, Section 793 of the DERA Program in the Energy Policy Act of 2005 (codified at 42 U.S.C. 16133), thereby allowing Beneficiaries (i) to ~~use such Trust Funds for actions not specifically enumerated in this Appendix D-2, but~~ highlight proposed Eligible Mitigation Actions that are also otherwise eligible under DERA pursuant to all DERA guidance documents available through the EPA, and (ii) to claim an additional state allocation under DERA, up to 50% of their fiscal year allocation. The Mitigation Trust funds will not, however, be used in a way otherwise inconsistent with the Trust Agreement."

3. **Appendix D-2. [New] Section 11, Other Eligible Off-Road Equipment. The Mitigation Trust should include other off-road diesel equipment in the definition of "Eligible Mitigation Actions and Mitigation Action Expenditures."** In Philadelphia, as in other areas, off-road diesel equipment are significant sources of NOx emissions.[6] Types of off-road equipment include graders, excavators, generators, tractors, trenchers, front end loaders, bulldozers, cranes, backhoes, and other construction and demolition equipment, among others, all of which are forms not included within the airport ground equipment, forklifts, and other vehicles currently identified in Appendix D-2. Including such off-road equipment in the definition of eligible action expenditures is consistent with the "goal of each Eligible Mitigation Action . . . to achieve reductions of NOx emissions in the United States." Appendix D, Sec. 2.03.

4. **Appendix D-2, [New] Section 12, Eligible Research Projects. The Mitigation Trust should include related air quality research studies in the definition of "Eligible Mitigation Actions and Mitigation Action Expenditures."** Including scientific air quality studies, and related public health research, in the definition of Eligible Mitigation Action supports the Mitigation Trust's goals by providing a basis for more effective and targeted decision-making in communities impacted by the non-compliant 2.0 Liter Subject Vehicles. Because NOx is a precursor to particulate matter, Eligible Research Projects should include research into the effects of localized diesel particulate matter (PM) and NOx on the public health (epidemiologic studies) of urban populations.[7] Such research could include Street Level Air Quality Monitoring to identify urban PM and NOx hotspots that can be further targeted by Beneficiaries for additional Eligible Mitigation Actions or independent emission reduction efforts. Including such scientific studies as Eligible Research Projects within the definition of Eligible Mitigation Actions and Mitigation Action Expenditures supports the "goal of each Eligible Mitigation Action . . . to achieve reductions of NOx emissions in the United States." Appendix D, Sec. 2.03.

5. **Appendix D, Section IV. The Mitigation Trust should include municipalities in the definition of eligible Beneficiaries under Section IV (Mitigation Trust Beneficiaries).** The goal of the

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[6] *See* A.J. Kean, et al., *A Fuel Based Assessment of Off-Road Diesel Engine Emissions*, 50 J. AIR WASTE MGMT. ASSOC. 1929-39 (Nov. 2000).

[7] *See*, William M. Hodan and William R. Barnard, Evaluating the Contribution of PM2.5 Precursor Gases and Re-entrained Road Emissions to Mobile Source PM2.5 Particulate Matter Emissions, Prepared by MACTEC Under Contract to the Federal Highway Administration (FHA), 13th International Emission Inventory Conference (Jun. 8-10, 2004), *available at* https://www3.epa.gov/ttnchie1/conference/ei13/mobile/hodan.pdf.

Mitigation Trust to "fully mitigate the total, lifetime excess NOx emissions from the 2.0 Liter Subject Vehicles where the 2.0 Liter Subject Vehicles were, are or will be operated" is not met unless municipalities are included in the definition of eligible beneficiaries. Including municipalities as eligible beneficiaries enables municipalities to structure and propose Eligible Mitigation Actions for Trust approval, which target the specific impacts of the Volkswagen violations on that particular metropolitan area. This is particularly true for municipalities with large air pollution control programs, who have the ability to meet Trust guidelines and requirements when preparing Eligible Mitigations Actions for Trust approval. Under the current structure, a municipality with a large air pollution control program and significant effects from the Volkswagen violations may not receive trust funds for otherwise Eligible Mitigation Actions simply because such funds are dispersed to projects across other areas of the state, or in favor of other state priorities, and the municipality has no mechanism to either receive feedback on a proposed Eligible Mitigation Action from the state or to successfully advocate for its negatively impacted constituents. By including municipalities as direct Mitigation Trust Beneficiaries, the Parties to the CD will address this problem.

Alternatively, the Mitigation Trust should add municipalities with air pollution control programs within the territorial boundaries of Beneficiaries as governmental entities, which must be provided with notice of mitigation funds and request procedures. To reflect this, Appendix D-3, Section 8 should be updated as follows:

> "The Beneficiary certifies that, not later than 30 Days after being deemed a Beneficiary pursuant to the Trust Agreement, the Beneficiary will provide a copy of the Trust Agreement with Attachments to:
> (1) the U.S. Department of the Interior, the U.S. Department of Agriculture, and any other Federal agency that has custody, control or management of land within or contiguous to the territorial boundaries of the Beneficiary and has by then notified the Beneficiary of its interest hereunder, explaining that the Beneficiary may request Eligible Mitigation Action funds for use on lands within that Federal agency's custody, control or management (including but not limited to Clean Air Act Class I and II areas), and setting forth the procedures by which the Beneficiary will review, consider, and make a written determination upon each such request; and
> (2) any municipality with an air pollution control program within the territorial boundaries of the Beneficiary, explaining the Beneficiary may request Eligible Mitigation Action funds for use by the municipality, and setting forth procedures by which the Beneficiary will review, consider, and make a written determination upon each such request."

Disparate Impact on Urban and Environmental Justice Areas

6. **EJ Consideration Criteria. The Mitigation Trust should change the terms of the Trust Agreement to place proper emphasis on the disparate impact on environmental justice areas.** Federal agencies and states implementing programs using federal funding must assure that their programs do not have a discriminatory effect on environmental justice populations. *See* Exec. Order No. 12,898, 3 C.F.R. § 859 (1995). Volkswagen's CAA violations have a disproportionate impact on urban areas where more of the non-compliant vehicles were, are, and will be operated, and particularly environmental justice areas.[8] The majority of Volkswagen dealerships in the state of

[8] *See generally*, David L. Buckeridge, et al., *Effect of Motor Vehicle Emissions on Respiratory Health in Urban Areas*, 110 ENVT'L HEALTH PERPSECT, 293-300 (2002); *see also* Michael Gelobter, *The Meaning of Urban*

Pennsylvania are concentrated in the Philadelphia metropolitan area.[9] Philadelphia's environmental justice (EJ) communities already host, or are otherwise near, major industrial and commercial air pollution sources. Exposure to additional air emissions, such as NOx emissions from non-compliant 2.0 Liter Subject Vehicles travelling through environmental just areas, are expected to have a disproportionate impact on those communities. Although the City recognizes that the EPA held a general informational call with EJ stakeholders after the CD was published for comment, giving them a fair summary of the CD, nothing in the terms of the CD indicate a requirement that impacts on environmental justice communities will weigh in the decision-making related to Eligible Mitigation Actions. The Trust Agreement makes no reference to environmental justice and creates no review procedures or requirements. The Mitigation Trust should include an additional Appendix, D-4, which would contain Eligible Mitigation Action preproposal submission and review criteria that includes EJ consideration criteria built into the proposal process. Such a change would help inform the decision-making of the Trustee and allow it to properly evaluate the impact of proposed Eligible Mitigation Actions on EJ populations. EJ communities must be as direct beneficiaries of this settlement as possible.

On behalf of the City, I would like to thank you for your time and attention to these comments, and for the opportunity to provide feedback on the proposed partial CD. If you have any questions or need any additional information with respect to these comments, please do not hesitate to contact me at (215) 685-7584 or kassahun.sellassie@phila.gov.

Sincerely,

Kassahun Sellassie

Kassahun Sellassie, PhD, PE
Acting Director, Air Management Services

Environmental Justice, 21 FORDHAM URB. L.J. 841, 849-50 (1993) (discussing health impacts on urban environmental justice communities).

[9] *See* Volkswagen, Volkswagen Dealership Locator, http://www.vw.com/dealers/ (search by "zip code") (last visited Jul. 27, 2016). A large area within the boundaries of Philadelphia is a designated environmental justice area. Pa. Dep't of Envt'l Prot.,eMap PA (click "Areas of POI – Environmental" and "Environmental Justice Areas), http://www.depgis.state.pa.us/emappa/ (last visited Jul. 27, 2016).

City of Phoenix
OFFICE OF ENVIRONMENTAL PROGRAMS

August 4, 2016

John C. Cruden Esq.
Assistant Attorney General,
U.S. DOJ—ENRD, P.O. Box7611
Washington, D.C. 20044–7611

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.

Dear Mr. Cruden:

The City of Phoenix (City) and the Valley of the Sun Clean Cities Coalition (VSCCC), chartered by the United States Department of Energy, offers the following comments pertaining to Appendix D-2, Eligible Mitigation Actions and Mitigation Action Expenditure of the above-referenced Partial Consent Decree.The City and the VSCCC support the Environmental Protection Agency (EPA) in its effort to redirect funds from this settlement in a fair and equitable formula to each state with the objective of improving air quality by reducing vehicle emissions. The draft settlement identifies a series of options for States to allocate these funds to address this objective.

The City and the VSCCC believe the options identified are too restrictive to be truly efficacious and strongly urge that settlement options be broadened to provide each State with the flexibility to choose investments that achieve the greatest emissions reductions with a commitment to long-term accomplishments. For example, except for electric vehicle charging infrastructure, this settlement does not provide States with the flexibility to provide infrastructure funding for other types of alternative fuels. There is a great opportunity to convert school buses and similar larger-diesel engines to alternative fuel options, but without capital funding to support the fueling infrastructure, these investments are unlikely to proceed. Investments in alternative fuel infrastructure demonstrate a greater long term commitment than replacing vehicle engines alone. Furthermore, utilizing settlement funds to create a market for alternative fuels such as renewable diesel would provide significant long-term opportunities to reduce mobile emissions. Renewable diesel has demonstrated large improvements in NOx emissions, greenhouse gas emissions, and other vehicle pollutant emissions, and could

replace all petroleum diesel use if an adequate supply and the appropriate logistics can be addressed.

The City and the VSCCC strongly urge that eligible vehicles be expanded to include 1992 through 2012 model years and that states be allowed the flexibility to determine the model years to upgrade or replace. The current limits on model years punishes those entities that without being required, have already proactively gone ahead and upgraded/replaced earlier model years and would not be allowed to upgrade/replace 2007-2012 model years under the current regime.

The City and the VSCCC also support the use of settlement funds to address truck idling in Arizona. Arizona has critical transportation corridors both east-west to and from the ports of California and north-south to and from the ports of the Arizona-Mexico border. The high use of these transportation corridors by truck traffic results in significant truck idling at truck stops and facilities. Alternative technologies to reduce engine idling would be an investment that would provide substantial reward in the form of reduced pollutants as a result of engine idle.

The City and VSCCC also suggest that for states with non-attainment areas, the state should prioritize disbursement of funds in those non-attainment areas to ensure the populations with greater exposure to poor air quality are able to benefit from the investments from this settlement.

In Section 9 of Appendix D-2, where settlement funds are allowed for use with light duty Zero Emission Vehicles (ZEV), the City and VSCCC request that E85 fuel infrastructure be specifically included, as the hydrogen option listed has extremely limited availability. The preferred recommendation is to allow states the freedom to choose which alternative fuels they will invest settlement funds in rather than restrict their options to specific fuels and vehicles, such as hydrogen, that are not readily available in most states.

The City and VSCCC also recommend that EPA work with states to ensure that investments made using settlement funds provide actual and continuing long-term benefits to air quality. Observations of past programs demonstrate that some entities may use funds to purchase bi-fuel options to obtain a lower up-front vehicle cost, but do not dedicate their use to the alternative fuel option. Process mechanisms need to be implemented to ensure continuing long-term benefits.

Sincerely,

T Ball, for

Joe Giudice
Office of Environmental Programs Administrator
City of Phoenix

c: Bill Sheaffer, Executive Director, Valley of the Sun Clean Cities Coalition
Thomas Remes, City of Phoenix Government Relations Director

CITY OF SOMERVILLE, MASSACHUSETTS
JOSEPH A. CURTATONE
MAYOR

August 4, 2016

John C. Cruden
Assistant Attorney General
U.S. Department of Justice – Environment & Natural Resources Division
P.O. Box 7611
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Dear Mr. Cruden:

Thank you for the opportunity to comment on the Department of Justice Proposed Partial Consent Decree relative to the Volkswagen "Clean Diesel" case. I applaud the federal government's coordinated efforts to mitigate the negative impacts of diesel emissions under the Clean Air Act. It is my understanding that in addition to consumer payments, Volkswagen will be required to fund a trust that will assist states and other jurisdictions in delivering eligible mitigation projects, as well as funding specific infrastructure related to Zero-Emissions Vehicles.

Somerville, Massachusetts is a small city of 80,000 residents with a long and well-documented history of public health impacts and environmental justice challenges due to diesel emissions. Our land area is a mere four (4) square miles, making our city the most densely-populated municipality in New England. This population density of 20,000 persons per square mile (30 persons per acre) has created a uniquely high exposure to key pollutants generated by diesel emissions such as nitrogen oxide (NOx), particulate matter (PM) and carbon dioxide (CO2).

Diesel emissions affecting the health of Somerville residents are generated by two primary sources: automobile and truck traffic; and heavy rail traffic. Data published in 2015 by the Boston Region Metropolitan Planning Organization (MPO) indicate that on average, Somerville experiences approximately 236,500 daily Vehicle Miles Travelled per square mile. The Massachusetts Bay Transportation Authority (MBTA) operates four heavy commuter rail lines that run through Somerville, generating 59,800 annual trips. In addition, the MBTA operates a 45-acre engine maintenance facility in Somerville, the sole location for maintenance of the 87 diesel locomotives in the regional fleet.

To better understand the health risks associated with exposure to vehicle emissions, the City of Somerville began partnering with Tufts University in 2006 to measure impacted populations. The research partnership is called the Community Assessment of Freeway Exposure & Health (CAFEH). Since 2007 CAFEH has published twenty nine (29) articles in peer-reviewed journals such as *Environmental Health*, *Journal of Exposure Science and Environmental Epidemiology* and *Atmospheric Environment*. These publications have demonstrated health disparities including increased cardiovascular

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disease, asthma, stroke and premature death among Somerville residents living near high-volume traffic corridors such as Interstate 93 (225,000 daily trips) and State Route 28 (36,000 daily trips).

Our city has taken many proactive steps to mitigate the negative health impacts of exposure to diesel-generated pollutants. We have worked tirelessly to promote alternative transportation modes at the local and regional levels, including establishing a public-private development partnership that in 2014 yielded the first new MBTA heavy-rail subway station in Massachusetts in three decades. The City has invested $8 million to date and committed another $50 million to support construction of the MBTA's Green Line Extension light rail service through Somerville, which is expected to begin revenue service in 2021. We have transformed bicycle and pedestrian infrastructure around the City, yielding some of the nation's highest rates of walking and bicycling. Our zoning ordinance mandates Transportation Demand Management for new development to ensure that smart-growth development discourages new automotive trip share.

In addition, Somerville has launched investments in Zero Emissions Vehicle infrastructure, including purchasing eight (8) electric vehicles for the municipal fleet. In 2015 the City installed five (5) electric vehicle (EV) charging stations as a pilot program; a second round consisting of four (4) new sites are proposed for our 2017 system expansion.

Based on Somerville's long experience with the negative health impacts of diesel emissions, I appreciate the federal government's efforts to mitigate impacts under the Volkswagen case. I look forward to collaborating with state agencies in Massachusetts to ensure meaningful and timely mitigation strategies here in Somerville are proposed to the Trustee for consideration.

Sincerely,

Joseph A. Curtatone
Mayor

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August 3, 2016

Assistant Attorney General, Environment and Natural Resources Division
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RE: *Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability*
Case No: MDL No. 2672 (JSC), D.J. Ref. No. 90-5-2-1-11386

Dear Assistant Attorney General:

For more than twelve years Minnesota businesses, nonprofit organizations, and governmental agencies have worked together to voluntarily reduce air pollution through an effort known as Clean Air Minnesota. Clean Air Minnesota also serves as the Minnesota stakeholder partnership for the U.S. EPA Ozone and PM2.5 Advance programs. Clean Air Minnesota is facilitated and coordinated by Environmental Initiative. (http://www.environmental-initiative.org/our-work/clean-air/clean-air-minnesota)

Please accept our comments as Clean Air Minnesota's co-chairs and Core Team members regarding the Volkswagen Partial Consent Decree.

To maximize the outcomes from this unparalleled opportunity for emission and exposure reduction, we recommend that the list of "Eligible Mitigation Actions and Mitigation Action Expenditures" be expanded. Specifically, regarding Appendix D-2, we make the following recommendations:

1. All States be allowed to include 2007 – 2012 model year Class 8 Local Freight or Drayage trucks. (referring to 1. Eligible Large Trucks);
2. All States be allowed to include 2007 – 2012 model year class 4 – 8 school buses, shuttle buses, or transit buses. (referring to 2. Eligible Buses);
3. For rail activities, all rail related Diesel Emission Reduction Act (DERA) eligible activities be allowed. (referring to 3. Freight Switchers);
4. All States be allowed to include 2007 – 2012 model year class 4 – 7 Local Freight Trucks. (referring to 6. Medium Trucks);
5. Add as an eligible mitigation action DERA/CARB approved heavy-duty, off-road diesel vehicles/equipment and construction equipment;
6. Add as an eligible mitigation action DERA/CARB approved emission reduction options for older, functioning pre-1984 equipment/vehicles with useful life remaining;

7. Some emphasis be given to engagement of private fleet and equipment owners in order to leverage matching funding to maximize the impact of the settlement funds.

We also recommend that some provision be included in the agreement regarding maintenance of effort protections to safeguard current state agency environmental protection efforts. It is important to ensure that state agency environmental budgets are not reduced because of these possible additional funds.

The current "Eligible Mitigation Actions" list unduly limits some States from making more significant gains in emission reductions. Our recommendations will allow more States and regions to make massive emission reductions from some of the largest emission sources in neighborhoods and communities without weakening any other settlement elements.

Given the magnitude of this funding, this settlement provides an unprecedented opportunity to make significant strides to clean up the air in communities across the country. Rather than limit eligible activities, this is a unique circumstance to reward creativity and ambition on the part of the States and their partners. All options should be available to States and their mitigation plan partners to be able to take advantage of these opportunities to reduce emissions and exposure.

Thank you for your consideration and please contact Environmental Initiative with any questions, concerns, or for further information.

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August 5, 2016

Assistant Attorney General
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RE: Proposed Volkswagen Diesel Emissions Settlement Consent Decree

Clean Fuels Michigan (CFM) is a non-profit organization that is focused on growing a high-tech, clean transportation industry in Michigan. The only statewide organization solely dedicated to advancing the clean fuel vehicle industry in Michigan, CFM would like to take this opportunity to respond to the proposed Volkswagen diesel emissions settlement consent decree.

While CFM appreciates the commitment of Volkswagen fines and penalties to support clean fuel vehicles, we request consideration of some modifications to requirements for both the $2.7 billion Environmental Mitigation Trust Fund to reduce nitrogen dioxide emissions and the $1.2 billion National Zero Emission Vehicle (ZEV) Investment Plan to improve infrastructure, access and education to support and advance zero emission vehicles.

One of the key tenets of CFM is that the organization is clean fuel agnostic, recognizing that technology is continually evolving making it difficult to predict what clean fuels will prove most valuable in the near, mid and long term. Rather than set policy that gives preference to a particular clean fuel, CFM believes policies should allow the market to make that determination. Given that, CFM strongly recommends that fueling infrastructure for natural gas, propane and hybrid vehicles also be eligible for funding from the Environmental Mitigation Trust Fund. Furthermore, CFM urges that the National ZEV Investment Plan include "near zero emission vehicles" as well to include new and future clean fuel technologies that extend beyond just electric and fuel cell vehicles.

CFM would also urge that priority for the use of any funds from the settlement be based on the those that have the greatest "bang for the buck" offering significant impact in high emission areas and valuable environmental gains. This will ensure that not only Michigan but the entire county realize the greatest benefit from these limited funds dedicated to emission reduction. To that end, CFM believes that forklifts should be excluded as an eligible use of the mitigation action expenditures as there is little emission reduction value gained compared with the costly investments in this equipment.

Thank you for this opportunity to provide comment. Please do not hesitate to contact Clean Fuels Michigan with any questions or concerns you may have: 517-853-1236.

CleanFuelsOhio

August 5, 2016

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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.

Dear Assistant Attorney General:

Clean Fuels Ohio (CFO) is pleased to submit these comments to the U.S. Department of Justice concerning the Partial Consent Decree in the above-referenced Volkswagen "Clean Diesel" case. Overall, CFO is encouraged by the broad goals of the partial settlement decree to buy back vehicles or terminate leases for consumers, reduce oxides of nitrogen (NOx) from existing diesel equipment, and expand zero-emission vehicle (ZEV) investments across the United States. The following comments address the $2.7 billion Environmental Mitigation Trust Fund ("Mitigation Trust") and the $2.0 billion ZEV Investment Commitment ("ZEV Investments") aspects of the Decree, in particular.

$2.7 Billion Environmental Mitigation Trust Fund for Oxides of Nitrogen (NOx) Remediation

1. **Inadequate Private Fleet Reimbursement**: Based on our experience administering clean diesel projects in Ohio, CFO believes reimbursements should be more equitable across private and government fleets. We suggest lowering the government reimbursement rate from 100 percent to 80 percent. This is consistent with the percentage allowed under the Congestion Mitigation and Air Quality Improvement Program (CMAQ). We suggest raising the rate for private fleets to 70 percent. While still lower than the government rate, 70 percent is adequate to incentivize private fleet participation. At the government's proposed rate, assuming the scrappage requirement is maintained, many private fleets will lack the incentive to participate. Since most diesel pollution comes from privately owned diesel vehicles, the program would not succeed in meaningful air quality and health improvements that would result from retirement of older diesels.

2. **Fair and Equal Assessments of Alternative Fuel Projects**: The current version of the settlement may penalize alternative fuel vehicle replacements, such as compressed natural gas (CNG), liquefied natural gas (LNG), and liquid petroleum gas (LPG) compared with diesel-to-diesel replacements. This is because the U.S. Environmental Protection Agency's (EPA) primary assessment tool, the Diesel Emission Quantifier (DEQ), uses default values that underrepresent the emissions reductions from CNG, LNG and propane compared to diesel replacements.[1] The

[1] Please see the attached materials that document the biased results from the DEQ compared with U.S. EPA engine certification data.

CleanFuelsOhio

effect of this bias would be to discourage alternative fuels projects that actually achieve greater reductions in NOx and other emissions based on currently available engines. The unintended consequence would be less NOx and other emissions reductions resulting from the program. Thus, CFO recommends that USEPA either modify the DEQ tool to ensure it renders fully accurate results from modern CNG, LNG, and LPG engines. If this is not possible, CFO asks the government to prohibit the states from using the DEQ for evaluation, and instead use other data sources, such as EPA or CARB engine certification data for these evaluations.

3. **Truck Stop Electrification (TSE) and Inland Shore Power Eligibility:** Idling diesel engines, including trucks parked at rest stops and marine vessels, create substantial and unnecessary pollution that can be mitigated by electrification infrastructure. For trucks, this is truck stop electrification (TSE). For marine vessels, this is shore power. The proposed settlement lists port electrification of ocean-going vessels as eligible, but currently does not list either TSE or marine shore power for inland lakes and rivers. The result would be missed opportunities to eliminate unnecessary diesel emissions from prolonged idling while parked or in ports. These truck stops and ports often are located in or close to disadvantaged communities, increasing the pollution and health burden on these communities. CFO proposes that the government expand eligibility to inland (rivers, lakes) vessels and TSE facilities for trucks.

$2.0 Billion Zero-Emission Vehicle Investment Commitment

4. **Transparency and Accountability in Volkswagen's ZEV Plan:** The zero-emission vehicle (ZEV) markets are at a critical stage of development. Broad, market-oriented investments, especially charging/fueling infrastructure but also consumer education, are critical. As currently drafted, the settlement agreement lacks transparency and would appear to create a program that lacks accountability, proper structure and rules to ensure investments that are effective and even-handed. CFO recommends that the government provide much greater detailed guidance and accountability mechanisms for the ZEV program and create a program structure that ensures transparency and following of best market-oriented practices for charging infrastructure and other investments.

5. **Balanced PEV Infrastructure and Other Investments:** Some have called for most of the $2.0 billion ZEV fund to be used for development of a nationwide DC fast charging network. While public DC fast charging is important, this one-size-fits-all approach would ignore market conditions and ongoing investments unique to each state and local areas. CFO recommends that the ZEV program be designed to direct funds to local projects that overcome market barriers in specific locations. These include investments in workplace and multi-unit residential PEV charging, along with public charging and H2 infrastructure, plus consumer and dealer education and dealer incentives.

6. **Balanced Investments in ZEV Market by State**: The government's draft settlement would direct 40% of the ZEV funding, $800 million, to a single state, California, while spreading the remaining 60% to the 49 other states. The justification is that California's ZEV market is more advanced. CFO disagrees with this justification and distribution. Air quality and other benefits from ZEVs are needed in all states. The market for ZEVs shows great promise in other states, including in

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the Midwest, as consumers become more acquainted with the benefits. Investments help overcome market barriers in all states as PEV markets become truly national, longer battery range PEVs enter the market, and FCVs begin to access markets in various states. CFO proposes an equitable distribution of settlement funds for the ZEV program based on population size and density. This still would result in California receiving a larger share than any other state, but not one grossly out of proportion.

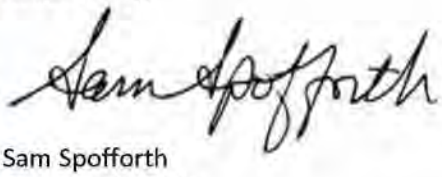
General Comments on the Capacity of Clean Cities Coalitions to Support the Government's Goals

The nearly 100 U.S. Department of Energy Clean Cities coalitions are active in all but a handful of U.S. states. These grassroots and stakeholder-based organizations and programs play an important role in their communities that makes them ideal partners to help identify and support both diesel NOx mitigation and ZEV programs and projects. Many coalitions, including Clean Fuels Ohio, also have significant experience administering projects through the USEPA's National Clean Diesel Initiative and numerous state-based programs. CFO asks the federal government to formally encourage states to consult and work with Clean Cities coalitions as local partners to help identify, select and administer projects. In playing these roles as local implementers, Clean Cities will help ensure that funds are targeted and spent well, with accountability to leverage maximum impact for air quality benefits and market acceleration of ZEVs.

Clean Fuels Ohio is a statewide, nonprofit organization dedicated to improving air quality and health, reducing environmental pollution, strengthening Ohio's economy, and enhancing our nation's energy security by promoting and encouraging the use of cleaner, domestic fuels and efficient vehicles. More information is available at www.CleanFuelsOhio.org. More information about the U.S. Department of Energy Clean Cities program is available at www.CleanCities.Energy.gov.

We appreciate the opportunity to submit these comments for your review.

Respectfully,



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CleanFuelsOhio

Exhibit – Diesel Emission Quantifier, Regarding Alternative Fuels

The Diesel Emission Quantifier (DEQ) has shown itself to be a valuable tool for providing estimated emission reduction for clean diesel and alternative fuel technologies. There remains, however, some calculative mismatches that create discrepancies for how alternative fuels are calculated within the DEQ. The DEQ tool has limitations and data gaps when calculating multiple types of projects and is particularly problematic when calculating gaseous fuel (compressed natural gas (CNG) and Propane) vehicle replacement projects. Specifically, the DEQ tool has data gaps related to the following:

Emission Reduction Factors – While DEQ aims to provide simple, generalized factors for emission reduction, these factors can often be incorrect for specific alternative fuels, such as CNG and Propane. These errors are evident when comparing the proportional emissions outputs from existing diesel engines vs. propane or CNG engines using U.S. EPA (and/or CARB) certification data on these engine platforms (more specific details below).

Missing Technology Options – The DEQ technology options do not currently reflect the full spectrum of commercially available, U.S. EPA approved, conversion options for alternative fuels. One specific example is dual-fuel natural gas and propane engine systems.

For CNG vehicle replacements, the DEQ offers an option for such technology under the emissions reduction technology scenarios, however, the DEQ indiscriminately applies a 50% NOx reduction and a 95% reduction of PM2.5. These figures do not reflect the proportional reductions demonstrated by a direct comparison between the emissions certification data of existing diesel engines versus new CNG units, examples of which are provided below:

Existing Diesel Engines[2]	Diesel Engine Model Year	New CNG Engine[3]	New CNG Model Year	% NOx Reduction from CNG System[4]	% PM Reduction from CNG System
MACK MR690s	2000	Cummins ISL G	2015-2016	96.75%	98.00%
MACK LE613	2000	Cummins ISL G	2015-2016	96.75%	98.00%
Volvo VNL42T300	2003	Cummins ISX 12 G	2015-2016	96.25%	97.00%
International 7400	2003	Cummins ISL G	2015-2016	96.8%	99.00%
Volvo VNL42T300	2005	Cummins ISX 12 G	2015-2016	96.25%	97.00%
Freightliner CL120	2006	Cummins ISX 12 G	2015-2016	96.25%	97.00%
Freightliner CL112	2006	Cummins ISX 12 G	2015-2016	96.25%	97.00%

[2] For each existing fleet vehicle, model year specific NOx and PM emissions standard data (in grams/bhp-hr) were assembled using the US EPA's database of Exhaust Emission Standards for Heavy-Duty Highway Compression-Ignition Engines And Urban Buses (view online at: http://www.epa.gov/otaq/standards/heavy-duty/hdci-exhaust.htm).

[3] For each new engine, NOx and PM emissions standard data (in grams/bhp-hr) were assembled using US EPA and CARB certified emissions data for each system and vehicle proposed.

[4] Percent reductions were created by comparing the existing diesel engine certification standards to the specific CNG or propane engine certification standards. The methodology used was as follows: (existing diesel engine certification level – CNG or Propane engine certification level) / existing diesel certification level = % reduced.

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Similarly, for propane vehicle replacements, the DEQ offers an option for such technology under the emissions reduction technology scenarios, however, the DEQ underrepresents the actual emissions reductions and does not reflect the proportional reductions demonstrated by a direct comparison between the emissions certification data of existing diesel engines versus new propane units, examples of which are provided below:

Existing Diesel Engines	Diesel Engine Model Year	New Propane Engine	Propane Model Year	% NOx Reduction from Propane System	% PM Reduction from Propane System
CAT	1998	Roush Propane	2016	98.0%	100.0%
Cummins	2000	Roush Propane	2016	98.0%	100.0%
International 3800	2003	Roush Propane	2016	98.0%	100.0%
Blue Bird TCF	2003	Thomas 311TS	2016	95.0%	90.0%

Due to the DEQ's data gaps for emission reductions using alternative fuels like CNG and propane, Clean Fuels Ohio recommends the U.S. EPA either work to correct these data gaps, or provide a manual emission reduction calculation process. An example of a manual calculation method is detailed below.

Manual Emission Reduction Calculation Process (example):

As described above, there are other avenues for calculating emissions such as those detailed in the California Air Resources Board (CARB) Carl Moyer Program. The Carl Moyer program guidelines provide an example of manual emission reduction calculation methodology, namely the *Estimated Annual Emissions based on hours of Operation* (Formula C-4) formula.[5] Instead of converting hour of operation to miles (using outdated data and diesel specific assumptions), the Carl Moyers Formula C-4 allows for a simpler output by focusing on engine load factor:

$$Emission\ Factor\ \left(\frac{g}{bhp-hr}\right) \times Horsepower\ \times Load\ Factor\ \times$$
$$Annual\ Hours\ of\ Operation\ \left(\frac{hours}{year}\right) \times \frac{1\ ton}{907{,}200\ grams}$$

For this equation, all factors are known, including Load Factor (LF), detailed in Table B-11 of Moyer's Guidelines.[6] While On-Highway Tractors/Trucks are not included, load factor of similar engines are detailed, such as Off-Highway Tractors (LF = 0.65), Off-Highway Trucks (LF = 0.57), or an "Other" catch-all category (LF = 0.43).

Conclusion:

Due to the DEQ's data gaps and inability to correctly account for emission reductions when using alternative fuels other than diesel, such as CNG or propane, Clean Fuels Ohio recommends the U.S. EPA either work to correct and update these data gaps, or provide a recommended manual emission reduction calculation process based on the existing engine certification data available for diesel and alternative fuel engines.

[5] The Carl Moyer Program Guidelines, Page C-3 (Page 37)
[6] The Carl Moyer Program Guidelines, Table B-11, Page B-6 (Page 18)

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August 5, 2016

John C. Cruden Esq.
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U.S. Department of Justice

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.

Dear Mr. Cruden:

CleanFuture appreciates this opportunity to comment on the Notice of Lodging of Proposed Partial Consent Decree Under the Clean Air Act, which was published in the Federal Register on July 6, 2016 (81 Fed. Reg. 44,051). The notice pertains to the proposed partial Consent Decree (CD) with the United States District Court for the Northern District of California in the lawsuit entitled In re: Volkswagen "Clean Diesel" Marketing, Sales Practices, and Product Liability Litigation, Case No: MDL No. 2672 CRB (JSC).

CleanFuture recommends the final settlement for Mitigation Actions allow **idle reduction,** the cleanest, most cost-effective clean diesel mitigation action. Idle reduction can save between 900 to 1,400 gallons of fuel each year per truck. [1] Idling diesel engines are epidemic, particularly affecting environmental justice communities that can be near freight, goods movement, and port facilities with excessive diesel idling of heavy duty trucks and other equipment.

The cleanest diesel engine is one that does not run. Idle Reduction Technology (IRT) reduces long-duration idling of the diesel engine by using an alternative technology. [2] According to EPA each year, long-duration truck idling results in an estimated or approximated 1 billion gallons of fuel consumption producing 180,000 tons of nitrogen oxides (NOx), 11 million tons of carbon dioxide (CO2) and 5,000 tons of particulate matter (PM). [2]

Omitting a verified idle reduction technology known as **Electrified Parking Spaces (EPS) / Truck Stop Electrification (TSE)** [2] contradicts other eligible mitigation actions allowed in Appendix D-2 of the consent decree. EPS / TSE is heavy duty zero emission supply equipment, therefore EPS / TSE should be identified as a specified, eligible mitigation action just as light duty zero emission supply equipment is specifically identified. Charging infrastructure associated with All-Electric Repower or All-Electric vehicle replacements is eligible, therefore idle reduction infrastructure should similarly be eligible.

Heavy duty zero emission supply equipment applied as a verified action in electrified parking spaces should receive the same treatment as light duty zero emission supply equipment, EPS should be identified as option available for Beneficiaries include in their mitigation plans to draw funds in the amount of:

1. 100% of the cost to purchase, install and maintain verified idle reduction equipment that will be available to the public at a Government Owned Property.
2. 80% of the cost to purchase, install and maintain verified idle reduction equipment that will be available to the public at a Non-Government Owned Property.
3. 60% of the cost to purchase, install and maintain verified idle reduction equipment that will be available at a freight or goods movement facility but not to the general public.

The EPA definition of Electrified Parking Spaces (EPS) / Truck Stop Electrification (TSE) is [2]:

> Electrification refers to a technology that uses electricity-powered components to provide the operator with climate control and auxiliary power without having to idle the main engine. This can be on-board equipment (e.g., power inverters, plugs), off-board equipment (e.g., electrified parking spaces or systems that directly provide heating, cooling or other needs), or a combination of the two.
>
> An EPS system (also known as Truck Stop Electrification) operates independently of the truck's engine and allows the truck engine to be turned off as the EPS system supplies heating, cooling, and electrical power.
>
> The EPS system provides off-board electrical power to operate the following:
>
> - Independent heating, cooling, and electrical power system;
> - Truck-integrated heating and cooling system; and/or
> - Plug-in refrigeration system that would otherwise be powered by an engine.

Mobile transport refrigeration systems powered by diesel engines are subject to long-duration idling of diesel engines. Transport refrigeration units (TRUs) are powered by diesel engines are used to refrigerate temperature-sensitive products transported in insulated semi-trailer vans, truck vans, shipping containers, and rail cars. Transport refrigeration units use small diesel engines that emit more diesel particulate matter (PM) and nitrogen oxides (NOx) on a grams per horsepower basis than larger engine categories that are used in motor vehicles.

Substantial diesel fuel is burned by these idling diesel engines in TRUs to keep temperature-controlled cargo at proper temperature. Electrification of these refrigeration units when parked offers the promise of substantially lower operating costs, engine wear, and reduced toxic air pollution, and lower greenhouse gas emissions. Hybrid electric TRUs can be plugged-in while parked to grid-supplied electricity provided by electrified parking spaces. [3]

Moving perishable products requires TRUs to provide necessary cooling. In the normal course of goods movement, transport refrigeration units accumulate significant stationary engine run hours (engine idling hours) to pre-cool trucks and trailers, for controlling cargo temperatures during loading and unloading, and for temperature control while staging loaded trucks and trailers for dispatch.

Freight and goods movement facilities are commonly in urban areas for local food distribution. Environmental Justice communities are often located nearby heavily traveled freeways, food distribution centers and warehouses, freight terminals, railyards, and ports; it is common for such goods movement facilities to be in the midst of disadvantaged communities. California Air Resources Board recognizes the higher exposure of disadvantaged communities to TRU idling in the "Initial Statement of Reasons for the Proposed Airborne Toxic Control Measure for In-Use Diesel-Fueled Transport Refrigeration Units (TRU) and TRU Generator Sets, and Facilities where TRUs Operate" staff report:

> The proposed Airborne Toxic Control Measure (ATCM) is consistent with the ARB's Environmental Justice (EJ) Policy to reduce health risks from toxic air contaminants in all communities, including low-income and minority communities. Many communities are located near where TRUs operate, such as heavily traveled freeways, storage and distribution facilities, railyards, and ports. By reducing emissions of diesel PM, other known toxic air contaminants, and other air pollutants from TRUs and TRU gen sets, the proposed ATCM will provide air quality benefits by reducing exposure to and associated health risk from these pollutants near facilities where TRUs and TRU generator sets operate. **These neighborhoods are frequently co-located with low-income and minority communities.** [4]

Diesel idling in TRUs at freight and goods movement facilities is a common occurrence in the normal course of goods movement with TRUs commonly accumulating half of the TRU diesel engine's run hours at distribution centers in local distribution fleets. Furthermore TRUs produce more NOx and other pollutants than many other diesel engines. The auxiliary engines generally installed on TRUs can emit over twice as much the NOx and particulate matter of a truck's main propulsion engine.[1] These TRU engines can run stationary (idle) at distribution centers for 700 to 1200 hours per year.

Idle reduction is the most cost-effective emission reduction, and the settlement favors technologies that are substantially less impactful per dollar. According to a US DOT report, Truck Stop Electrification is the lowest cost mitigation strategy in terms of Cost/Ton of NOx/HC Reduced. [5] Another affirms idle reduction strategies such as Electrified Parking Spaces to be the most cost effective in terms of NOx reduction with cost-effectiveness greater than diesel retrofits or heavy vehicle diesel engine replacements. [6]

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[1] For heavy duty truck engines the current standard level for PM and NOx+NMHC is .01 PM / 2.4 NMHC+NOx g/bhp-hr standards, while most trailer TRU engine are either in the <25 hp category (0.22 PM / 5.6 NMHC+NOx per g/hp-hr) or the 25-50- hp category (0.22 PM / 3.5 NMHC+NOx per g/hp-hr) so the <25 hp trailer TRU engines produce 2.33 times the NOx.

Truck stop electrification can include the high voltage electrified parking spaces to plug-in TRUs, however there are differences between TSE and EPS for TRUs. TSE is mainly used for mandatory rest periods for long haul carriers and owner-operators to avoid idling the truck diesel engine during rest periods. Selected TSE sites include high voltage power for electrified parking spaces for TRUs. Electrified parking spaces for TRUs serve local distribution at food distribution centers, food manufacturers, cold storage warehouses and terminals where refrigerated goods are loaded, unloaded and staged for local deliveries. Stationary operation of TRUs to keep goods at proper temperature is necessary for food quality, integrity and food safety, yet idle reduction with electrified parking spaces is a cleaner, cheaper and quieter alternative. [7]

Recommendation:
CleanFuture recommends specific Mitigation Actions be added for Heavy Duty Zero Emission Vehicle Supply Equipment and Transport Refrigeration Units per Appendix A.

In conclusion, CleanFuture appreciates the opportunity to comment on the partial consent decree. We share your desire to maximize the air quality mitigation realized from the $2.7B Mitigation Fund. Thank you for considering our perspective, that allowing Beneficiaries flexibility to tackle the 1B gallon/year idling problem will further settlement goals.

We invite any opportunity for a follow-up discussion. Should you with to have questions, please contact me at john@CleanFuture.us, or 503-427-1968.

Sincerely,

CleanFuture, Inc.

John A. Thornton

References

[1] EPA SmartWay, "Idle Reduction: A Glance at Clean Freight Strategies," June 2016. [Online]. Available: https://www.epa.gov/sites/production/files/2016-06/documents/420f16025.pdf. [Accessed 13 July 2016].

[2] EPA SmartWay, "Learn About Idling Reduction Technologies (IRTs) for Trucks," [Online]. Available: https://www.epa.gov/verified-diesel-tech/learn-about-idling-reduction-technologies-irts-trucks. [Accessed 10 July 2016].

[3] Electric Power Research Institute (EPRI), "Market and Technology Assessment of Electric Transport Refrigeration Units," EPRI, Palo Alto, 2015. 3002006036.

[4] California Air Resoures Board (CARB), "AIRBORNE TOXIC CONTROL MEASURE FOR IN-USE DIESEL-FUELED TRANSPORT REFRIGERATION UNITS (TRU) AND TRU GENERATOR SETS, AND FACILITIES WHERE TRUS OPERATE. STAFF REPORT: INITIAL STATEMENT OF REASONS," October 2003. [Online]. Available: http://www.arb.ca.gov/regact/trude03/isor.pdf. [Accessed 14 July 2016].

[5] National Research Council (U.S.), "The Congestion Mitigation and Air Quality Improvement Program: Assessing 10 years of Experience / Committee for the Evaluation of the Congestion Mitigation and Air Quality Improvement Program.," 2002. [Online]. Available: http://onlinepubs.trb.org/onlinepubs/sr/sr264.pdf. [Accessed 16 July 2016].

[6] U.S. Department of Transportation (US DOT), "Congestion Mitigation and Air Quality (CMAQ) Improvement Program - Cost Effectiveness Tables Development and Methodology," 3 December 2016. [Online]. Available: http://www.fhwa.dot.gov/environment/air_quality/cmaq/reference/cost_effectiveness_tables/report/costeffreport.pdf. [Accessed 13 July 2016].

[7] Electric Power Research Institute (EPRI), "Market Assessment and Technology Review of Truck Stop Electrification and Electric Transport Refrigeration Units," in *Electrification Initiative: Tri-State Generation and Transmission Association, Inc. Case Study Report*, Palo Alto, EPRI, 2016. 3002003528.

[8] EPA, "SmartWay – Learn About Idle Reduction Technologies (IRT) for Trucks," [Online]. Available: https://www.epa.gov/verified-diesel-tech/learn-about-idling-reduction-technologies-irts-trucks. [Accessed 5 July 2016].

Appendix A

Proposed Mitigation Actions to include in Appendix D-2

ELIGIBLE MITIGATION ACTIONS AND MITIGATION ACTION EXPENDITURES

11. Heavy Duty Zero Emission Vehicle Supply Equipment. Each Beneficiary may use up to fifteen percent (15%) of its allocation of Trust Funds on the costs necessary for, and directly connected to, the acquisition, installation, operation and maintenance of new heavy duty zero emission vehicle supply equipment for projects as specified below. Provided, however, that Trust Funds shall not be made available or used to purchase or rent real estate, other capital costs (e.g., construction of buildings, parking facilities, etc.) or general maintenance (i.e., maintenance other than of the Supply Equipment).

    a. Heavy duty electric vehicle supply equipment includes fast charging equipment (or analogous successor technologies) that is located in a public place, workplace, or private freight or goods movement facility.
    b. Verified electrified parking spaces for idle reduction that is located in a public place, workplace, or private freight or goods movement facility.
    c. Subject to the 15% limitation above, each Beneficiary may draw funds from the Trust in the amount of:
        1. 100% of the cost to purchase, install and maintain verified idle reduction equipment that will be available to the public at a Government Owned Property.
        2. 80% of the cost to purchase, install and maintain verified idle reduction equipment that will be available to the public at a Non-Government Owned Property
        3. 60% of the cost to purchase, install and maintain verified idle reduction equipment that will be available at a freight or goods movement facility but not to the general public.

12. Transport Refrigeration Units (TRUs)
    a. Eligible TRUs include 1992-2012 model year diesel TRUs. For Beneficiaries that have State regulations that already require upgrades to 1992-2012 model year TRUs at the time of the proposed Eligible Mitigation Action, Eligible TRUs shall also include compliant TRUs that have met State in-use performance standards by the required compliance date.
    b. Eligible TRU diesel engines must be Scrapped.
    c. Eligible TRUs may be Repowered with any new All-Electric motor, or may be replaced with any new Alternate Fueled, Hybrid, or All-Electric TRU, with the model year in which the Eligible TRU Mitigation Action occurs.
    d. For Eligible Non-Government Owned TRUs, Beneficiaries may only draw funds from the Trust in the amount of:
        1. 25% of the cost of a new Alternate Fueled (e.g. CNG, propane, Hybrid) TRU or TRU and insulated trailer when electrified parking spaces for idle reduction are installed under Heavy Duty Zero Emission Vehicle Supply Equipment Mitigation

Action (with Heavy Duty Zero Emission Vehicle Supply Equipment eligible to draw funding at 80% of eligible costs at publicly accessible Non-Government Owned facilities, or 60% at limited access Non-Government Owned facilities, respectively).

2. 75% of the cost of a Repower with a new All-Electric engine, including the costs of installation of such engine, and Heavy Duty Zero Emission Vehicle Supply equipment associated with the new All-Electric engine.
3. 75% of the cost of a new All-Electric TRU, including Heavy Duty Zero Emission Vehicle Supply Equipment associated with the new All-Electric TRU.

e. For Eligible Government Owned TRUs, Beneficiaries may only draw funds from the Trust in the amount of:
   1. 100% of the cost of a new Alternate Fueled (e.g. CNG, propane, Hybrid) TRU or TRU and insulated trailer when electrified parking spaces for idle reduction are installed under Heavy Duty Zero Emission Supply Equipment Mitigation Action (with Heavy Duty Zero Emission Vehicle Supply Equipment eligible to draw funding at up to 100% of eligible costs at publicly accessible Government Owned facilities.)
   2. 100% of the cost of a Repower with a new All-Electric engine, including the costs of installation of such engine, and Heavy Duty Zero Emission Vehicle Supply Equipment associated with the new All-Electric engine.
   3. 100% of the cost of a new All-Electric TRU, including Heavy Duty Zero Emission Vehicle Supply Equipment associated with the new All-Electric TRU.

From: jkim@shorepower.com
To: jkim@shorepower.com; ENRD, PUBCOMMENT-EES (ENRD)
Sent: 7/31/2016 4:04:27 PM
Subject: 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.

John C. Cruden Esq.
Assistant Attorney General
Environment and Natural Resources Division
U.S. Department of Justice
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.

Dear Mr. Cruden:

Our organization writes to request that the final settlement between the U.S. government and Volkswagen provide maximum flexibility for States and Native American tribes to consider allocating some of their funds to electrified parking spaces (EPS) and truck stop electrification (TSE). Specifically, we ask that the settlement expressly list truck stop electrification as an eligible mitigation activity within Appendix D-2, along with the nine other activities that already include various forms of diesel retrofits and the marine equivalent of truck stop electrification. While TSE is eligible for funding under the DERA program option, we are concerned that some States and Tribes will decline or minimize use of the DERA option. Moreover, should Congress decide not to provide funding for the DERA program, there would be limited opportunity to invest in TSE. We know TSE is a cost-effective strategy to reduce NOx emissions and value this mitigation option.

Too often, drivers idle their engines during overnight stays in order to maintain a safe and comfortable cab interior environment. The practice takes place on a large scale and has a disproportionate impact on disadvantaged communities where truck stops and fleet terminals are often located. DERA's own guidelines flag the communities surrounding truck stops for programmatic priority. The Argonne National Laboratory (http://www.afdc.energy.gov /uploads/publication/hdv_idling_2015.pdf) estimates that rest-period idling wastes about 1 billion gallons of diesel and results in the emission of about 55,000 tons of nitrogen oxides released annually in the US. The EPA rates Truck Stop Electrification as the single most cost effective activity to mitigate mobile sources of NOx emissions (less than one third of the cost per ton achieved through diesel retrofits). See page 13 (https://www3.epa.gov /otaq/stateresources/policy/general/420b07006.pdf). Truck Stop Electrification, an EPA SmartWay verified technology, provides long-haul truck drivers an alternative to idling their diesel engines during their overnight stays. Significant NOX mitigation can be achieved through 1) installation of new TSE locations; and 2) TSE vouchers for truck drivers to encourage more truckers to use existing TSE facilities.

Again, we urge you to specifically list EPS/TSE infrastructure and TSE vouchers as eligible mitigation activities under Appendix D-2 of the settlement. This would afford beneficiaries maximum flexibility to achieve the settlement's goal of improving air quality in disadvantaged communities by reducing harmful diesel emissions.

Thank you for your consideration!

Sincerely,

John Thornton
CleanFuture, Inc.
Tigard, OR
john@CleanFuture.us

Electrified parking spaces for idle reduction of diesel engines is a viable, cost-effective technology for NOx

reduction, yet often overlooked as a clean diesel action. The cleanest diesel engine is one that does not run, or instead substitutes by running on electricity whenever possible. The omission of EPS as an approved Mitigation Action is a barrier to increased deployment of SmartWay verified actions. Recognition in Appendix D-2 elevates awareness, otherwise few if any projects are likely to follow the DERA option. Further the DERA Option disadvantages electrified parking spaces through inequitable funding treatment. For example, light duty zero emission vehicle supply equipment is funded at 60%, 80%, or 100% per D-2. Charging infrastructure associated with new All-Electric engines for Class 8 trucks and buses per D-2 can receive 75% or 100% funding per D-2. EPS should be funded consistently with these other electrification actions in D-2; EPS is a heavy duty zero emission vehicle supply equipment so it should receive funding levels consistent with other electric infrastructure actions in D-2.

Transport refrigeration units (TRU) is equipment that uses small diesel engines that emit more diesel particulate matter (PM) and nitrogen oxides (NOx) on a grams per horsepower basis than larger engines used in motor vehicles. TRU equipment idles (operates while stationary) for significant time in the normal course of operation for pre-cooling, loading, unloading, and staging at goods movement facilities. TRU diesel engines commonly operate for 50% of overall engine run hours while parked stationary at distribution centers, cold storage warehouses and other freight / goods movement facilities. These freight and goods movement facilities are commonly located near environmental justice communities. Idle reduction with EPS in TRUs, and equipment replacement of old diesel TRUs with new Hybrid TRU technology should be allowed as a specific enumerated Mitigation Action under Appendix D-2 for localized mitigation.

From:	Kevin Matthews
To:	ENRD, PUBCOMMENT-EES (ENRD)
CC:	Stephen Crolius; Kevin Matthews
Sent:	8/4/2016 1:49:42 PM
Subject:	Comments on VW Settlement - Case No: MDL. No. 2672 CRB (JSC)
Attachments:	Crolius-Matthews Comment Letter on VW Settlement - Final - 8-4-16.docx

August 4, 2016

The Honorable John Cruden
Assistant Attorney General for Energy and Natural Resources Division
U.S. Department of Justice
950 Constitution Avenue, NW
Washington, DC 20530-0001

VIA E-MAIL: pubcomment-ees.enrd@usdoj.gov

RE: Comments on Proposed "VW Settlement" Case No: MDL. No. 2672 CRB (JSC)

Dear General Cruden:

We write to you today as the Co-Project Directors of the Clinton Global Initiative Vehicle-to-Grid EV School Bus Commitment Team that is working to deploy cost competitive ZEV school buses throughout the United States. We congratulate the parties on reaching a settlement as regards the Volkswagen vehicles that were allowed to emit higher levels of emissions than permitted in the U.S. Ensuring that our citizens and consumers are protected is the vital role of government and we applaud the numerous public servants at the federal and state level that worked diligently to achieve this settlement on our behalf.

We would like to provide the following comments as it relates to the various "Environmental Relief" portions of the settlement. We believe that the settlement and the implementing entities should focus these funds on providing zero-emission electric (ZEV) school buses to communities across the U.S. For too long we have allowed our nation's children and communities to be exposed to diesel emissions from these ubiquitous vehicles. There are numerous health and environmental studies that document the harmful impacts that diesel school buses have on our children and communities. Most notably there are significant concerns relating to the young and developing lungs of children that are exposed while riding school buses – this includes increases in asthma. School bus passengers include all levels of socio-economic status (SES) in our country, but there is a disproportionate number of lower income and disadvantaged communities that rely on school buses for pupil transportation.

Further, over the last several years a significant amount of public sector funding has been directed toward reducing emissions from transit buses. This is important, but it has also resulted in a lack of attention being paid to reducing or eliminating emissions from school buses. When considered as fleets, the U.S. school bus fleet is larger than the transit bus fleet. Because of the school bus fleet size and cumulative number of miles driven annually, the emissions from school buses exceed those of transit buses. Gram for gram, pollutants emitted by diesel school buses have more serious impacts than those of transit buses. This is because these pollutants tend to become concentrated in the interiors of school buses and to be inhaled by a population whose maturing lungs are particularly susceptible to the insults inflicted by the pollutants.

These health impacts have been studied and documented for the last 15 years, including by scientists commissioned by the California Air Resources Board.[1] Concern spawned by these studies has led to efforts in California to replace conventional diesel buses with a variety of alternatives including "clean-diesel" measures such as direct oxidation catalysts (DOCs), and alternative fuels including compressed natural gas, propane, and gasoline. Given the broad penetration of at least the clean-diesel measures, it was reasonable to hope that the problem of compromised health for school bus riders would be on its way out.
Unfortunately, the results in this regard are less favorable than one might hope. A landmark study on the impact of pollution-reduction measures in school buses was published last year in the American Journal of Respiratory and Critical Care Medicine. It showed that the most widely adopted clean-diesel measures have reduced fine and ultra-fine

particulate matter on buses by as little as 10 percent (for the impact of ultra-low-sulfur diesel fuel on the concentration of PM 2.5) and as much as 42 percent (for the impact of diesel oxidation catalysts on the concentration of ultra-fine particles). From the "glass half-full" perspective, the authors conclude that these reductions have led to a decrease in the rate of pupil absenteeism of about eight percent. From the "glass half-empty" perspective, the study showed that clean-diesel measures generally failed to bring on-board pollutant concentrations down to even those levels present on the sides of busy roads. These outcomes were no doubt behind the decision of the American Journal of Respiratory and Critical Care Medicine to publish an editorial calling attention to the importance of the problem of air pollution on board school buses. The editorial opens as follows:

> For more than a decade, elevated air pollution levels inside school buses have been recognized as an insidious hazard that may affect the health of 25 million U.S. children who commute to school in diesel powered school buses each day. Concentrations of traffic-related air pollutants (TRAP) reported inside school buses are up to several-fold higher than ambient background levels. What are the health effects of these short-term, but relatively intense, exposures to children? This question is amplified by concerns that children are likely to be especially susceptible to the health effects of air pollution. Emissions from diesel engines are a major source of the complex mixtures of fine and ultrafine particulate and gas-phase compounds that make up TRAP. In numerous studies, TRAP has been associated with a growing list of acute and chronic adverse health effects. Of particular importance to children is the established association between short-term exposure to TRAP and exacerbation of asthma, as well as emerging evidence linking long-term exposures to reduced lung growth, incident asthma, obesity, and neurocognitive deficits.[2]

The editorial concludes with these words: "Efforts to clean up diesel engine emissions from school buses are likely to have tremendous societal benefits."[3] The editorial shines a light on the fact that the societal impact of a microgram of PM 2.5 is more severe when that microgram is present on board a school bus than in almost any other setting. From this it follows that using the same yardstick to measure the cost-effectiveness of an investment in cleaner air for school buses and for transit buses is unlikely to maximize the actual societal health benefit generated by the invested dollars.

The perverseness of the situation is sharpened when the resources available for pollution-reduction are compared between transit buses and school buses. Reduced-emission transit buses are supported by a variety of public-sector programs, led by but not limited to the Low or No Emission Vehicle Deployment Program sponsored by the Federal Transportation Administration. In 2016, this program features a national budget of $211 million. The program covers up to 80 percent of the cost of low- and no-emission buses. By contrast, with the exception of the Lower-Emission School Bus programs sponsored by certain California air districts, there are no subsidy programs of any kind for school buses.

Therefore, we strongly encourage that the settlement, and its implementation, focus on providing the "Environmental Relief" funds to projects that provide ZEV school buses to communities throughout the country. The use of these funds will address the lack of resources that have been dedicated to providing ZEV school buses to school districts in the U.S. These programs will have a significant return on investment as removing children from diesel school buses will reduce their lifetime health impacts, making them healthier and more productive citizens in our country. In addition, it will increase ZEV vehicle exposure to potentially every community and SES level in our country. We need more of our citizens driving ZEV vehicles and using ZEV school buses as an example that everyone can see and ride will potentially lead to greater adoption of ZEVs across the country.

Thank you for your consideration. We look forward to working with all entities that will be implementing this settlement to bring ZEV school buses to every community in the country. We will all benefit from this use of the settlement funds.

Sincerely

/S/ /S/

Stephen Crolius
Co-Project Director

Kevin L. Matthews
Co-Project Director

[1] "Characterizing the Range of Children's Pollutant Exposure during School Bus Commutes", Final Report. Prepared for the California Air Resources Board, Contract No. 00-322. Principal Investigator Dennis R. Fitz, College of Engineering, Center for Environmental Research and Technology, University of California Riverside. October 10, 2003.

[2] S. D. Adar et al. "Adopting Clean Fuels and Technologies on School Buses". American Journal of Respiratory and Critical Care

Medicine. Vol. 191, no. 12, June 15, 2015. Pp. 1413-1421.

[3] Op. cit. American Journal of Respiratory and Critical Care Medicine. Pp. 1350-1351.

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August 4, 2016

The Honorable John Cruden
Assistant Attorney General for Energy and Natural Resources Division
U.S. Department of Justice
950 Constitution Avenue, NW
Washington, DC 20530-0001

VIA E-MAIL: pubcomment-ees.enrd@usdoj.gov

RE: Comments on Proposed "VW Settlement" Case No: MDL. No. 2672 CRB (JSC)

Dear General Cruden:

We write to you today as the Co-Project Directors of the Clinton Global Initiative Vehicle-to-Grid EV School Bus Commitment Team that is working to deploy cost competitive ZEV school buses throughout the United States. We congratulate the parties on reaching a settlement as regards the Volkswagen vehicles that were allowed to emit higher levels of emissions than permitted in the U.S. Ensuring that our citizens and consumers are protected is the vital role of government and we applaud the numerous public servants at the federal and state level that worked diligently to achieve this settlement on our behalf.

We would like to provide the following comments as it relates to the various "Environmental Relief" portions of the settlement. We believe that the settlement and the implementing entities should focus these funds on providing zero-emission electric (ZEV) school buses to communities across the U.S. For too long we have allowed our nation's children and communities to be exposed to diesel emissions from these ubiquitous vehicles. There are numerous health and environmental studies that document the harmful impacts that diesel school buses have on our children and communities. Most notably there are significant concerns relating to the young and developing lungs of children that are exposed while riding school buses – this includes increases in asthma. School bus passengers include all levels of socio-economic status (SES) in our country, but there is a disproportionate number of lower income and disadvantaged communities that rely on school buses for pupil transportation.

Further, over the last several years a significant amount of public sector funding has been directed toward reducing emissions from transit buses. This is important, but it has also resulted in a lack of attention being paid to reducing or eliminating emissions from school buses. When considered as fleets, the U.S. school bus fleet is larger than the transit bus fleet. Because of the school bus fleet size and cumulative number of miles driven annually, the emissions from school buses exceed those of transit buses. Gram for gram, pollutants emitted by diesel school buses have more serious impacts than those of transit buses. This is because these pollutants tend to become concentrated in the interiors of school buses and to be inhaled by a population whose maturing lungs are particularly susceptible to the insults inflicted by the pollutants.

These health impacts have been studied and documented for the last 15 years, including by scientists commissioned by the California Air Resources Board.[1] Concern spawned by these studies has led to

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efforts in California to replace conventional diesel buses with a variety of alternatives including "clean-diesel" measures such as direct oxidation catalysts (DOCs), and alternative fuels including compressed natural gas, propane, and gasoline. Given the broad penetration of at least the clean-diesel measures, it was reasonable to hope that the problem of compromised health for school bus riders would be on its way out.

Unfortunately, the results in this regard are less favorable than one might hope. A landmark study on the impact of pollution-reduction measures in school buses was published last year in the American Journal of Respiratory and Critical Care Medicine. It showed that the most widely adopted clean-diesel measures have reduced fine and ultra-fine particulate matter on buses by as little as 10 percent (for the impact of ultra-low-sulfur diesel fuel on the concentration of PM 2.5) and as much as 42 percent (for the impact of diesel oxidation catalysts on the concentration of ultra-fine particles). From the "glass half-full" perspective, the authors conclude that these reductions have led to a decrease in the rate of pupil absenteeism of about eight percent. From the "glass half-empty" perspective, the study showed that clean-diesel measures generally failed to bring on-board pollutant concentrations down to even those levels present on the sides of busy roads. These outcomes were no doubt behind the decision of the American Journal of Respiratory and Critical Care Medicine to publish an editorial calling attention to the importance of the problem of air pollution on board school buses. The editorial opens as follows:

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Engineering, Center for Environmental Research and Technology, University of California Riverside. October 10, 2003.

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Therefore, we strongly encourage that the settlement, and its implementation, focus on providing the "Environmental Relief" funds to projects that provide ZEV school buses to communities throughout the country. The use of these funds will address the lack of resources that have been dedicated to providing ZEV school buses to school districts in the U.S. These programs will have a significant return on investment as removing children from diesel school buses will reduce their lifetime health impacts, making them healthier and more productive citizens in our country. In addition, it will increase ZEV vehicle exposure to potentially every community and SES level in our country. We need more of our citizens driving ZEV vehicles and using ZEV school buses as an example that everyone can see and ride will potentially lead to greater adoption of ZEVs across the country.

Thank you for your consideration. We look forward to working with all entities that will be implementing this settlement to bring ZEV school buses to every community in the country. We will all benefit from this use of the settlement funds.

Sincerely

/S/

Stephen Crolius
Co-Project Director

/S/

Kevin L. Matthews
Co-Project Director

From: Martin Abbott
To: ENRD, PUBCOMMENT-EES (ENRD)
CC: Mpomerantz@cng.us.com
Sent: 7/29/2016 6:09:34 PM
Subject: Application of VW Mitigation Funds

There are two areas I can see benefiting from these funds.

1. Provide financial assistance to shops that would like to become CNG compliant so there are more, local options for fleets to get the conversion work done. Getting a shop to be CNG compliant with safety equipment…etc costs between $150K and $500K depending on the shop size and type of equipment purchased. Offsetting some or most of these costs would encourage shops to do so because the ROI looks more reasonable. Given the low diesel price currently, the payback period for fleets and shops to convert to CNG is far too long.

2. Repowering Medium Duty, Older Trucks. A CNG Repowered truck from model year 2004 and has much lower emissions than diesel trucks from model year 2010 and newer. However, CARB regulations only require a MY 2010 and new to comply. Repowering one of these trucks costs about $40K, whereas a MY 2010 and newer truck can be purchased for $25K to $30K depending on the year and configuration. Making funds available to help with repowering costs would help motivate fleets to clean up the older trucks instead of buying new diesel trucks. This would greatly reduce emission and further support the transition to CNG. Our research indicates there are more than 500,000 trucks (My 2004 and older) still on the road with DT466 Navistar engines in them. Let's repower them using a technology developed by North American Repower that uses remanufactured DT466 engines as drop ins for these trucks.

Thank you,

Martin Abbott
Director of Sales

The largest diameter Type 3 cylinders in the world!

CNG cylinders international
a member of the Winkelmann Group

2331 Sturgis Road
Oxnard, CA 93030
Phone +1 (805) 278-8060
Fax +1 (805) 278-8090
Cell [redacted]
Email: mabbott@cng.us.com
Web: www.cng.us.com

COLORADO
Department of Public
Health & Environment
Dedicated to protecting and improving the health and environment of the people of Colorado

August 5, 2016

United States Department of Justice
Assistant Attorney General, Environment and Natural Resources Division
U.S. DOJ–ENRD
P.O. Box 7611
Washington, D.C. 20044-7611

VIA EMAIL

Re: State of Colorado Comments on 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

To Whom It May Concern:

The Air Pollution Control Division of the Colorado Department of Public Health and Environment appreciates the opportunity to comment on the proposed Partial Consent Decree regarding emission control systems on Volkswagen 2.0 liter diesel vehicles. Colorado supports the mitigation of excess emissions of nitrogen oxides ("NO_x"). Colorado proposes two revisions to the NO_x mitigation trust fund.

I. Vintage Restrictions on Eligible Vehicles

The Mitigation Trust Agreement generally limits the funding eligibility of transit buses and other Eligible Buses to model year 2006 or older. Model years 2007-2012 are eligible in states with existing regulations that require upgrades to 1992-2006 model year buses. While Colorado does not have state regulations requiring upgrades to 1992-2006 buses, many transit agencies replace buses on a 12 year schedule because the Federal Transit Administration allows federal funds to be used to replace transit buses at that time. Few eligible transit vehicles will remain in Colorado in 2017 when settlement funds are expected to be available, and almost none will remain after 2018. This could frustrate the purpose of the mitigation trust. Colorado requests a change to the vintage requirements for Eligible Buses. Using a vintage date of 2012 with a preference for 2006 and older buses would allow states the flexibility to replace a sufficient number of buses to achieve the desired reduction of NO_x emissions.

More broadly, fleets that replace vehicles at a higher rate are likely to face similar challenges in meeting the 2006 model year requirement. This is particularly true for fleets with high vehicle miles traveled ("VMT") because they are often replaced more quickly. Because emissions increase as VMT increases, replacing 2007-2012 model year vehicles in high-VMT fleets would yield significant NO_x reductions. Colorado requests that the vintage requirements for Eligible Large Trucks and Eligible Medium Trucks be revised in the same manner as for Eligible Buses.

II. Treatment of "Near-Zero" Natural Gas Engines

The State of Colorado promotes the adoption of compressed natural gas ("CNG") vehicles. For Non-Government Owned Eligible Large Trucks, Eligible Buses, and Eligible Medium Trucks the Mitigation Trust Agreement allows the reimbursement of 25% to 50% of the cost of new or Repowered diesel or Alternate Fueled vehicles. Colorado requests that the reimbursement percentages be changed to recognize the benefits of "Near-Zero" CNG vehicles that meet the California Optional Low NO_x Emission Standards for Heavy Duty Engines for 2015 and Subsequent Model Year of 0.02 g/bhp-hr. Colorado requests that 75% of the costs of Non-Government Owned new and Repowered Near-Zero vehicles meeting this standard be eligible for reimbursement.

Thank you for your consideration of these comments.

Sincerely,

Chris Colclasure

Chris Colclasure
Deputy Director, Air Pollution Control Division

From: jkim@shorepower.com
To: jkim@shorepower.com; ENRD, PUBCOMMENT-EES (ENRD)
Sent: 8/5/2016 11:39:43 AM
Subject: 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.

John C. Cruden Esq.
Assistant Attorney General
Environment and Natural Resources Division
U.S. Department of Justice
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.

Dear Mr. Cruden:

Our organization writes to request that the final settlement between the U.S. government and Volkswagen provide maximum flexibility for States and Native American tribes to consider allocating some of their funds to electrified parking spaces (EPS) and truck stop electrification (TSE). Specifically, we ask that the settlement expressly list truck stop electrification as an eligible mitigation activity within Appendix D-2, along with the nine other activities that already include various forms of diesel retrofits and the marine equivalent of truck stop electrification. While TSE is eligible for funding under the DERA program option, we are concerned that some States and Tribes will decline or minimize use of the DERA option. Moreover, should Congress decide not to provide funding for the DERA program, there would be limited opportunity to invest in TSE. We know TSE is a cost-effective strategy to reduce NOx emissions and value this mitigation option.

Too often, drivers idle their engines during overnight stays in order to maintain a safe and comfortable cab interior environment. The practice takes place on a large scale and has a disproportionate impact on disadvantaged communities where truck stops and fleet terminals are often located. DERA's own guidelines flag the communities surrounding truck stops for programmatic priority. The Argonne National Laboratory (http://www.afdc.energy.gov /uploads/publication/hdv_idling_2015.pdf) estimates that rest-period idling wastes about 1 billion gallons of diesel and results in the emission of about 55,000 tons of nitrogen oxides released annually in the US. The EPA rates Truck Stop Electrification as the single most cost effective activity to mitigate mobile sources of NOx emissions (less than one third of the cost per ton achieved through diesel retrofits). See page 13 (https://www3.epa.gov /otaq/stateresources/policy/general/420b07006.pdf). Truck Stop Electrification, an EPA SmartWay verified technology, provides long-haul truck drivers an alternative to idling their diesel engines during their overnight stays. Significant NOX mitigation can be achieved through 1) installation of new TSE locations; and 2) TSE vouchers for truck drivers to encourage more truckers to use existing TSE facilities.

Again, we urge you to specifically list EPS/TSE infrastructure and TSE vouchers as eligible mitigation activities under Appendix D-2 of the settlement. This would afford beneficiaries maximum flexibility to achieve the settlement's goal of improving air quality in disadvantaged communities by reducing harmful diesel emissions.

Thank you for your consideration!

Sincerely,

Brian Trice
Columbia-Willamette Clean Cities Coalition
Tualatin, OR
triceb@linnbenton.edu

From: IdleAir TSE Partners
To: ENRD, PUBCOMMENT-EES (ENRD); info@idleair.com
Sent: 8/5/2016 4:50:06 PM
Subject: 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

John C. Cruden Esq.
Assistant Attorney General
Environment and Natural Resources Division
U.S. Department of Justice

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.

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Too often, drivers idle their engines during overnight stays in order to maintain a safe and comfortable interior environment. The practice takes place on a large scale and has a disproportionate impact on disadvantaged communities (see https://www.idleair.com/tse-environmental-justice/) where truck stops and fleet terminals tend to be located. DERA's own guidelines flag the communities surrounding truck stops for programmatic priority. The Argonne National Laboratory estimates that rest-period idling wastes about 1B gallons of diesel and results in the emission of about 55,000 tons of nitrogen oxides released annually in the US (see http://www.afdc.energy.gov/uploads/publication/hdv_idling_2015.pdf). The EPA rates Truck Stop Electrification as the single most cost effective activity to mitigate mobile sources of NOX emissions (less than one third of the cost per ton achieved through diesel retrofits). See page 13 (https://www3.epa.gov/otaq/stateresources/policy/general/420b07006.pdf). Truck Stop Electrification, an EPA SmartWay verified technology, provides long-haul truck drivers an alternative to idling their diesel engines during their overnight stays. Significant NOX mitigation can be achieved through 1) installation of new TSE locations; and 2) TSE vouchers for truck drivers to encourage more truckers to use existing TSE facilities.

Again, we urge you to specifically list TSE infrastructure and TSE vouchers as eligible mitigation activities under Appendix D2 of the settlement. This would afford beneficiaries maximum flexibility to achieve the settlement's goal of improving air quality in disadvantaged communities by reducing harmful diesel emissions.

Thank you for your consideration.

Sincerely,

Nathan Moulton
Title: Chief Operating Officer
Organization: Colville Tribal Federal Corporation
Email: [redacted]
Additional Comments:

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

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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

Respectfully submitted,

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VIA ELECTRONIC AND U.S. MAIL

August 4, 2016

Assistant Attorney General
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Washington, DC 20044 - 7611
Attention: pubcomment-ees.enrd@usdoj.gov

Re: Partial Consent Decree in re. Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation

Dear Attorney Dworkin:

The Connecticut Department of Energy and Environmental Protection (DEEP) appreciates the opportunity to comment on the U.S. Department of Justice's (DOJ's) proposed partial consent decree in the matter of Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation, Case No. 2672 CRB (JSC), which was published in the *Federal Register* on July 6, 2016 (81 *Federal Register* No. 129). DEEP appreciates the efforts of the DOJ and its partners in resolving the Volkswagen (VW) litigation and bringing about a proposed settlement to help those entities most affected by the increase in harmful air quality pollution as a result of VW's actions. DEEP would like to offer the following comments on the proposal.

Connecticut faces serious air quality challenges. Connecticut is in nonattainment for the Environmental Protection Agency's (EPA) 2008 Ozone standard and will need significant emissions reductions to meet EPA's stronger 2015 ozone standard. The illegal actions of VW, which increased emissions of oxides of nitrogen (NOx) by up to forty times in some vehicles, significantly frustrates Connecticut's ability to meet its federal clean air obligations and protect public health. The ability to make meaningful reductions in NOx, through the Environmental Mitigation Trust Agreement (Trust), is crucially important for DEEP to meet these federal obligations.

DEEP strongly supports clearly defined parameters to enable beneficiaries to utilize the NOx mitigation funding to enact a wide variety of programs that will reduce air pollution. The broad scope of these parameters is critical as there is no one set of programs that will work the same for each beneficiary. The proposed consent decree should support a wide variety of technology neutral programs, which do not pick winners, so that each beneficiary may determine the most effective and efficient measures tailored to their unique circumstances. With this overarching goal, DEEP suggests the following minor changes.

DEEP recommends amending the proposed consent decree and related documents to include a mechanism to allow the Trust administrator to evaluate and authorize funding decisions for programs, not specifically included on the list in Appendix D, but that are consistent with the goals of reducing NOx emissions. As a small state and lacking the time to prepare a full inventory of potential projects that would be eligible for funding under the Trust, DEEP is concerned about its ability to access the full

amount of its allocation. As such, beneficiaries should be given the opportunity to fund mobile source projects that achieve emissions reductions in the most efficient manner feasible.

The fifteen percent cap on light duty zero emission supply equipment investment should be increased to no less than twenty-five percent to further assist small states, like Connecticut, to reap the full scope of potential air quality benefits associated with the Trust. The current cap may unnecessarily limit the use of funds for fleet electrification transformation that is empirically proven[1] to be successful in states like Connecticut. Electrification of passenger vehicles, which are the largest single contributor to NOx emissions in Connecticut, is necessary to both mitigate VW's illegal pollution and attain near and long term health-based air quality standards.

DEEP supports the proposed consent decree but strongly advocates for increased flexibility. As constructed the proposed consent decree will limit the beneficiaries' abilities to fully remediate VW's actions. If you or members of your staff have any questions regarding this letter, please do not hesitate to contact me at 860-424-4008.

Sincerely,

Michael J. Sullivan
Deputy Commissioner
Department of Energy and Environmental Protection

[1] Archsmith, Kendall, and Rapson, UC Davis, Available at http://ei.haas.berkeley.edu/research/papers/WP263.pdf

August 5, 2016

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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

Dear Assistant Attorney General Cruden:

The organizations listed below, representing a wide range of alternative fuel providers, vehicle manufacturers, and industry associations respectfully submit the following comments in response to the Department of Justice's notice concerning the above-referenced litigation and the proposed consent decree, which was published in the Federal Register on July 6, 2016 (the "Consent Decree").[1]

We write to urge the government, the court and the other parties to modify the Consent Decree to enable the use of the Environmental Mitigation Trust and the National and California ZEV Investment Plan funds in ways that will provide greater, faster nitrogen oxides ("NOx") emissions reductions at lower cost. In addition, we believe strongly that the requested modifications will result in directing more of these emission reductions to the communities and regions where they are most needed.

Introduction

Our organizations strongly support the basic structure of the Consent Decree. The size and scope of the settlement sends a clear message that vehicle and engine manufacturers must comply with our nation's emissions standards, and it should help deter any future attempts to circumvent these standards. More specifically, the Environmental Mitigation Trust will help ensure that funding goes to replacing or repowering many of the remaining pre-2007 diesel engines in our midst, and will do so in a way that will deliver benefits across the country and in many communities that are disproportionately burdened by these vehicles. The National and California ZEV Investment Plan will help overcome a chicken-and-egg problem that has hampered the introduction of new vehicle fuels and technologies for decades.

[1] Notice of Lodging of Proposed Partial Consent Decree Under the Clean Air Act, 81 Fed. Reg. 44051 (July 6, 2016). Capitalized terms used herein shall have the meanings attributed to them in the proposed Consent Decree documents unless otherwise defined herein.

The need for swift action is real. More than half of all Americans—166 million people, 52.1 percent of the nation's population—live in counties where they are exposed to unhealthful levels of particulate matter (PM) or ozone pollution.[2] People over 65 years of age, people under 18 years old, people with asthma or other heart or lung disease, and diabetics are at greatest risk from this pollution.

Pre-2007 medium-duty and heavy-duty diesel engines emitting high levels of PM and NOx lie at the core of this nationwide pollution problem. While the Volkswagen light-duty vehicles that gave rise to the Consent Decree are a significant contributor to this pollution, the nation's trucks, buses, nonroad equipment, locomotives, and marine engines are an even bigger part of the problem.

The good news is that cleaner medium-duty and heavy-duty vehicles and engines exist today that emit NOx at levels that are 90% lower than even the most stringent EPA 2010 model year emission standards; many more will enter the market over the life of the Consent Decree. Our recommendations are aimed at accelerating the deployment of these vehicles and engines and thereby increasing the overall emissions reductions that will result from the implementation of the Consent Decree.

Recommendation 1: We recommend that the final Consent Decree provide 75 percent funding for new trucks or Repowers that use engines that are certified to meet California's Optional Low-NOx Standard of 0.02 g/bhp-hr NOx.

As currently drafted, the Consent Decree provides funding for Non-Government Owned Eligible trucks and buses based on the technology used, rather than the level of NOx reductions provided. Thus, the Consent Decree provides the same funding for a new or repowered diesel or Alternate Fueled (e.g., CNG[3], propane, Hybrid) vehicle (25, 40, or 50 percent), regardless of its actual emissions benefits, compared with 75 percent of the cost of a new All-Electric vehicle.

By scaling the incentives to provide greater funding for medium-duty and heavy-duty engines that are certified at the California Optional Low-NOx Standard (OLNS) of 0.02 g/bhp-hr level, the Consent Decree can kick-start the commercialization and deployment of medium-duty and heavy-duty engines that are 90 percent cleaner on NOx than today's typical medium-duty and heavy-duty engine and thereby achieve the greatest NOx reductions.[4] This can be done in two ways: funding a higher percentage of the cost of vehicles powered by these cleaner engines) and by prioritizing their funding before any funds are used for higher-emitting engines or vehicles.

Recent research indicates that a truck equipped with a 0.02 g/bhp-hr NOx engine has lower life-cycle NOx emissions than an All-Electric truck being charged on any electrical grid in the United States.[5] Further, such

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[2] "Key Findings". American Lung Association, State of the Air 2016. http://www.lung.org/our-initiatives/healthy-air/sota/key-findings/, page 4.

[3] It is worth noting that Class 8 trucks also operate on liquefied natural gas (LNG), so we request clarification that these funds will be available to LNG trucks as well.

[4] Since 2010, EPA has required heavy-duty diesel engines to be certified at the 0.2 grams-per-brake-horsepower-hour ("g/bhp-hr") level. The California OLNS is set at 0.02 g/bhp-hr, 90 percent lower than the EPA standard. "Final Regulation Order for Phase 1 Greenhouse Gas Regulations." California Air Resources Board, December 5, 2014. http://www.arb.ca.gov/regact/2013/hdghg2013/hdghgfrot13.pdf, pages 3 and 6.

[5] "Game Changer Technical White Paper". Gladstein, Neandross & Associates, 2016. http://ngvgamechanger.com/, Section 6.4 and Appendix 1. Emissions of low-NOx natural gas engines produce NOx emissions that are comparable to or lower than similar electric drive vehicles in all 50 U.S. states when taking into account upstream NOx

an ultra-low NOx truck can provide these low NOx emissions at a cost that is considerably lower than a comparable All-Electric truck. While actual cost depends on the application, an All-Electric medium or heavy-duty vehicle costs three to four times a comparable vehicle powered by a 0.02 g/bhp-hr engine. In addition, there are vehicle applications where no battery electric or fuel cell vehicle is (or will be) available, yet ZEV-equivalent strategies using other power sources or fuels may be.

In order to maximize NOx reductions, the Consent Decree should distinguish between engines that meet EPA's 2010 NOx standard (0.2 g/bhp-hr NOx) and the California OLNS (0.02 g/bhp-hr NOx). Providing the same funding incentive for both engines means that fleets will not take advantage of the cleaner option.

In consideration of these facts, we respectfully request that the list of Eligible Mitigation Actions contained in Appendix D-2 be modified to provide a 75 percent funding incentive for the purchase of new trucks or Repowers that are equipped with engines that are certified at the California OLNS of 0.02 g/bhp-hr. In addition, we recommend that the Trustee be empowered to (i) prioritize these engines for funding before any funds are used for higher-emitting engines or vehicles; and (ii) update this provision as needed to reflect the improved performance of future technologies or the adoption of new EPA or CARB heavy-duty engine emission standards.

To be clear, we support the 25 percent incentive for trucks that meet the EPA 2010 standard. However, enabling the use of mitigation funds to provide an additional incentive for trucks that use California OLNS engines will help accelerate the commercialization of these cleaner-burning engines. Moreover, this approach can provide emissions reductions that are comparable to, and sometimes better than All-Electric trucks (on a life cycle basis) at significantly lower cost, thereby providing faster, greater emissions reductions than the current approach allows.

Recommendation 2: We recommend that the final Consent Decree be modified to enable Appendix C funding for projects that will accelerate the use of any vehicles that can demonstrate ZEV-equivalent emissions performance.

The Consent Decree provides $2 billion in funding for actions that will support increased use of zero emission vehicle ("ZEV") technology, such as infrastructure investments, public education, and other activities. We strongly support investments to ZEV and other next-generation technologies. However, we believe that this fund should be open to actions that will enhance the opportunity of all emerging technologies that can provide emissions reductions that are comparable to the current generation of ZEV technologies (i.e., battery electric vehicles, fuel cell vehicles, and plug-in hybrid electric vehicles).

Today's Consent Decree will fund ZEV projects for the next 10-15 years. Over the life of the Consent Decree, new fuels and technologies will undoubtedly emerge that will expand the list of truck strategies that can provide emissions performance that is comparable to (or even cleaner than) today's ZEVs. Indeed, and as noted above, there are already California OLNS-certified engines being developed that can provide NOx emissions reductions that are comparable to (and even better than) today's ZEVs. When combined with a renewable fuel supply, these engines will also provide comparable GHG emissions reductions to today's ZEVs; and in most cases, the lifecycle GHG emission benefits can be considerably lower than that

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emissions from the average regional grid mix. It is worth noting that 11 state and local air quality districts have petitioned EPA to adopt the OLNS as a national standard for all new heavy-duty engines as soon as 2022. From California to New York, air quality officials have identified the introduction of these low-NOx heavy duty engines as critical to their ability to deliver cleaner, healthier air and meet federal air quality standards.

provided by All-Electric vehicles, even when charged with 100 percent renewable energy[6]. This technology exists today—the first California OLNS engine has been already certified by CARB and EPA, and more OLNS-certified engines are expected in the near future.[7] It is expected that these engines will operate on a wide variety of fuels, including diesel, natural gas, propane, and DME as well as renewable versions of all of the fuel options, that will dramatically increase the greenhouse gas benefits of these engines.

Beneficiaries should have the flexibility to determine the best ZEV or ZEV-equivalent strategies for their states or regions within the context of an overall performance requirement, and should have the flexibility to consider strategies that do not yet exist and will emerge over the coming decade. While a battery electric ZEV might prove cleanest in a state with a clean power grid like California, Washington, or Oregon, other states might find that other ZEV-equivalent approaches will produce the greatest emissions reductions at a lower cost. In addition, and as noted above, there are vehicle applications where no battery electric or fuel cell vehicle will be available, yet ZEV-equivalent strategies using other power sources may be. By providing some implementation flexibility to a ZEV-equivalent performance benchmark, we believe that the ZEV Implementation Fund will maximize its environmental potential and provide an important incentive that will help emerging clean vehicle technologies succeed.

The bottom line is this: Just as EPA emissions standards have been fuel-neutral and technology-neutral since the first emissions standards of the 1970s, incentives to accelerate the market for engines that perform at zero- and near-zero emissions levels should also be fuel-neutral and technology-neutral. Rather than picking winners and losers in the rapidly developing ZEV and "near-ZEV" market, it should follow the decades-long successful model of CARB and EPA emissions standards, and adopt a fuel-neutral and technology-neutral approach that provides funding to support the commercialization and deployment of all engines that provide emissions reductions that are comparable to today's ZEVs.

Therefore, we propose that the definition of "ZEV" or "zero emission vehicle" in Section I.1.9 of Appendix C be modified to include all engines or vehicles that can demonstrate that they emit NOx emissions that are comparable to ZEVs that are then commercially available in the marketplace, to the satisfaction of the Trustee.

Recommendation 3: Modify Appendix D to enable Beneficiaries to use funding to replace model year 2007-2012 vehicles in all States.

We request that Appendix D be modified to enable Beneficiaries to receive funding for Eligible Large Truck, Eligible Bus, and Medium Truck projects that include the replacement or repowering of model year 2007-2012 vehicles in all States. Currently, the Consent Decree requires the replacement or repower of 1992 – 2006 model year trucks but allows areas that already require fleets to retire these older trucks to also fund the replacement or repower of 2007 – 2012 model year vehicles.

The current proposal to limit the funding for certain 2007-2012 model year vehicles unnecessarily restricts potential of funding for eligible truck and bus projects in two ways. First, it limits this opportunity to only a few areas of the country. California is currently the only state that requires upgrades for 1992-2006 model year trucks and buses. Second, it excludes a significant number of fleets that operate only 2007 or

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[6] "Low Carbon Fuel Standard". California Air Resources Board, November 26, 2016. Table 6 on pages 58-67, http://www.arb.ca.gov/regact/2015/lcfs2015/lcfsfinalregorder.pdf. Please also see Section 6.4 and Appendix 1 of the "Game Changer Technical White Paper", which can be found at http://ngvgamechanger.com/.

[7] "ISL G Near Zero Natural Gas Engine Certified to Near Zero - First Mid-Range engine in North America to reduce NOx emissions by 90% from EPA 2010". Cummins Westport, October 5, 2015. http://www.cumminswestport.com/press-releases/2015/isl-g-near-zero-natural-gas-engine-certified-to-near-zero.

newer model year trucks, but that operate very high mileage vehicles. In many cases, these high-mileage trucks can be the best candidates for cost-effective NOx reductions. As well, the fleets that are most likely to invest in ultra-modern and ultra-low-emission fleet technologies are large corporations that tend not to have model year 2006 or older trucks in their operation, even today. Therefore, the largest potential audience for this funding program and targeted technology will effectively be excluded from participation, except in a few instances. For the growth of the overall clean fuel and advanced technology market, it is critical that these leading fleets be able to participate in this program. We therefore request that the replacement program be expanded to allow fleets in all areas of the country to replace or repower 2007 – 2012 model year vehicles.

It is worth noting that, as time goes on, the 1992-2006 limitation will become an anachronism. Today's Consent Decree will govern funding that will be used to repower or replace vehicles in 2026 and potentially beyond, when pre-2006 engines will be few and far between. The program should have a mechanism for updating the model year eligibility annually to ensure that it is always repowering or replacing the appropriate model year engines and vehicles.

Recommendation 4: Modify Appendix D to provide a waiver from the scrappage requirements for Electric Vehicles and Vehicles that meet the California OLNS.

Given the need to accelerate the transition to advanced vehicle technologies like Electric Vehicles and vehicles that meet the California OLNS of 0.02 g/bhp-hr, we strongly urge that the scrappage requirement be waived when fleets are using Environmental Mitigation Trust funds to purchase these vehicles.

Nearly twenty years of experience with California and federal replacement programs has shown that scrappage requirements often limit the demand for new vehicle purchases. Simply stated, forcing a fleet to strand an asset that still has some value makes it more difficult for many fleets to invest in advanced vehicle technologies. Again, it is imperative that leading fleets be encouraged by this program to participate in order to accelerate and scale the deployment of ultra-low-emission technologies and fuels in the marketplace.

We recognize the value of scrappage requirements in many contexts. Thus, we strongly support a scrappage requirement when the replacement vehicle is powered simply with an engine that meets today's existing EPA or CARB NOx standard.

However, to meet upcoming air quality and public health imperatives, the Consent Decree should incentivize and accelerate the development of a robust market in Electric Vehicles and vehicles that are certified at 0.02 g/bhp-hr and thereby achieve emissions reductions that are 90 percent greater than when conventional engines are purchased. Thus, we strongly urge that the scrappage requirement be waived when fleets are using Environmental Mitigation Trust funds to purchase Electric Vehicles and vehicles that are certified at 0.02 g/bhp-hr.

Conclusion

In conclusion, we urge the Justice Department to work with the other parties to integrate our recommendations into the final Consent Decree. Doing so will maximize NOx emission reductions to the greatest extent possible, and thus help mitigate the issues that led to the need for this Consent Decree. If you have any questions or wish any additional information on any of the points discussed in this letter, please do not hesitate to contact us through Richard Kassel, Senior Vice President, GNA, 5 Penn Plaza, 23rd Floor, New York, NY 10001. He can also be reached at rich.kassel@gladstein.org or at 212-849-6861.

Thank you for the opportunity to provide these comments.

Sincerely,

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August 5, 2016

Filed by email to: pubcomment-ees.enrd@usdoj.gov

Assistant Attorney General, U.S. DOJ—ENRD
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RE: 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

The Consolidated Edison Company of New York ("Con Edison" or "the Company") submits these comments in response to the U.S. Department of Justice ("DOJ") notice published in the *Federal Register* on July 6, 2016 (81 FR 44051-2) related to a proposed Partial Consent Decree with the U.S. District Court for the Northern District of California in the referenced lawsuit.

Con Edison is a subsidiary of Consolidated Edison, Inc., one of the nation's largest investor-owned energy companies, with approximately $14 billion in annual revenues and $33 billion in assets. The Company provides electric, gas and steam service to more than three million customers in New York City and Westchester County. Overall, CECONY serves a population of approximately nine million people throughout a service territory covering 660 square miles. Con Edison has an active electric vehicle program and has supported the development of electric vehicle infrastructure throughout its service territory; please see *www.coned.com/electricvehicles/default.asp* for more details about the Company's efforts.

Con Edison's comments here are specifically focused on the potential need for electrical system upgrades associated with new ZEV charging facilities funded under the provisions of the Partial Consent Decree "ZEV investment commitment." The language in Appendix C and Appendix C-1 of the Partial Consent Decree does not specifically address the costs of expanding electrical networks to meet the increased demand of ZEV charging infrastructure. For example, to support "Level 2 charging at multiunit dwellings, workplaces, and public sites [and] DC fast charging facilities"[1] as envisioned by the Partial Consent Decree, it may be necessary or efficient for the charger owner or installer ("customer") to request that the local utility provide new electricity distribution. That distribution is often at the customer's expense. To help encourage charger installations, the Company recommends that distribution expenses assessed to the customer by the utility be reimbursable.

Commercial garages, which provide the majority of public charging in Con Edison's service territory, are an example of how this inclusion could enable more charging infrastructure. While the property may have sufficient electrical capacity to support electric vehicle chargers, that capacity can be located far away from the garage and require long or challenging construction to bring it to the desired location. Additionally, the garages are often on long-term leases and operated separately from the rest of the facility, adding contractual and operational hurdles. In most circumstances customers must pay the

[1] Paragraph 1.10.1 of Appendix C

Company to add an additional electrical service distribution to a property that already has sufficient power. Having these customer costs be reimbursable in addition to those costs already approved under the proposed settlement would help facilitate the EV market in New York City.

The Company recommends that the language of the Partial Consent Decree be modified to clarify that such costs are necessary and indeed part of the ZEV investment. Specifically, the Company suggests the following edits[2] to Paragraph 1.10.1 of Appendix C of the Partial Consent Order:

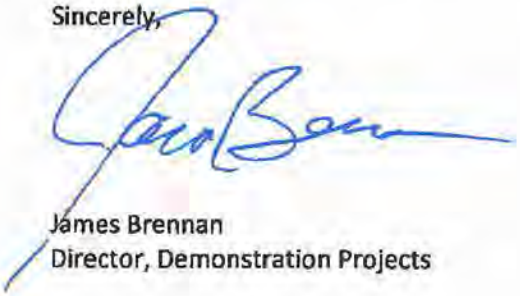
> 1.10.1. Design/planning, construction/installation, operation, and maintenance of ZEV infrastructure. That infrastructure should support and advance the use of ZEVs in the United States by addressing an existing need or supporting a reasonably anticipated need. Such expenditures may include the installation of: (i) Level 2 charging at multiunit dwellings, workplaces, and public sites, (ii) DC fast charging facilities accessible to all vehicles utilizing non-proprietary connectors, (iii) new heavy-duty ZEV fueling infrastructure (in California); (iv) later generations of the types of charging infrastructure listed in i, ii, and iii; (v) electrical equipment installed by local utility electricity suppliers or their contractors and billed to the customer to allow for the operation of the types of charging infrastructure listed in i, ii, and iv, and ~~(v)~~ (vi) ZEV fueling stations;

To be certain that the costs associated with new item (v) in Paragraph 1.10.1 (as shown above) are "Creditable Costs", paragraph 2.2 of Appendix C-1 should also be modified as follows:

> 2.2. Electricity Costs - Unless otherwise agreed to in writing by EPA or CARB, as applicable, the costs for electricity for charging ZEVs are not Creditable Costs. Notwithstanding this provision, the labor and materials costs of electrical equipment installed by local utility electricity suppliers or their contractors which would otherwise be borne by the customer that support the operation of eligible ZEV investment projects or activities in the National and California ZEV Investment Plans approved by EPA or CARB, shall be Creditable Costs.

Con Edison appreciates the opportunity to comment upon the provisions of the Partial Consent Decree and looks forward to partnering in the development of the National ZEV Investment Plan.

Sincerely,



James Brennan
Director, Demonstration Projects

[2] New text is underlined, deleted text is annotated with a strikethrough

ConsumersUnion®

POLICY & ACTION FROM CONSUMER REPORTS

August 5, 2016

The Honorable John C. Cruden
Assistant Attorney General
Environment and Natural Resources Division
U.S. Department of Justice
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Submitted by email to pubcomment-ees.enrd@usdoj.gov.

***In re: Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation;* Case No: MDL No. 2672 CRB (JSC); D.J. Ref. No. 90-5-2-1-11386—Comments of Consumers Union on the Partial Consent Decree**

Dear Mr. Cruden:

Consumers Union, the policy and mobilization arm of Consumer Reports,[1] welcomes the opportunity to comment on the partial consent decree submitted by the U.S. Department of Justice (DOJ) to the U.S. District Court for the Northern District of California in the case titled *In re: Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation*. We generally support this settlement as fair, adequate, and reasonable, but urge several modifications be made before the agreement is finalized.

Since September 2015, when the public learned of the alleged emissions cheating by the settling defendants (collectively, Volkswagen or VW), Consumer Reports has marshaled capabilities across our organization to make sense of Volkswagen's defeat devices and hold the company accountable through research, testing, journalism, and policy work. Consumers deserve a strong voice in the response to Volkswagen's deceit, and we are working to ensure they are heard.

On September 24, 2015, Consumer Reports President and Chief Executive Officer Marta Tellado publicly called for Volkswagen to rectify its betrayal through four types of actions,

[1] Consumers Union is the policy and mobilization arm of Consumer Reports. Consumers Union is an expert, independent, nonprofit organization whose mission is to work for a fair, just, and safe marketplace for all consumers and to empower consumers to protect themselves. It conducts this work in the areas of food and product safety, telecommunications reform, health reform, financial reform, and other areas. Consumer Reports is the world's largest independent product-testing organization. Using its more than 50 labs, auto test center, and survey research center, the nonprofit organization rates thousands of products and services annually. Founded in 1936, Consumer Reports has over 8 million subscribers to its magazine, website, and other publications.

including financial, environmental, mechanical, and ethical restitution.[2] Consumer Reports immediately suspended its "recommended" rating for the VW Jetta and Passat diesel models until we could retest the vehicles with any approved emissions modification performed and assess whether the repair has adversely affected performance or fuel economy.[3] We urged the federal government and California to punish Volkswagen commensurate with this betrayal and mobilized consumers to demand that the company face appropriate consequences, compensate its customers, and remediate the environment.[4]

As additional details of Volkswagen's deception became public, our testers and journalists investigated VW "Clean Diesel" advertising, evaluated vehicle performance in "cheat" mode, and gave voice to affected consumers who wrote us.[5] We were grateful that the Justice Department and the Federal Trade Commission (FTC) filed suits against Volkswagen, and immediately began our evaluation of the proposed deal—from a consumer-facing perspective—when the agencies, along with the Environmental Protection Agency (EPA) and the State of California, announced the settlement package including this consent decree.[6]

For the portion of claims that it settles, this consent decree largely meets the standards that Consumer Reports described for making consumers and the environment whole.[7] Under the decree, Volkswagen compensates consumers by offering to fix, buy back, or cancel leases for affected vehicles. Owners receive financial restitution of at least what we called for: the full current value of the car, plus compensation for lost value attributable to VW's deceit. If an emissions modification is approved, consumers have meaningful options for choosing whether to keep their car or return it without any obligation to remain a customer of the company. In

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[2] Marta Tellado, Ph.D. "Will Volkswagen's penalty be high enough?" CNN Opinion (Sept. 24, 2015) (online at www.cnn.com/2015/09/24/opinions/tellado-volkswagen-scandal).

[3] "VW, Audi Cited by EPA for Cheating on Diesel Emissions Tests," Consumer Reports (Sept. 30, 2015) (online at www.consumerreports.org/cro/cars/vw--audi-cited-by-epa-for-cheating-on-diesel-emissions-tests).

[4] *Id.;* Consumers Union, "To the new VW CEO: Meet this test." (Sept. 2015) (online at secure.consumersunion.org/site/Advocacy?cmd=display&page=UserAction&id=3081).

[5] *See, e.g.,* "Consumer Reports Tests VW Diesel Fuel Economy, Performance in 'Cheat' Mode," Consumer Reports (Oct. 9, 2015) (online at www.consumerreports.org/cro/cars/testing-volkswagen-diesel-fuel-economy-and-performance-in-cheat-mode); "Did Volkswagen Use 'Cheat Mode' as a Selling Point?" Consumer Reports (Oct. 19, 2015) (online at www.consumerreports.org/volkswagen/did-volkswagen-use-cheat-mode-as-a-selling-point); "The People Speak Out on Volkswagen Dieselgate," Consumer Reports (Oct. 2, 2015) (online at www.consumerreports.org/cro/cars/the-people-speak-out-on-volkswagen-dieselgate); "Volkswagen Diesel Owners Share Their Stories," Consumer Reports (May 19, 2016) (online at www.consumerreports.org/volkswagen-emissions/volkswagen-diesel-owners-share-stories-with-consumer-reports); "Some VW Owners: Don't Take My TDI Away From Me," Consumer Reports (June 23, 2016) (online at www.consumerreports.org/cars/dont-take-my-tdi-away-from-me).

[6] Consumers Union, "Consumers Union on Justice suit against Volkswagen over emissions scandal," press release (Jan. 4, 2016) (online at consumersunion.org/news/consumers-union-on-justice-suit-against-volkswagen-over-emissions-scandal); "FTC Charges Volkswagen With False Advertising," Consumer Reports (Mar. 29, 2016) (online at www.consumerreports.org/volkswagen/ftc-charges-volkswagen-with-false-advertising); Consumers Union, "Consumers Union Applauds 'Unprecedented' Volkswagen Settlement," press release (June 28, 2016) (online at consumersunion.org/news/consumers-union-applauds-unprecedented-volkswagen-settlement).

[7] *See* "What VW Should Do for Its Diesel Owners," Consumer Reports (June 26, 2016) (online at www.consumerreports.org/volkswagen/what-vw-should-do-for-its-diesel-owners).

undertaking any emissions modification, VW pays consumers restitution for the deceit and provides them appropriate incentives to take the time and trouble to get their cars fixed. Critically, Volkswagen also will address the environmental and air quality damage from its decisions by making a substantial investment in zero emission vehicle (ZEV) technologies, and mitigate past, ongoing, and future emissions through appropriate offsets.

However, there is much more the federal government and states can and should do to hold Volkswagen fully accountable. If this settlement is finalized, regulators must wield tough oversight of VW to ensure that it implements its recall, investment, and mitigation programs appropriately. Also, while this settlement covers the majority of affected vehicles, a resolution must be reached that penalizes VW and compensates consumers and the environment for the impact of illegal devices in diesel vehicles with 3.0-liter engines. Finally, civil penalties and any appropriate criminal penalties must be assessed against the company and its executives as a deterrent against future wrongdoing. Consumer Reports strongly urges federal and state officials to complete the job and take these critical actions.

In addition, there are some needed improvements to the proposed partial consent decree. Below, we offer DOJ, California, and the Court the following more detailed facts and considerations to examine during review of the settlement. There are several shortcomings of the proposed decree that we urge the three entities to address before finalizing the agreement.

I. The Buyback and Lease Termination Options Are Entirely Justified, but Should Be Revised to Increase Buyback Values, Allow More Time for Eligible Sellers to Identify Themselves, and Protect All Lessees from Incurring Recall-Related Costs

Under the settlement, Volkswagen must offer owners and lessees of eligible vehicles the opportunity, for two years, to have their cars bought back by the company at a replacement value of the vehicle as of September 17, 2015, or to have their leases terminated at no cost. These consumers would also receive an additional cash restitution payment of between $5,100 and $9,800 for owners and approximately half that amount for lessees.

Consumer Reports considers these buyback and lease termination options to be entirely justified, and we are pleased that the settlement offers these options for 100% of the covered non-compliant vehicles. Consumers were sold a different product than advertised, and they deserve the ability to no longer be a customer of Volkswagen, if they so choose. We agree with the parties to the settlement that these options are warranted by the need for prompt action to remedy the deception of consumers and the widespread Clean Air Act violations, that the noncompliance is clear, and there are no practical engineering solutions at present that would provide sufficient remedies in lieu of the proposed recall program.[8] In fact, while recent press reports have indicated progress on a fix,[9] it is still possible that no adequate emissions repair will be achievable—making a buyback and lease termination program all the more necessary to ensure the settlement makes consumers and the environment whole.

Under the settlement, Volkswagen's buyback offer must be at no less than the Retail Replacement Value, which is defined as "the cost of retail purchase of a comparable replacement vehicle of similar value, condition, and mileage as of September 17, 2015."[10] This is an appropriate definition, and overall, consumers taking advantage of the buyback option under this settlement would likely receive cash payments in line with their cars' value plus compensation.

However, we do note that the settlement also states that the "offer of buybacks and fulfilment of their buyback obligations under the FTC Order and Class Action settlement satisfies the requirements" of the buyback under the Justice Department's settlement, despite the fact that the Class Action settlement requires the use of a car's NADA Clean Trade-In value for determining the price paid.[11] This is instead of using the NADA Clean Retail value or a value between the two, which is approximately the price that a consumer could expect to receive if selling the car privately.

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[8] Partial Consent Decree, Preamble at 3.

[9] *See, e.g.*, "Volkswagen May Be Nearing Agreement Over U.S. Recall," Wall Street Journal (July 25, 2016) (online at www.wsj.com/articles/volkswagen-may-be-nearing-agreement-over-u-s-recall-1469451003); "Exclusive: California regulator says testing to begin on Volkswagen diesel fix," Reuters (July 29, 2016) (online at www.reuters.com/article/us-volkswagen-emissions-exclusive-idUSKCN10921J);

[10] Partial Consent Decree, Appendix A at 3.

[11] Partial Consent Decree, Appendix A at 6; Consumer Class Action Settlement Agreement and Release at 4, 16, 60 (June 28, 2016) (online at www.cand.uscourts.gov/filelibrary/1782/Consumer_Settlement_Agreement.pdf).

While recognizing the overall adequacy of the buyback prices that consumers would receive, Consumer Reports believes it would be more accurate for the settlement not to use the NADA Clean Trade-In value as the figure to represent the value of a consumer's car prior to public knowledge of the VW deceit. This figure is closer to the wholesale value of the car, rather than its retail replacement value. Using, at a minimum, an estimated private sale price (approximately between the Clean Trade-In and Clean Retail values) would be more consistent with the Justice Department settlement's definition of Retail Replacement Value, and would lead to buyback offers for consumers that would be at least several hundred dollars higher. Moreover, using the Clean Trade-In figure instead of a more appropriate one undermines the value to consumers of the owner restitution under the Class Action settlement, which is supposed to mean monetary compensation "in addition to the Vehicle Value Payment or Approved Emissions Modification."[12]

Another category of affected consumers are those who sold their vehicle after September 18, 2015, and during the claims period. The settlement stipulates that the consumer who sold the car—the "eligible seller"—and the new owner would split the owner restitution payment approximately 50/50 between themselves. While Consumer Reports supports this solution, and find it to be appropriate and adequate, the proposed timeline concerns us. To qualify for eligible seller restitution payment, consumers have only 45 days to identify themselves. This means that with preliminary approval granted by the Court on July 26, 2016, these individuals must contact Volkswagen, such as at www.VWCourtSettlement.com or www.AudiCourtSettlement.com, by September 16, 2016. We are concerned that this will not be enough time for Volkswagen to properly notify those who are eligible and for those notified to respond. With this deadline rapidly approaching, we strongly urge the parties to the settlement and the Court to address our concerns at the upcoming August status hearing, and that in the finalized settlement, the timeline be extended for eligible sellers to identify themselves, to ensure that all affected consumers have an opportunity to receive the restitution payment to which they are entitled.

With regard to the lease termination option, Consumer Reports is pleased that consumers who leased an affected vehicle from VW Credit have the option of a complete lease termination that includes full cancellation of the remaining term of the lease with no financial or other penalty or cost to the consumer. We particularly support the explicit language in the settlement ensuring that VW companies "pay any amounts necessary to accomplish the return of the vehicle without penalty to the Eligible Lessee, including, without limitation, early termination fees owed to third parties."[13] Because fees for excess wear and use are exempted from this provision and may still be charged to the lessee, we encourage consumers to make sure they receive an itemized invoice of any such charges, review them carefully, and challenge them if they are inappropriate.

In addition, we question whether this settlement provides adequate protections for those consumers who leased an affected car from an entity other than VW Credit. It is possible that the leasing companies that own these cars may decide to cancel the lease and become "eligible

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[12] Consumer Class Action Settlement Agreement and Release at 12-13.

[13] Partial Consent Decree, Appendix A at 6.

owners" so that they can participate in the recall program and obtain, for instance, a buyback.[14] Depending on the terms of the lease, the current lessees could be left without transportation unexpectedly through no fault of their own, or even incur financial costs associated with the termination of their lease.[15] We urge the Court, government agencies, and VW to revise the consent decree to require leasing companies other than VW Credit to provide lessees adequate advance notice and no-cost lease termination in order to become eligible owners.

II. Any Approved Emissions Modification Program Should Clearly Inform Consumers of Buyback or Lease Termination Alternatives, Allow Them to Choose These Options After Receiving a Modification, and Better Protect Them from Improper Liability Waivers or Releases

Consistent with our belief that consumers must have meaningful options in responding to Volkswagen's deceit, Consumer Reports supports including an emissions modification program as an option under the settlement, if EPA and the California Air Resources Board (CARB) verify that a repair would substantially reduce emissions. According to EPA, any approved emissions modification "will reduce NO_x [nitrogen oxide] emissions from the vast majority of vehicles by approximately 80 to 90 percent compared to their original condition."[16] According to CARB, "the consent decree establishes stringent criteria for approving an emissions modification that will reduce emissions from these vehicles by 80% to 90% or more, without any substantial reduction of fuel economy or performance."[17]

While we appreciate the major emissions reductions that an approved emissions modification could bring, we do remain concerned that such a modification would not actually meet federal or state emissions standards. Ultimately, VW is not able to give consumers the car they thought they were buying or leasing, and it cannot make the cars stop polluting at an illegal level. The impact of VW's cheating is ongoing, and will continue—underscoring the necessity of additional accountability measures, in the form of tough civil and potentially criminal penalties, to deter wrongdoing in the future.

Nevertheless, Consumer Reports supports an adequate emissions modification because it is preferable to offering just a buyback or lease termination for consumers who want to keep their car. This settlement program also comes with strong terms ensuring that any approved emissions modification is free, open to all eligible owners or lessees regardless of class action participation, has no end date, and includes Lemon Law-type protections and an extended

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[14] Partial Consent Decree, Appendix A at 2.

[15] We do recognize that the FTC Order allows for "specific arrangements" to be made "in exceptional cases" for leasing companies other than VW Credit to obtain an approved emissions modification without canceling or terminating the lease. Federal Trade Commission, [Proposed] Partial Stipulated Order for Permanent Injunction and Monetary Judgment at 6-7 (June 28, 2016) (online at www.ftc.gov/system/files/documents/cases/proposed_partial_stipulated_order_filed_copy_0.pdf).

[16] Environmental Protection Agency, "Volkswagen Clean Air Act Partial Settlement" (June 28, 2016) (online at www.epa.gov/enforcement/volkswagen-clean-air-act-partial-settlement).

[17] California Air Resources Board, "Volkswagen Diesel Vehicle Consent Decree Frequently Asked Questions" (June 28, 2016) (online at www.arb.ca.gov/msprog/vw_info/vw_faq.htm).

warranty.[18] In addition, we agree with the parties to the settlement that permitting an approved emissions modification helps avoid undue waste and environmental harm.[19]

Consumer Reports urges Volkswagen to use all tools at its disposal to get the word out to consumers about the emissions modification, and urges it to communicate not just through U.S. mail and a public website, but also through email, social media, press outlets, and other means. While the provisions in the settlement requiring Volkswagen to notify consumers about the availability or non-availability of an approved emissions modification are adequate, to reach the 85% recall rate target—which we discuss in greater detail in the following section—we expect the company will need to go well beyond these minimum requirements for notice.[20] As it does so, we urge regulators to carefully monitor these communications to ensure that VW is abiding by its obligation to "make clear" that the owner or lessee alternatively has a right to participate in the buyback or lease termination options.[21] Consumers should not be misled into believing that a buyback or lease termination is any less of an acceptable option for them than an emissions modification. Additionally, we urge VW to disclose information on a public website about an approved emissions modification immediately once it has been approved, rather than waiting two days, so that consumers who see the news and want to get more information right away can do so.[22]

As discussed, we support that the settlement requires Volkswagen to offer consumers an extended emissions warranty and a Lemon Law-type remedy covering any approved emissions modification. However, Consumer Reports thinks that consumers initially choosing the emissions modification should have another option, given that the car may perform differently once a fix has been made. These consumers should be granted a period of time after the modification, perhaps 30 days, during which they can decide that they are not satisfied with the car, and can change their minds and participate in the buyback or lease termination program. They should receive the full cash payment to which they would have been entitled had they selected the buyback or lease termination option in the first place.

Consumer Reports anticipates that giving consumers this option—or a similar option that protects them from being stuck with a modified car that they do not want—would assist Volkswagen in reaching its 85% recall rate targets. We have received comments from hundreds of consumers about their manipulated diesel vehicles. While these comments have not been verified independently, based on what we have heard, there is a portion of VW customers who are wary of reductions in performance or fuel economy and are very reluctant to return their cars for an emissions modification. Some suggest that cash compensation would motivate them, while others told us they will resist a fix, saying "they just might force me to sell it back. [They're] not going to get their hands on my car" and "[t]he retrofit will almost certainly affect the performance of the car. I live in an area with no emissions checks, so I won't be forced to do

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[18] Partial Consent Decree, Appendix A at 7.

[19] Partial Consent Decree, Preamble at 4.

[20] Partial Consent Decree, Appendix A at 3-5.

[21] Partial Consent Decree, Appendix A at 4.

[22] Partial Consent Decree, Appendix A at 5.

anything."[23] To encourage the participation of these reluctant consumers, Volkswagen will need to indemnify them against unsatisfactory performance or fuel economy by ensuring they have a second chance to take the buyback or lease termination.

We also share several comments about the period after an eligible vehicle receives an approved modification. While we agree with the settlement's goals in ensuring that Volkswagen must not require consumers to release the company from liability in exchange for receiving an emissions modification, Consumer Reports is concerned that the current wording of this provision—prohibiting the release when required "solely" in exchange for receiving the modification—is too narrow.[24] We would urge that, in the finalized decree, the word "solely" be deleted from subparagraphs 5.1.2 and 8.2.5 of Appendix A. We would strongly urge Volkswagen to refrain from seeking to improperly require consumers to sign away their legal rights. We would also urge regulators and consumers to watch the marketplace vigilantly for such a practice and to make it publicly known if they find this practice is occurring. This action would ensure that consumers have information they need about choosing the emissions modification, as opposed to a buyback or lease termination.

Consumer Reports strongly supports other provisions in the settlement related to the period after a vehicle receives an approved modification. This includes labeling and other disclosures required by this settlement for vehicles that have received an emissions modification, including disclosures to subsequent purchasers and a new Monroney fuel economy label.[25] Any consumer who may purchase or lease one of these modified cars in the future has a right to know how the car was changed and which components were added as a part of this recall program, as well as its up-to-date emissions levels and fuel economy.

III. The Recall Requirements Are Tough, but Key Aspects Should Be Tougher to Protect Consumers and Get Highly Polluting Cars Off the Road Faster

A. The Recall Rate Target of 85% by June 2019 is Appropriately Ambitious, but Should Include Earlier, Staggered Targets to Motivate Quick Action

Under the settlement, Volkswagen must remove from commerce, or perform an approved emissions modification on, at least 85% of the affected 2.0-liter vehicles by June 30, 2019. VW must also meet a separate 85% recall rate in California. If Volkswagen fails to reach the 85% recall rate target, the company must pay additional funds into the Environmental Mitigation Trust established under this settlement. The company must pay $85 million for each percentage point by which it falls short of the national recall target and $13.5 million for each percentage point by which it falls short of the California recall target.

Consumer Reports thinks that an 85% recall rate by June 30, 2019, is an appropriately ambitious target for Volkswagen, and we are pleased that the settlement provides tough

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[23] "Some VW Owners: Don't Take My TDI Away From Me," Consumer Reports (June 23, 2016) (online at www.consumerreports.org/cars/dont-take-my-tdi-away-from-me).

[24] Partial Consent Decree, Appendix A at 7.

[25] Partial Consent Decree, Appendix A at 8.

consequences for the company if it fails to meet this target. VW will need to promote its recall program vigorously and creatively to reach the 85% level. According to the National Highway Traffic Safety Administration (NHTSA), an average of 25% of cars recalled for safety defects every year go unrepaired.[26] Volkswagen faces a distinct challenge in reaching an 85% recall rate for its diesels, in which the recall is not related to an acute safety hazard but rather to Clean Air Act and other environmental violations. In addition to communicating to consumers in novel ways, the company will need to make the recall as convenient as possible for consumers. This should include flexible appointment scheduling, pick-ups, and loaner vehicles as needed—regardless of whether or not the dealer service is occurring under warranty—to ensure that consumers determine it is worth their time to participate in the recall.

While we support the settlement's recall rate target, Consumer Reports also notes that there may be drawbacks to having only one target deadline nearly three years from now, as opposed to staggered deadlines over the course of several years. Staggered deadlines would provide additional built-in incentives for quick action, and help ensure that Volkswagen gets its highly polluting vehicles off the road as soon as possible. Consumers would be made whole faster, and less NO_x would be emitted into the air. By contrast, having one deadline in 2019 could lead to a backloaded recall process in which more unmodified VW and Audi diesels remain on the road for a longer period of time. To avoid the unnecessary pollution that would result, we strongly urge the Court and regulators to pressure VW to carry out its recall program as expeditiously as possible and at the very least set targets to achieve steady progress toward full recall completion in each periodic report it files with government agencies.

To reach the 85% target, Volkswagen should not hesitate to offer consumers additional incentives to take part in the recall, in addition to the restitution payments and steps the company will take to communicate with consumers and to make the recall as convenient as possible for them. We are pleased that the settlement makes clear that nothing prohibits VW from offering such incentives, while also stating that these incentives cannot be offered in lieu of any options to consumers under the settlement.[27]

At Consumer Reports, we will be watching Volkswagen's recall program closely to ensure that it works for consumers. This will include monitoring the tools and methods that the company uses to reach the 85% recall rate target. As discussed, we think this appropriately ambitious target may drive VW to be particularly creative in its consumer outreach. If so, we look forward to documenting the lessons of this recall program that could help other companies with product recalls—and the regulators that oversee them—achieve the highest possible rate of recall completion.

B. Requirements for Salvage, Resale, and Export Are Generally Appropriate, but Labeling and Disclosure Obligations Should Extend to Consumers Abroad

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[26] National Highway Traffic Safety Administration, "The 'Safe Cars Save Lives' campaign urges consumers to check for open recalls at least twice a year," press release (Jan. 21, 2016) (online at www.nhtsa.gov/About+NHTSA/Press+Releases/ci.nhtsa-launches-safe-cars-save-lives-campaign-01212015.print).

[27] Partial Consent Decree, Appendix A at 9.

For vehicles returned to Volkswagen that lack an approved emissions modification, the settlement takes the right approach. Rendering functional vehicles inoperable and recycling them is by no means ideal from the perspective of minimizing waste; however, in this case, it is necessary. The components in the affected diesels that are integral to VW's deceit violate the Clean Air Act, among other statutes, and must not be permitted to run. We are pleased that the settlement allows these returned vehicles to be salvaged for parts, while also—critically—exempting the engine control unit, diesel oxidation catalyst, or diesel particulate filter from being salvaged, resold, or exported.[28]

More generally, we support that the settlement permits VW only to resell or export vehicles if they have received an approved emissions modification. It would be highly inappropriate to simply export these vehicles' emissions problems to another country.[29] If VW does export modified vehicles, we urge that the agreement make clear that the company must extend its labeling and disclosure obligations under this settlement to potential owners or lessees abroad.

C. Regulators Have Broad Oversight Tools, but Certain Penalties Should Be Stronger

Consumer Reports applauds the settlement's comprehensive reporting requirements. The settlement specifies that Volkswagen must provide EPA, CARB, and the California Attorney General's office with detailed reports on all aspects of the settlement. This includes reports on Volkswagen's progress toward reaching the recall rate targets, detailed accounts on each eligible vehicle, and a compilation of all notices used to inform consumers. The settlement also includes a particularly keen requirement for the company to report to regulators summaries or copies of all bulletins, notices, or other similar communications sent to authorized dealerships about the recall program.[30] We support these reporting requirements and urge Volkswagen to be clear and forthright with regulators, and for these overseeing agencies to make these reports public. In this way, all interested parties can help ensure that Volkswagen keeps to the settlement's terms.

Consumer Reports also supports the settlement's stipulated penalties in the event that Volkswagen fails to meet any of a variety of requirements. These penalties act as incentives to ensure that Volkswagen meets its obligations. While most of the penalties would provide appropriate deterrence, the penalties for failure to submit reports and unauthorized waiver or release of liability should be stronger to better reflect the potential severity of the impact of these violations on the environment and consumers.[31] Increasing these penalties further would better ensure that Volkswagen does not make a business decision to pay relatively modest fines instead of complying with the terms of the settlement.

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[28] Partial Consent Decree, Appendix A at 10.

[29] *Id.*

[30] Partial Consent Decree, Appendix A at 10-12.

[31] Partial Consent Decree, Appendix A at 12-13.

IV. The Zero Emission Vehicle Investment Will Help Pay For the Harm Done, but Should Not Be Fulfilled through Government Incentives or Excess Public Outreach

Consumer Reports has long supported investment in the development of electric vehicles, including zero emission vehicles (ZEVs). Our surveys have found strong consumer support for electric vehicles, with 65% of those surveyed in California—where the market for electric vehicles is most mature—showing interest in the continuation of electric vehicle technological innovation and more than half considering electric cars for their next purchase.[32] Additionally, more than half of surveyed drivers in several Northeast states showed interest in electric vehicles, with 35% considering an electric vehicle for their next purchase.[33] We support California's ZEV program, which our research has found helps consumers save on fuel costs and helps bring ZEVs to cost-competitiveness with internal combustion engine vehicles.[34]

Consumer Reports believes that a $2 billion investment in ZEV technology is an appropriate way for Volkswagen to pay for its harm to the environment. Consumers were told that their 2.0-liter vehicles were low emission vehicles, when in reality they emitted up to 40 times the legal limit of nitrogen oxides (NO_X), leading to more polluted air. By having Volkswagen invest in ZEV technology, innovation, and infrastructure, the settlement can help prevent future emissions from further harming our air, and can lead the company to compensate for some of the environmental damage it has done.

While Consumer Reports supports the settlement's requirement for Volkswagen to invest $2 billion in Zero Emission Vehicle (ZEV) technology and infrastructure, we caution against Volkswagen being able to receive loans, grants, or other incentives from federal or state agencies to carry out this ZEV investment. We believe that if Volkswagen were allowed to apply these incentives to the settlement, it would constitute "double dipping" by disincentivizing Volkswagen from investing $2 billion of its funds and instead using federal or state funds for this purpose. We would recommend that the consent decree be modified to clarify that any subsidies Volkswagen receives during this time period make those specific investments ineligible as a creditable cost. Additionally, we would suggest that DOJ ensure that public outreach is capped at 5% of the investments, so that the stipulated money results in tangible benefits. Consumer Reports also encourages the draft investment plans to align with the "Guiding Principles to Promote Electric Vehicles and Charging Infrastructure" that the White House published in July 2016, to ensure that the investment plans are the most beneficial for consumers and the environment.[35]

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[32] "More Than Half of California Drivers Considering Electric Cars, Survey Shows," Consumer Reports (May 27, 2016) (online at www.consumerreports.org/cars/electric-vehicle-interest-strong-california-northeast).

[33] Consumers Union, "In the Northeast, Survey Shows Strong Interest Big Potential for Electric Vehicles," press release (May 26, 2016) (online at consumersunion.org/news/ev-survey-in-the-northeast).

[34] Consumers Union, "New Consumers Union Report Finds California's Clean Transportation Policies Provide Net Savings for Consumers," press release (Mar. 31, 2016) (online at consumersunion.org/news/report-california-clean_transportation-policies-provide-net-savings-for-consumers).

[35] White House, "FACT SHEET: Obama Administration Announces Federal and Private Sector Actions to Accelerate Electric Vehicle Adoption in the United States" (July 21, 2016) (online at www.whitehouse.gov/the-press-office/2016/07/21/fact-sheet-obama-administration-announces-federal-and-private-sector).

V. VW Must Completely Offset Any Past, Present, and Future Emissions through the Mitigation Trust

Consumer Reports fully supports the settlement's requirement for Volkswagen to establish a $2.7 billion Environmental Mitigation Trust fund. The trust is intended to fully mitigate the total lifetime excess NO_x emissions from the 2.0-liter vehicles covered by the settlement. All 50 States, Puerto Rico, the District of Columbia, and Indian tribes can be beneficiaries, and receive a specific allocation of funds from the total $2.7 billion that they can use on projects that best fit their citizens' needs from the listed eligible mitigation actions. These eligible mitigation actions include projects to reduce NO_x from heavy-duty diesel sources near population centers, such as delivery trucks and school and transit buses. We encourage beneficiaries to carefully consider programs that will directly benefit populations most susceptible to adverse health consequences caused by NO_x emissions exposure.

We emphasize the importance of completely offsetting any past, present, and future NO_x emissions based on the adverse health consequences associated with NO_x. The Environmental Protection Agency (EPA) notes that even short-term NO_x exposure can lead to, or worsen, adverse health effects such as respiratory disease, heart disease, increased hospital admissions, and premature death.[36] Children, the elderly, people with preexisting lung conditions, and those who spend time outdoors are especially susceptible to NO_x-related health consequences. Given the large amount of excess NO_x emissions from Volkswagen 2.0-liter vehicles, it is imperative that Volkswagen continue to reduce population exposure to these harmful gases.

VI. Conclusion

In summary, Consumers Union appreciates the opportunity to comment on the partial consent decree in the case *In re: Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation*. We generally support this settlement as fair, adequate, and reasonable, but have shared facts and considerations that should be examined and addressed before finalizing the agreement, including:

- The buyback and lease termination options are entirely justified, but should be revised to increase buyback values, allow more time for eligible sellers to identify themselves, and protect all lessees from incurring recall-related costs;
- Any approved emissions modification program should clearly inform consumers of buyback or lease termination alternatives, allow them to choose these options after receiving a modification, and better protect them from improper liability waivers or releases;
- The recall requirements are tough, but key aspects should be tougher to protect consumers and get highly polluting cars off the road faster;

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[36] Environmental Protection Agency, "Nitrogen Dioxide: Health" (Feb. 23, 2016) (online at www3.epa.gov/airquality/nitrogenoxides/health.html).

  - The recall rate target of 85% by June 2019 is appropriately ambitious, but should include earlier, staggered targets to motivate quick action;
  - Requirements for salvage, resale, and export are generally appropriate, but labeling and disclosure obligations should extend to consumers abroad;
  - Regulators have broad oversight tools, but certain penalties should be stronger;
- The zero emission vehicle investment will help pay for the harm done, but should not be fulfilled through government incentives or excess public outreach; and
- VW must completely offset any past, present, and future emissions through the mitigation trust.

Going forward, we strongly urge regulators to wield robust oversight of Volkswagen to ensure that the company implements its recall, investment, and mitigation programs appropriately, and that it offers meaningful solutions for the 3.0-liter engine diesel vehicles that it has not yet addressed. We also call on federal and state officials to assess tough civil penalties and any appropriate criminal penalties against the company in order to hold it fully accountable. These penalties are essential to deterring future wrongdoing that harms consumers and the environment, and ensuring that Volkswagen's deceit—the most severe in automotive history—is never repeated.

Respectfully submitted,

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August 5, 2016

Assistant Attorney General
U.S. DOJ – ENRD
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RE: Volkswagen Partial Consent Decree – "In re: Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation, Case No: MDL No. 2672 CRB (JSC)

To Whom It May Concern:

After reviewing the partial consent decree between DOJ, EPA and Volkswagen, CSX is encouraged by the significant breadth of mitigation resources available to offset the emissions caused by the Volkswagen diesel vehicles covered under the consent decree. However, CSX would like to offer the following comments regarding the partial consent decree:

1. The mitigation portion of the partial consent decree (i.e., Appendix D) currently appears to exclude certain non-road trucks from the list of eligible mitigation actions. Interpreting the definitions of a "Port Drayage Truck" and "Class 8 Local Freight, and Port Drayage Trucks (Eligible Large Trucks)" appears to support a conclusion that non-road trucks that perform drayage truck operations are not an eligible mitigation action.

    - " "Drayage Truck" shall mean trucks hauling cargo to and from ports and intermodal rail yards"

    - " "Class 8 Local Freight, and Port Drayage Trucks (Eligible Large Trucks)" shall mean truck tractors with a Gross Vehicle Weight Rating (GVWR) greater than 33,000 lbs used for port drayage and/or freight/cargo delivery (including waste haulers, dump trucks, concrete mixers)."

    Of concern to CSX is the limitation to trucks that haul cargo to and from rather than also within port and intermodal terminals. A narrow interpretation of these definitions appears to disallow trucks that operate solely within a port or intermodal rail yard.

Currently CSX has more than 100 non-road 'hostler' trucks that are used at our intermodal facilities to move containers and trailers within the intermodal terminal fence line. The hostler trucks perform the same type of service as drayage trucks; however, with two significant differences: (1) they are captive to the property and (2) are equipped with non-road certified engines.

Our hostler trucks operate at intermodal terminals, adjacent to our railyards, many of which are in close proximity to population centers and urban areas. By allowing the inclusion of non-road hostler trucks as eligible mitigation actions within Appendix D-2 of the partial consent decree, additional benefits to the areas immediately adjacent to the intermodal terminal can be achieved.

We respectfully request the following modifications be made to the eligible mitigation actions:

- that the definition of "Drayage Trucks" be modified to read as follows: "Drayage Trucks" shall mean trucks hauling cargo to and from as well as within the boundaries of ports and intermodal terminals; and

- that the list of eligible mitigation actions be modified to include non-road trucks used in support of intermodal rail facilities. Additionally, we request that the funding available to partner organizations remain consistent with that provided to Port Drayage Trucks.

2. The eligible mitigation actions with respect to locomotives are limited only to freight switch locomotives and eligibility should be modified to include locomotives that operate within a limited geographical area rather than limited only to rail yards.

In addition to our long-haul locomotives that move across state lines and freight switchers that operate solely within the confines of a rail yard, we also perform local deliveries and short-line operations. Local deliveries typically occur in close proximity to a rail yard and incentives to repower or replace these locomotives would provide meaningful benefits to the community near the freight rail yard. An example of our operations that are consistent with short-line maneuvers is rail movements between Orlando and Tampa, FL; our locomotives serve this dedicated route traveling through the congested urban areas of these two cities as well as the communities in between.

We respectfully request that the list of eligible mitigation actions be modified to include locomotives that may operate outside of a rail yard in service for local and short-line rail movements. CSX suggests the following changes to include a new category of eligible mitigation action:

Local and Short-Line Locomotives

a. Eligible Local and Short-Line Locomotives include pre-Tier 4 locomotives that operate 1000 or more hours per year.
b. Eligible Local and Short-Line Locomotives must be Scrapped.
c. Eligible Local and Short-Line Locomotives may be Repowered with any new diesel or Alternate Fueled or All-Electric engine(s) (including Generator Sets), or may be replaced with any new

diesel or Alternate Fueled or All-Electric (including Generator Sets) Local and Short-Line Locomotives, that is certified to meet the applicable EPA emissions standards (or other more stringent equivalent State standard) as published in the CFR for the model year in which the Eligible Local and Short-Line Locomotives Mitigation Action occurs.

d. For Non-Government Owned Local and Short-Line Locomotives, Beneficiaries may draw funds from the Trust in the amount of:
    1. 75% of the cost of a Repower with a new diesel or Alternate Fueled (e.g. CNG, propane, Hybrid) engine(s) or Generator Sets, including the costs of installation of such engine(s).
    2. 25% of the cost of a new diesel or Alternate Fueled (e.g. CNG, propane, Hybrid) Local or Short-Line Locomotive.
    3. 75% of the cost of a Repower with a new All-Electric engine(s), including the costs of installation of such engine(s), and charging infrastructure associated with the new All-Electric engine(s).
    4. 75% of the cost of a new All-Electric Local or Short-Line Locomotive, including charging infrastructure associated with the new All-Electric locomotive.
e. For Government Owned Eligible Local and Short-Line Locomotives, Beneficiaries may draw funds from the Trust in the amount of:
    1. 100% of the cost of a Repower with a new diesel or Alternate Fueled (e.g. CNG, propane, Hybrid) engine(s) or Generator Sets, including the costs of installation of such engine(s).
    2. 100% of the cost of a new diesel or Alternate Fueled (e.g. CNG, propane, Hybrid) Local or Short-Line Locomotive.
    3. 100% of the cost of a Repower with a new All-Electric engine(s), including the costs of installation of such engine(s), and charging infrastructure associated with the new All-Electric engine(s).
    4. 100% of the cost of a new All-Electric Local or Short-Line Locomotive, including charging infrastructure associated with the new All-Electric locomotive.

3. In order to encourage companies to consider either repower or replacement of Non-Government owned locomotives, the incentive funding should be increased. The funding amounts align closely with those in the EPA DERA program and at those levels, it is difficult to encourage participation of locomotive companies. This is supported by the fact that EPA hasn't approved a locomotive repower project since 2013, even though they are typically among the most cost-effective diesel emission reduction projects.

   CSX respectfully requests that the locomotive repower funding incentive be modified to align more closely with past DERA funding models that encouraged and realized greater participation by Non-Government locomotive companies. CSX suggests the following changes for Non-Government owned locomotives:

   - 75% of the cost of a Repower with a new diesel or Alternate Fueled (e.g. CNG, propane, Hybrid) engines(s) or Generator Sets, including the cost of installation of such engine(s).

CSX is committed to protecting the environment and the safety and health of the public, customers and its employees in all aspects of the company's operations. We are pleased that these resources are being made available in order to provide significant diesel emission reductions. CSX requests that the above changes be considered to allow greater opportunity for diesel fleets to reduce NOx emissions and maximize participation in the program.

Sincerely,

Carl Gerhardstein
Assistant Vice President – Public Safety, Health & Environment

The Diesel Emissions Reduction Act Coalition

August 5, 2016

John Cruden, Assistant Attorney General
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611
Washington D.C. 20044

Dear Assistant Attorney General Cruden:

We are submitting comments on behalf of a broad coalition that shares several specific concerns regarding the Mitigation Trust Fund ("MTF"), Appendix D of the Partial Consent Decree lodged in In Re: Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation, Case No: MDL 2672 CRB (the "Decree"). The Decree itself emphasizes that its purpose is to "fully mitigate the total, lifetime excess NOx emissions" from the vehicles at issue.[1] Our comments set out several small changes to the Decree that would likely increase the NOx reduction achieved by the MTF to a significant degree, assisting the parties in reaching the Decree's goal.

Our coalition has worked collaboratively for over a decade to support the efforts of the Environmental Protection Agency ("EPA") to implement the Diesel Emissions Reduction Act of 2005 ("DERA"). DERA provides financial assistance to vehicle and vessel owners to retrofit or replace existing vehicles, vessels, or equipment with the latest technology to reduce diesel emissions, including NOx, from existing diesel engines. The program requires annual appropriations from Congress. Our coalition has successfully advocated for these annual appropriations, which have amounted to over $650 million since the program was launched.

The coalition has also provided technical advice to EPA on the means to administer the incentive program effectively. DERA has proven to be one of the most successful and cost-effective EPA programs. Since it was launched, it has achieved 335,200 tons of NOx reduction with a payback of $5 to $21 of environmental, health, and economic benefits for every dollar of federal funds expended.[2]

The coalition respectfully suggests the following changes in the administration of the MTF, with the purpose of achieving *even more* significant NOx reductions pursuant to the principal goal of the Decree, and thereby mitigating the adverse effect on the environment associated with VW's use of defeat devices.

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[1] Decree at page 5, paragraph 7

[2] Third Report to Congress: Highlights from the Diesel Emission Reduction Program, EPA-420-R-16-004 February 2016 at page 3. See also Diesel Engine Grants Program Nets Major Air, Public Health Benefits, April 29, 2016 at https://www.epa.gov/newsreleases/epa-report-diesel-engine-grants-program-nets-major-air-public-health-benefits-0.

1. Funding Under The EMT Should Be Technology Neutral Applying the Same Percentage Subsidy Across All Comparable Technologies.

To achieve a higher level of NOx emissions reduction, Appendix D should be modified so that the percentage subsidy levels are the same across all technologies. As presently drafted, the Decree provides a different percentage subsidy for different types of technology. For example, the purchase of a replacement for a class 4-8 school bus model 2006 and older could include a new diesel vehicle that is eligible for a 25% subsidy or an all-electric vehicle that is eligible for a 75% subsidy. Because all-electric vehicles are two to four times more expensive than diesel vehicles and the NOx emission reduction is almost the same, the cost per ton of NOx reduction on an all-electric vehicle is far higher than it is for a clean diesel vehicle.[3] In the case of a drayage truck analysis done by the California Air Resources Board, all-electric vehicles are twice as expensive as diesel vehicles and replacing a pre-2002 diesel with a new diesel achieves 95% of the NOx reduction achievable with an all-electric replacement. As such, the cost per ton of NOx reduced by replacing a drayage truck with an all-electric vehicle at a 75% subsidy is 5 to 6 times higher than a diesel replacement at a 25% subsidy.[4] This means that for any given level of total funding available to fund vehicle replacement, far less NOx reduction will be achieved with investment in all-electric vehicles than would be achieved with investment in clean diesel vehicles and equipment.

Another example is based on an analysis done by the U.S. Department of Transportation ("DOT"), which shows that widely available clean diesel technology can eliminate a ton of NOx emissions for under $20,000 per ton. In contrast, electric technologies can reduce a ton of NOx emissions for a cost in the range of $700,000 to $1.5 million per ton.[5] So theoretically, if the expenditure of the $2.7 billion in the Decree for the purchase of NOx reduction technology is spent on clean diesel technology, 135,000 tons of NOx can be reduced versus 1,800 to 3,857 tons with the purchase of all-electric technology, including infrastructure. Admittedly, this is a stark example, but it demonstrates that at the extreme a plan that incentivizes investment in all-electric technology over investment in clean diesel technology would be sub-optimal in terms of NOx reduction and its beneficial impact on the environment and on human health.

Given these examples, a better approach is to maintain technology neutrality by providing the same percentage subsidy for all technology solutions. The idea of technology neutrality has been followed by EPA in many of its mobile source

[3] http://www.fhwa.dot.gov/environment/air_quality/cmaq/reference/cost_effctiveness_tables/

[4] This calculation is based upon a draft analysis published by CARB entitled Technology Assessment: Medium-and-Heavy-Duty Battery Electric Trucks and Buses dated October 2015. The calculation makes the following assumptions: electric drayage trucks with a range of 100 miles per day (35,000 per year), a cost at $208,000, zero NOx emissions, and 2.3 kWh per mile of energy on average to move the vehicle. The new diesel truck is similar except it costs $108,000 and emits 0.2 g/bhp-hr NOx. The replaced diesel truck is model year 1996, emits 4.8 g/bhp-hr of NOx, and has 5 years remaining life.

[5] http://www.fhwa.dot.gov/environment/air_quality/cmaq/reference/cost_effectiveness_tables/

regulations. This small change in approach has the potential of achieving a far higher level of NOx reduction than would otherwise be the case under the Decree as written.

The coalition understands that there may be policy goals other than NOx reduction that the parties want to achieve by incentivizing the purchase of all-electric vehicles. But it should be noted that even after making the MTF subsidy technology neutral, the Decree will still provide an enormous investment in electric vehicle technology. The Decree provides for $2 billion of investment over a 10-year period to support increased use of technology for Zero Emissions Vehicle ("ZEV").[6] By making the MTF technology neutral and thus increasing NOx reduction, the Decree will promote three goals: greater NOx reduction, the commensurate improvement in health, and the longer term development of ZEV.

2. Funding Under the Trust Should Be the Same for Both Public and Private Entities.

A second simple change that would achieve greater reduction of NOx is to make the MTF provider neutral -- not distinguishing between public entities (such as local governments) and private entities. The subsidy, regardless of its level, should be the same percentage subsidy for both private and government entities.

As drafted, the Decree provides much greater subsidies for governments than for private entities. It provides a 100% subsidy to governments for repowering or replacing a government-owned vehicle, while the private sector is only eligible for subsidies ranging from 40% for repowering diesel and alternative fuel vehicles, 25% for the purchase of a new diesel or alternative fuel vehicle, and 75% for repowering or purchasing an all-electric vehicle. We support the language in the Decree that would treat private school bus companies under contract with local school districts the same as government entities. This is a step toward applicant neutrality, but we feel the Decree should go further. Perhaps the MTF should allow other private companies under contract to governmental entities to be treated the same, as well. There is no sound environmental basis for a huge difference between the subsidy for governments versus the private sector. The purchase of a clean vehicle by the private sector has the same environmental benefit as the purchase of the same vehicle by a governmental entity so why give government a higher level of subsidy? This is one of the reasons for treating private school bus companies under contract with local school districts the same as government entities. A school bus owned by a private company has the same environmental benefit as a school bus owned by a local government.

A 100% subsidy dilutes the environmental impact of the Decree because it will result in the overall purchase of fewer clean vehicles and equipment than would otherwise be the case. The result is a much lower level of NOx reduction for any given level of funding made available. A 25% subsidy provided to the private

[6] Decree at page 4, Para. 6 and Appendix C

sector for the purchase of a clean vehicle will enable the purchase of four clean vehicles with the same amount of funds that would be used by a government to purchase one vehicle with a 100% subsidy. Equalizing the subsidy will result in four times the level of NOx reduction.

A 100% subsidy will also give governments a perverse incentive to purchase new vehicles without regard to cost. By reducing the government subsidy to a lower amount, one equal to the subsidy available to private entities, government decision-makers would appropriately have to evaluate which technology provides the most cost-effective solution to meet their needs. A subsidy that is less than 100% will require governments to evaluate which technology will provide the most cost-effective reduction of NOx, with the result that the MTF can achieve a higher level of overall NOx emissions.

3. **Decisions on What Competing Projects to Fund Should Be Made On the Relative Cost Effectiveness of the Technology Proposed for Use.**

The question on how competing projects will be evaluated by the Trustee is not addressed in the Decree. The coalition suggests that relative cost effectiveness for NOx reduction be the primary standard for such evaluation. As has already been demonstrated above, using the most cost effective technologies results in the highest level of NOx reduction for a given level of total funds made available to invest in NOx reduction technologies.

4. **The MTF Should Include a Preference for Projects That Would Not Otherwise Be Funded.**

The MTF Trustees should be required, in approving projects for funding, to evaluate whether those projects would be funded even in the absence of funding from the MTF. For example, some fleet owners renew their fleets according to a pre-determined schedule. Funding these fleet purchases will not add any environmental benefit above that which would have been achieved without a subsidy. However, we believe the benchmark for the age of the vehicles to be replaced should be model year 2009 and older as those vehicles do not have the most current emission control technology.

5. **Some Portion of Funds should be to Concentrate Grant Funding in Areas with the Highest Levels of Nonattainment.**

Increased NOx emissions raise concerns about public health, especially as they relate to the occurrence of asthma. While it is important to focus on the reduction of NOx going forward, the health concerns related to past NOx emissions should also be addressed. One way to address health issues is to favor geographic areas with the highest nonattainment for ground-level ozone. Thus, we propose that the MTF state that preference will be given to projects that reduce ozone by reducing

NOx emissions, a precursor to ozone, in the areas of the highest nonattainment for ozone.

6. States Should Be Permitted to Use The DERA Program to Administer Their Funds.

In the DERA program, there already exists a widely praised and extremely successful mechanism for providing funding to incentivize equipment and vehicle owners to install retrofit technologies on existing heavy duty diesel vehicles and engines, or to replace engines and equipment, thus reducing emissions by as much as 90 percent. Since implementation, the DERA program has become one of the most cost-effective federal clean air programs. EPA has estimated that every $1 in federal DERA assistance is met with another $3 in non-federal matching funds, including significant investments from the private sector, and generates $5 to $21 in health and economic benefits. EPA's most recent estimates indicate that the program has upgraded nearly 73,000 vehicles or pieces of equipment, and saved over 450 million gallons of fuel. EPA also estimates that total lifetime emission reductions achieved through DERA funding are 335,200 tons of NOx and 14,700 of PM. These reductions have created up to $12.6 billion of health benefits. Further, DERA benefits each state because 30 percent of the funding goes to support state programs.[7]

Given that we already have in DERA an existing program that has been highly successful in incentivizing technologies to reduce NOx emissions, the establishment of a new Trust, and new programs for each state, to do essentially the same thing is unnecessary and inefficient. To the extent each state wishes, it should be able to use the DERA program to distribute the funds to the extent permitted by law.[8]

At the very least, as the goal of the Decree is to achieve additional NOx emissions, it is important to ensure that the MTF is not considered as a replacement of the DERA program. If the establishment of the MTF undermines the DERA program, that portion of the NOx emission reductions that is being achieved today will be lost.

7. States Should Maintain Current Funding Levels for their Existing Diesel Emission Reduction Programs.

Many states have exemplary programs to address diesel emissions. Texas and California are but two examples of mature state programs that provide funding to accelerate the acceptance of new, cleaner vehicles and technologies that help to reduce mobile source emissions. States should be required to make a commitment to maintain their existing programs in order to receive the funding under the

[7] Third Report to Congress: Highlights from the Diesel Emission Reduction Program, EPA-420-R-16-004 February 2016 at pages 3 - 5.
[8] See 42 U.S.C. § 16139

Decree. If states were allowed to reduce their current funding, the VW settlement funds would not result in a net reduction in NOx emissions.

Thank you for considering our comments.

Sincerely,

American Trucking Associations' – Associated General Contractors of America
Blue Bird – Clean Air Task Force – Corning Incorporated
Cummins Inc. – Diesel Technology Forum – Emissions Control Technology Association
Manufacturers of Emission Controls Association
National Association of State Directors of Pupil Transportation Services
National School Transportation Association – Saltchuk
Truck and Engine Manufacturers Association – United Motorcoach Association

cc: Volkswagen Case Team
Air Enforcement Division
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DIESEL TECHNOLOGY FORUM

August 4, 2016

Mr. John Cruden
Assistant Attorney General,
U.S. Department of Justice—Environment & Natural Resources Division
P.O. Box 7611
Washington, D.C. 20044-7611

Submitted Electronically

In RE: *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

Dear Assistant Attorney General Cruden:

I am writing on behalf of the Diesel Technology Forum which represents manufacturers of diesel engines, vehicles and equipment. The Forum is a not-for-profit educational organization dedicated to raising awareness of the clean air and economic benefits of clean diesel technology. More information on the Forum, including a list of members, is available at www.dieselforum.org

These comments are on the above-captured matter of the proposed VW Environmental Mitigation Trust Agreement ("MT"). The partial consent decree incorporates a program to mitigate excess emissions of oxides of nitrogen (NOx) generated by diesel passenger vehicles manufactured by VW. These affected vehicles were recognized as having the capability of by-passing emission control devices.

We remind the Court that there is no evidence to indicate anything inherently defective with clean diesel technologies deployed on passenger vehicles and the enormous variety of diesel powered heavy duty vehicles and off-road equipment. In fact, the greater adoption of clean diesel technologies will generate enormous immediate term NOx emission reductions and will achieve the NOx mitigation goals outlined in the MT.

Summary

The partial proposed consent decree provides for $2 Billion set aside dedicated funding to vehicle and infrastructure electrification in addition to $2.7 Billion towards funding mitigation projects to reduce NOx emissions. Our comments herein are with respect to the $2.7 Billion discretionary Environmental Mitigation Trust oriented to reduce NOx emissions.

We believe the greatest opportunity for mitigation of NOx emissions comes from projects for the replacement or repowering of heavy duty diesel trucks, engines and equipment with new

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diesel technology. This strategy can achieve the desired environmental goals of the Court in the timeliest manner.

However, as currently configured, the approach outlined in the partial consent decree favors investments in technologies that may have longer lead times with relatively lower NOx emissions reduction potential.

The highest percentage of potential MT funding allocations based on the proposed MT would fund investments in technologies and infrastructure that are previously documented by EPA, CARB and USDOT as being the least cost effective investment in emissions reductions. As a result, it is plausible that the effectiveness of this scheme will delay NOx reductions, and/or achieve those in lower levels than envisioned by the Court.

The MT makes no disclosure of the excess emissions to be reduced, and therefore limits the ability of interested parties to comment specifically about the merits of the proposed mitigation measures, and whether the entire scheme achieves its stated goal. This limits the input of interested parties such as the Diesel Technology Forum to provide a quantitative and analytical input to the proposed mitigation environmental trust.

Recent petitions to EPA from the South Coast Air Quality Management District and other states, claims the need for additional reductions in NOx emissions from heavy duty on highway vehicles to achieve compliance with the national ambient air quality standard for ozone has been thoroughly established. Nonetheless, the MT appears to ignore this fact and discount the funding opportunities for clean diesel related projects that achieve documented NOx reduction.

We respectfully encourage the Court and the parties of the decree to revise the MT such that the allocation scheme place a higher value on timely, guaranteed, and cost effective NOx reduction potential, irrespective of the technology deployed. In this way, the VW settlement can achieve its objectives and do the greatest good for the most people.

I. The MT should be refashioned to be technology neutral. Remedies based substantially on clean diesel technology would deliver more certain reductions in NOx emissions in a timelier manner than other approaches.

According to data compiled recently by the U.S. Department of Transportation, clean diesel technologies are the most cost effective NOx control strategy. An analysis conducted by the U.S. Department of Transportation, using the recent emissions model generated by the U.S. Environmental Protection Agency, determined that proven clean diesel technology delivers more air quality benefits on a dollar-for-dollar basis.[1]

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1 http://www.fhwa.dot.gov/environment/air_quality/cmaq/reference/cost_effectiveness_tables/index.cfm#Toc445205109

How Much Investment is Needed to Reduce 1 ton of NOx Emissions?

Technology	$ per Ton of NOx Reduction
Idle Reduction	$2,040
Diesel Engine Replacement: Heavy-Duty Truck Engines	$13,748
Diesel Engine Replacement: Transit Bus Engines	$51,131
Diesel Engine Replacement: School Bus Engines	$77,315
Extreme Temperature cold start	$364,817
Car Sharing	$319,608
Bike Sharing	$1,217,644
EV Infrastructure	$1,462,694

The analysis concludes that widely available diesel technology can eliminate a ton of NOx emissions for under $20,000.

Clean diesel technology can provide immediate term air quality benefits. Clean diesel technology deployed to achieve the near-zero NOx emissions standard established for commercial vehicles manufactured as of 2010, reduce emissions by 98 percent relative to a truck manufactured in 1988. According to 2016 research commissioned by the Diesel Technology Forum, commercial vehicles using clean diesel technology in service from 2010 to 2015 have eliminated 7.5 million tons NOx while saving 69 million barrels of crude oil and 29 million tons of carbon emissions. These benefits will continue to grow as more of the older Class 3-8 fleet transitions to new clean diesel technology.

The regional air quality benefits provided by diesel technology that meets the model year 2010 standard are substantial. Air quality regulators in southern California estimate that NOx emissions in the region could fall immediately by 70 percent, or 86 tons each day, if all commercial vehicles are powered by a diesel engine that meets the near-zero NOx standard.[2] The California Air Resources Board estimates that the biggest anticipated reduction in NOx emissions between 2012 and 2035 will be attributable to heavy-duty diesel

[2] http://www.aqmd.gov/docs/default-source/Agendas/aqmp/white-paper-working-groups/preliminary-draft-goods-movement-white-paper---060515.pdf?sfvrsn=2

vehicles as more of the fleet transitions to clean diesel technology that meets the model year 2010 standard.[3]

Replacing older trucks with new clean diesel technology in the fleet of commercial vehicles will have immediate term air quality benefits for other regions. Nationwide, one-in-four heavy-duty diesel vehicles, almost 2.5 million vehicles, are powered by a clean diesel engine that meets or beats the near-zero NOx emissions standard established for model year 2010. Three out of four trucks are of the older generation with relatively higher levels of NOx emissions. Significant additional NOx reduction can occur in regions across the country if more of the commercial vehicle fleet transitions to near-zero emissions diesel technology.

Additional Air Quality Benefits Under Greater Adoption of Clean Diesel Technology in Commercial Vehicles (eliminated tons NOx/year)

Share of the fleet with a clean diesel engine (2010 or later model year)	Pennsylvania	New York	New Jersey
100%	105,000	95,000	63,000
75%	68,000	64,000	43,000
50%	31,000	34,000	22,000

Source: Research Commissioned by the Diesel Technology Forum (2016)

Similar near-zero NOx emissions standards established for commercial vehicles are now required of the large variety of off-road equipment including construction and agricultural equipment. As of 2014, most off-road equipment must meet the "Tier 4" emissions standard established by the U.S. Environmental Protection Agency (EPA). As of 2015, larger applications such as locomotives and marine workboats must meet these standards. Depending on horsepower range, diesel technology to meet these strict standards result in more than a 95 percent reduction in NOx emissions relative to previous generations of technology.

Much like commercial vehicles, the greater adoption of Tier 4 clean diesel technology will generate substantial air quality benefits. The California Air Resources Board estimates that NOx emissions from agricultural equipment will fall by 50 percent and NOx emissions

[3] California Air Resources Board. Emissions Inventory Data, http://www.arb.ca.gov/ei/emissiondata.htm

attributable to other off-road equipment will fall by 77 percent between 2012 and 2035, largely by the adoption of Tier 4 diesel technology.[4]

Remedy: The MT should be technology neutral and fails to provide funding for the full population of off-road equipment. According to the California Air Resources Board, the large variety of off-road equipment including construction equipment, represents the 3rd largest source of NOx emissions, yet the MT does not provide funding to improve the emissions from this equipment. Access to MT funding will allow owners of older equipment to replace or repower with new engines to generate substantial air quality benefits.

II. The Mitigation Trust outlined in the partial consent decree issued for public comment is faulty because it fails to consider key factors central to the timely mitigation of NOx emissions; technology availability, desire of target MT recipients to invest in fuel and technology choices, timeframe for its implementation and ability to deliver proven NOx reductions.

The primary interest of the court in the mitigation program as stated in the Purpose and Recitals is to

> "…fully mitigate the total lifetime excess NOx emissions from the 2.0 Liter Subject Vehicles where the 2.0 Liter Subject Vehicles were, are or will be operated." (APPENDIX D p.1)

Based on the most recent emissions inventories of CARB, NOx emissions from heavy duty trucks are the primary source of concern for the region achieving its ozone attainment requirements, with these vehicles making up 21 percent of all NOx emissions from the transportation sector – the largest source of NOx emissions in the inventory. According to research commissioned by the Diesel Technology Forum, 82 percent of heavy-duty vehicles in operation in California are powered by an engine that does not meet the latest near-zero NOx emissions requirement established for trucks manufactured beginning in 2010.

Yet the MT fails to focus the mitigation strategies on technologies that have the potential to achieve the greatest emissions reductions, or at the very least, follow a technology neutral scheme that would allow equal access to MT funding whatever the strategy that a specific applicant may choose to submit for an eligible mitigation measure. If Trustees approve allocations of dollars as currently envisioned, the MT will likely end up paying far more dollars for far fewer reductions of NOx emissions.

For example, all electric technologies in heavy duty Class 8 vehicles identified in the MT (APPENDIX D-2 1(d)(4)) are either not fully commercially available or are available in limited quantities for niche applications. Yet the MT provides funding for 75 percent of the cost of a new all electric commercial vehicle but only 25 percent of the cost of a new diesel vehicle.

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[4] California Air Resources Board. Emissions Inventory Data, http://www.arb.ca.gov/ei/emissiondata.htm

These all-electric commercial heavy-duty vehicles by their nature would have less operational capacity and range as a comparable diesel truck. As a result, it is reasonable to conclude that such a vehicle will provide an overall smaller potential reduction in NOx when compared to air quality benefits that could be achieved from replacing an eligible heavy duty truck with new clean diesel technology.

The MT also fails to consider the marketplace and consumer acceptance of the MT-favored technologies and the likelihood of implementation success. Many of the fuels and technologies promoted here for the highest levels of funding allocation are technologies that are not mature enough for commercialization or do not provide a sufficient return on investment for fleets to justify the greater risk and increased cost.

To date, all-electric Class 8 tractors are not commercially available except in very small niche short-haul or last-mile applications where there is adequate electric charging infrastructure to allow for frequent recharging. The majority of new Class 8 tractors perform regional and long haul delivery operations on average of 120,000 miles each year in regions with no access to charging infrastructure. Additional time and resources are needed to continue research, development and rigorous testing of these all-electric technologies for heavy-duty vehicles. Many years will pass before these technologies are commercially available, if they are ever delivered to the market.

In contrast, clean diesel technology is widely available in all markets for all customers, does not require additional infrastructure developments or other special requirements and is proven in its ability to reduce NOx emissions that are generating substantial air quality improvements today.

Remedy: We respectfully urge the parties and the Court to reconsider the allocation scheme proposed here to provide equal funding for all technologies and fuels that reduce NOx emissions with any preferences based on cost effectiveness of NOx reductions in line with the quickest realization of the program's stated purpose. Funding provided through the Environmental Mitigation Trust for the greater adoption of clean diesel technology will provide more certain and immediate NOx reductions and other air quality improvements.

III. By giving funding preference in the MT to Government Fleets instead of Private Fleets, the MT is dramatically limiting NOx emissions reductions opportunities.

The MT as configured provides government fleets with funding allocations up to 100 percent for their eligible vehicles. Government fleets by their very nature, travel far fewer miles than does a comparable vehicle in a private fleet. Therefore, the potential for NOx emissions reductions in a particular region will likely be reduced for a dollar invested in a government fleet vehicle compared to the same dollar invested in a private fleet vehicle. The environment is agnostic on the source of the emissions reduction.

Remedy: The MT should remove preference for government fleet vehicles in favor of more rapidly achieving NOx mitigation for all fleet vehicles (government and private) in a region.

IV. The Diesel Emissions Reduction Act program (DERA) is a proven, effective and ready-made vehicle for facilitating environmental mitigation.

The DERA program is a bipartisan, well documented, proven and credible program for reducing NOx and particulate emissions from diesel engines, particularly in driving clean air benefits across heavy-duty applications. The program has provided funding according to a technology neutral approach. Clean diesel technologies have provided most of the air quality benefits thanks to clean diesel's favorable cost-benefit.

According to the April 2016 3rd report from EPA to Congress, enormous success has been delivered, thanks to the highly quantified and validated DERA program and the review and award process.[5] For example, the program has not precluded or promoted one retrofit or replacement technology over another in reducing NOx emissions by 335,200 tons between 2008 and 2013. In fact, clean diesel technology has driven the overwhelming majority of these clean air benefits provided through the DERA program.

The DERA program serves as an example of the effectiveness of clean diesel to provide immediate air quality benefits to communities around the country. The American Lung Association, in its State of the Air Report for 2016, cites the retirement older diesel vehicles and equipment as a leading factor to improving air quality. Easy access to clean diesel fuel and growing availability of biodiesel and renewable diesel fuel do not necessitate additional investments in fuel infrastructure. Clean diesel engines and advanced diesel emission control technologies that meet the most stringent emissions standards have been proven in the marketplace for almost half-a-decade.

Diesel engines are the prime mover in 15 sectors of the economy, not just smaller or niche applications in developing markets or only in major population centers. Incremental investments to upgrade diesel vehicles with replacement cleaner diesel engines will ensure greater success and ensure NOx mitigation that exceeds the court targets.

Remedy: The DERA program offers greater and proven opportunities for NOx reduction and for the administration of NOx mitigation program.

V. Conclusion

As presently configured, the MT funding scheme appears to favor promotion of alternative fuels and technologies at scales and timeframes that will unlikely deliver equivalent or greater NOx emissions reductions than an approach focused on replacing older diesel engines with new ones. We encourage a revised approach that establishes achieving mitigation of NOx emissions in the fastest possible timeframe as the overarching mandate for the MT.

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[5] U.S. EPA. 3rd Report to Congress: Highlights of the Diesel Emissions Reduction Program (2016). http://nepis.epa.gov/Exe/ZyPDF.cgi?Dockey=P100OHMK.pdf

At a minimum, a technology neutral approach is warranted. Allowing for the equal treatment (allocations and vehicle eligibility) of clean diesel technologies among all others to reduce the excess NOx emissions will deliver anticipated air quality benefits in a timelier manner than will other schemes.

EPA, in reports to Congress (DERA) in rulemaking activities and other venues acknowledges the enormous NOx and particulate matter benefits that have been achieved by the introduction of clean diesel technology across the wide variety of on- and off-road applications. These benefits are provided without additional investments in fueling and other infrastructure and have been demonstrated in the market place to effectively achieve emissions reductions while also meeting customer demands. Yet in the MT, EPA and other parties to the settlement have discounted these advantages in favor of alternative approaches.

In conclusion,

- The MT should be revised to a technology-neutral funding allocation scheme where all technology including clean diesel is fairly considered for levels of funding allocations more commensurate with its NOx reduction potential;
- The MT should fully disclose the NOx reductions targets for each state to allow for a full analysis by all interested parties;
- Given that a separate set-aside of $2 Billion exists for electric vehicle related investments, the $2.7Billion MT should give first priority to other NOx reduction technologies.
- The MT should expand the scope of technology eligibility by including a wider category of off-road equipment, and
- The Diesel Emissions Reduction Act program (DERA) should serve as a guiding example of a technology neutral program credited for providing immediate, measurable and cost effective emission reductions.

The MT in its current form has placed other priorities over proven NOx mitigation strategies, deferring cleaner air in favor of promoting alternatives. We encourage that the MT be modified as noted herein to fully realize the potential for substantial and proven clean air benefits from incorporating clean diesel technology.

Please contact me at (301) 668-7230 with any questions or concerns.

Very truly yours,

Allen R. Schaeffer

Allen R. Schaeffer
Executive Director

CC: The Honorable Gina McCarthy, US EPA
Ms. Janet McCabe, US EPA
Mr. Chris Grundler, US EPA
Ms. Mary Nichols, California Air Resources Board
Dr. Alberto Ayala, California Air Resources Board
Ms. Kamala Harris, Attorney General, State of California