EXHIBIT 5

Department of Justice Response to Comments

United States of America v. Volkswagen AG, et al., Case No. 3:16-cv-00295

Partial Consent Decree for 2.0 Liter Vehicles
Response to Public Comments Received by the United States

In connection with the public comment period held pursuant to 28 C.F.R. § 50.7, the United States received 1,195 comments on the proposed 2.0 liter Consent Decree. Those comments are attached to the United States' motion in full, at Exhibits 4a through 4h. The United States has consolidated and organized the comments into 33 summaries presented below. For each summary, a general description of the types of comments received is presented, followed by a narrative response that explains how the United States considered the comments and what change, if any, was made to the proposed Consent Decree as a result.

Outline of Comment Summary:

I. Appendices A and B – Buyback and Emissions Modification Programs

1. **Insufficient Compensation.** Roughly 450 commenters (most of whom are current vehicle owners) wrote to say that the settlement provides insufficient compensation for consumers who elect the buyback option. Commenters offered a number of arguments, including: a) the buyback should be based on a retail value or private sale value of the vehicle, rather than the Sept. 2015 NADA Clean Trade value; b) the buyback should refund the entire purchase price of the vehicle; c) the buyback fails to compensate for such related costs as: the time and hassle of buying a replacement vehicle, transportation costs in buying a new vehicle, sales tax or financing costs for a replacement vehicle, after-market add-ons like snow tires or a roof rack, or unused extended warranties or maintenance plans.

Response: The purpose of the Amended Partial Consent Decree (hereinafter "Consent Decree" or "Decree") is to obtain appropriate environmental injunctive relief under the authorities of the Clean Air Act (CAA) and the California Health and Safety Code (CHSC). This is consistent with Congress's purpose in enacting the CAA, which, in

part, was to "protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare." The CAA and implementing regulations aim to protect human health and the environment by reducing emission of nitrogen oxides (NOx) and other pollutants from mobile sources of air pollution. The buyback program mandated in Appendix A of the Decree is part of a vehicle recall program pursuant to EPA's and CARB's respective authorities under the CAA and the CHSC that is designed to remove from the roads and highways of the United States vehicles that emit NOx in excess of applicable standards. The Decree requires the Settling Defendants to offer to buy back 100% of the 2.0 Liter Subject Vehicles as part of the recall program. The Settling Defendants may also modify the emission systems of the vehicles to reduce NOx emissions if such a modification is approved by EPA and CARB. If the Settling Defendants fail to remove from the road or modify the emission systems for at least 85% of the 2.0 Liter Subject Vehicles by implementing the environmental recall, the Settling Defendants are required to pay significant additional money into the Mitigation Trust which will be used to reduce excess NOx emissions. The primary goal of the compensation required under the buyback program is to incentivize participation in the recall to remove polluting vehicles from the road, not to redress specific consumer injuries.

It is important to the success and integrity of the EPA and CARB buyback program that vehicle owners be offered a fair and reasonable price for their vehicle to achieve the environmental goals of the Decree. The Consent Decree defines this price as the "Retail Replacement Value" – the cost of retail purchase of a comparable replacement vehicle of a similar value, condition, and mileage as of September 17, 2015. Buyback compensation that satisfies the Retail Replacement Value standard is inherently fair because it exactly compensates an owner for the asset that is the subject of the environmental harm – i.e., the vehicle that is being bought back based on the price of the vehicle before news of the noncompliance issue was public. As this Court noted in granting preliminary approval to the Class Action Settlement, "the full purchase price of Eligible Vehicles is unlikely to represent the maximum recovery," and a reasonable settlement can "take[] into account [depreciation caused by] Class Members' use of their Eligible Vehicles." (Am. Order Granting Prelim. Approval of Settlement, Dkt. No. 1698, July 29, 2016 at 27). The buyback compensation afforded eligible owners under the Decree (Retail Replacement Value) appropriately takes into consideration concepts of depreciation and is reasonable and sufficient to achieve the environmental goals of the Decree.

The proposed Consent Decree does not specify a precise Retail Replacement Value for each vehicle. The Decree does acknowledge that the consumer payments required by the related FTC and PSC Settlements ("Related Settlements") are equal to or in excess of Retail Replacement Value, and therefore the Settling Defendants may fulfill their obligation under the Decree to offer a fair and reasonable buyback of the vehicles by fulfilling their obligations under the Related Settlements. The Related Settlements

also provide consumer compensation beyond the fair value of the vehicle by compensating owners and lessees for additional consumer economic losses- such as added costs associated with shopping for a new vehicle, taxes and title fees, add-on expenses for warranties or after-market vehicle modifications and accessories, or payments that compensate for fraud and deception. These types of consumer injuries are the subject of the FTC complaint and the class action proceeding and are appropriately addressed in the Related Settlements and included in those agreements' calculation of consumer damages. *See* Chairwoman Edith Ramirez, Fed. Trade Comm'n, *Volkswagen to Spend up to $14.7 Billion to Settle Allegations of Cheating Emissions Tests and Deceiving Customers on 2.0 Liter Diesel Vehicles* (June 28, 2016), https://www.ftc.gov/news-events/press-releases/2016/06/volkswagen-spend-147-billion-settle-allegations-cheating (noting that the consumer payments required by the Related Settlements represent "full and fair compensation, not only for the lost or diminished value of the vehicles, but also for the other harms" inflicted on affected consumers"); Pls.' Mem. In Supp. Of Final Approval of 2.0 Liter TDI Settlement, Decl. of Edward M. Stockton, Dkt. No. 1784-1, Aug. 26, 2016 at 15 (noting that the consumer payments required by the Related Settlements are "equal to a minimum of 112.6% of the subject vehicles' retail values as of September 2015"). Because the above comments relate to specific elements of consumer compensation and economic loss, and do not relate to any specific components of the Clean Air Act Consent Decree, they are outside the scope of this Decree.

2. **Inequitable Distribution of Consumer Payments.** Many commenters who are vehicle owners argued that the buyback figures skewed in favor of newer car models at the expense of older ones – owners of older vehicles should be compensated more because they endured the fraud the longest and caused the greatest environmental harm. Others wrote to say that the buyback skewed in favor of older cars at the expense of newer ones – owners of newer vehicles should be compensated more because they paid the most for their cars and got the least value out of owning the vehicle before the news became public. Relatedly, some comments argued that the greater alternative compensation for consumers who had outstanding vehicle loans detracted from funds that would otherwise benefit consumers who did not have outstanding loans. Other comments argued that mitigation and ZEV investment components of the settlement were too large, and that those dollars should rightfully go to consumers instead.

   Response: As discussed in the Response to Comment 1 above, the purpose of the buyback recall program is to remove polluting cars from the road and not to provide additional consumer compensation beyond the value of the vehicle. Issues related to the distribution of consumer payments are outside the scope of the proposed Consent Decree and are addressed in the FTC and PSC Related Settlements. The Related Settlements allocate a $10.033 billion funding pool across the class of all eligible vehicle owners and lessees to fund the buyback and lease termination programs. The FTC (the agency with a statutory mandate to serve the cause of consumer protection)

has represented that this fund is sufficient to fully compensate all injured car owners. *See Federal Trade Comm'n Statement in Supp. of [PSC] Settlement,* Dkt. No. 1781, p.1. The PSC has stated likewise that the Class Action Settlement provides enough money for class members to replace their vehicles (at pre-emissions scandal retail value) and to receive additional real economic benefits. *Plaintiffs' Notice of Motion, Motion, and Memorandum in Support of Final Approval of The 2.0-Liter TDI Consumer and Reseller Dealer Class Action Settlement* ("Pls' Final Approval Memo"), Dkt 1784, pp. 16-17; *see also Exhibit A to Plaintiffs' Motion, Declaration of Edward M. Stockton* ("Stockton Dec."), Dkt. 1784-1, ¶ 28, 39. Provided the Settling Defendants offer Retail Replacement Value to implement the buyback program, they will have satisfied the mandate under the CAA Consent Decree.

The mitigation and ZEV investment components of the Consent Decree are separate and apart from the environmental recall program and also do not compensate for consumer injury.

3. **Buyback and Trade-In Flexibility.** Commenters argued that the buyback option should allow for owners to trade in their TDI diesel Volkswagen for a comparable gasoline Volkswagen or Audi model. Others argued that the buyback should allow discounts or other consideration for consumers who elect to trade in their vehicle for a Volkswagen or Audi.

Response: As discussed in the Response to Comment 1 above, the purpose of the buyback recall program is to remove polluting cars from the road under the authority of the CAA and California's CSHC in order to address the environmental impacts of the Settling Defendants' actions. The Consent Decree expressly does not prohibit Settling Defendants from offering other incentives or trade-in options to further incentivize participation in the buyback and approved emission modification programs. The buyback program required by the Consent Decree provides sufficient compensation to consumers to enable the purchase of a comparable vehicle at retail cost. Pls' Final Approval Memo, Dkt. 1784, pp. 16-17; Stockton Dec., Dkt. 1784-1, ¶¶ 28, 39.

4. **Lease Termination.** Vehicle lessees submitted a number of comments related to the lease termination provision of the settlement. These commenters argued that the settlement unfairly failed to address such issues as prepaid leases, third-party leases, or fleet leases. Some lessees always intended to purchase their vehicles at the end of their leases, and thus did not abide by mileage limitations. Now that these consumers are terminating a lease, these commenters argued the mileage penalty will be deducted from their compensation. Additionally, some commenters argued that the consumer damages compensation for lessees should be the same as that for vehicle owners.

Response: As with the buyback program, the lease termination program component of the proposed Consent Decree is part of an environmentally-focused vehicle recall

intended to remove polluting cars from the road. In the case of a leased vehicle, Settling Defendants will be required to modify the vehicle (assuming a modification is approved) before the vehicle may be sold after lease termination. The proposed Decree ensures that lessees may return their vehicle to Settling Defendants without early termination penalties. Other claims for consumer damages associated with leased vehicles, such as claims relating to prepaid leases and lease mileage penalties, are outside the scope of the Consent Decree and are appropriately addressed in the Related Settlements.

5. **Mileage Adjustment.** Many commenters said that the mileage adjustment for the buyback compensation is unfair. According to these commenters, Volkswagen marketed these vehicles based on their mileage and targeted high-mileage drivers. Therefore, a "standard" mileage adjustment of 12,500 miles a year is unreasonable for these vehicles. The mileage adjustment "punishes" drivers who thought they were getting the best environmental value out of their vehicle – those who were driving their car the most in the belief that it was a "green" vehicle. Where a vehicle owner can show his or her *actual* mileage as of September 2015, the owner should be able to use that figure instead of using the 12,500 miles per year adjustment.

Response: As noted by the Court and discussed in the answer to Comment 1 above, a reasonable settlement can take into account depreciation caused by the use of the vehicle. *See* Response to Comment #1.The proposed Consent Decree does not specify a precise buyback value for each vehicle or enumerate a specific mileage adjustment. However, the Decree does require Settling Defendants to offer Retail Replacement Value, which is the cost of retail purchase of a comparable replacement vehicle of a similar value, condition, and mileage as of September 17, 2015. Furthermore, while the precise terms of the mileage adjustment are consumer provisions addressed in the Related Settlements and are outside the scope of the Consent Decree, EPA and CARB believe that the Related Settlements make reasonable assumptions for depreciation due to vehicle mileage. *See* Stockton Dec., Dkt. No. 1784-1 at 16.

6. **Vehicle Performance Uncertain.** Some consumers commented that the Emissions Modification option is difficult to assess because the timeline for when a modification might become available is not clear and effects on vehicle performance are unknown. Commenters argued that vehicle owners should not be forced to drive their vehicles while waiting for a modification to become available, and Volkswagen should provide loaner cars during the interim. One comment argued that consumers should be given a trial period after receiving the Emissions Modification, in which the consumer can return the car and receive a buyback within 30 days if the consumer is not happy with the modification.

Response: The details and characteristics of an emission modification cannot be known until such modification is proposed by Settling Defendants to EPA and CARB.

Once the modification is proposed, Settling Defendants must make detailed disclosures and submit detailed test data that describe all of the expected impacts the proposed modification is likely to have on vehicle performance and emission control system durability. Decree App. B at ¶ 4.3.8. These disclosures must be approved by EPA and CARB, and will be made to all affected owners and lessees before the time period in which they must elect to receive the approved modification. Importantly, the buyback program will still remain open during the entire time that Settling Defendants are submitting applications for and potentially receiving approval for the emissions modification. If at any time before the end of the buyback program a vehicle owner or lessee receives the complete modification disclosures and decides against the modification option, he or she will still have the option of choosing the buyback or lease termination. Provision for a loaner car for use while a vehicle owner is waiting for an emissions modification to be approved is an additional form of consumer damages that is outside the scope of the Consent Decree. Finally, the settlement includes a "lemon law" warranty remedy provision that provides further protections to owners who elect an emissions modification. Decree App. A at ¶ 5.3.2.

Settling Defendants will provide consumers a detailed emissions modification disclosure before the time consumers make their election between a buyback or emissions modification, so they will have an opportunity to evaluate which option they prefer before making their choice. A second buyback option that would be available to consumers after they elect an emissions modification is essentially a consumer remedy that is beyond the scope of this Consent Decree.

7. **Insufficient Warranty.** Some commenters argued the warranty accompanying the Emissions Modification is insufficient and should include a lifetime warranty on affected systems.

Response: Settling Defendants must provide an extended warranty for any vehicle that receives an approved emissions modification. Aspects of the warranty go beyond warranties that manufacturers must provide as part of ordinary vehicle sales transactions, including not only the cost of parts and labor but also a longer warranty duration and even a loaner vehicle for service lasting longer than 3 hours, with the goal of ensuring consumers are protected from any reasonably foreseeable impacts of the emissions modification. The technical experts at EPA/CARB have carefully considered the scope of the warranty and believe that it is fair, reasonable, and consistent with the goals of the CAA.

Under Section 207(i)(1) of the CAA, all manufacturers of new light duty trucks and vehicles must provide warranty coverage for parts related to controlling emissions, such as the EGR system, for the first two years or 24,000 miles of use, whichever occurs first. 42 U.S.C. § 7541(i)(1). Additionally, under Section 207(i)(2) of the CAA, manufacturers must provide a warranty for specified major emission control

components for a period of eight years or 80,000 miles, whichever occurs first. 42 U.S.C. § 7541(i)(2); *see also Emissions Warranties for 1995 and Newer Light-duty Cars and Trucks under 8,500 Pounds Gross Vehicle Weight Rating*, Office of Transportation and Air Quality, EPA-420-F-15-035, October 2015, https://www3.epa.gov/otaq/ld-hwy.htm#consumer. The specified major emission control components are the catalytic converter, the emissions control unit (or engine control module), and the onboard emissions diagnostic system. *Id.*

The extended emissions warranty for modified vehicles Settling Defendants must provide under the Decree covers the specified major emissions control components under CAA Section 207(i)(2), any part replaced as part of an emissions modification, parts EPA/CARB identified based on the reasonable anticipation of impact from the emissions modification (including the entire exhaust after treatment system, the entire fuel system, the entire EGR system, and the turbocharger), and additional parts (including the assembled block, crankshaft, cylinder head, camshaft, and valve train).

Additionally, although Section 207(i) of the CAA requires only a two year/24,000 miles warranty for most of these parts (with the exception of the eight year/80,000 warranty for the specified major emission control components) the extended emissions warranty required under the Decree covers all of the parts listed above for the longer period of the following two alternatives: (1) ten years or 120,000 miles (150,000 miles for model year 2015 vehicles) from the time of original purchase, whichever occurs first, or (2) four years or 48,000 miles from the time of the modification, whichever occurs first. This means, for example, that Settling Defendants must provide an extended warranty for an additional four year/48,000 period from the date of modification even if the vehicle is modified when it is beyond ten years or 120,000 miles (150,000 miles for model year 2015 vehicles). Importantly, the extended emissions warranty is associated with the car and does not supersede or void any outstanding warranty, or modify, limit or affect any state, local, or federal rights available to owners. Finally, customers with concerns about the adequacy of the extended emissions warranty may select the buyback option rather than the emissions modification.

8. **Eligibility for Consumer Program.** The United States received a number of comments regarding which consumers are eligible to receive the buyback or consumer restitution payments under the Class Settlement. Commenters raised questions or arguments relating to the cut-off date for wrecked or totaled vehicles; the distribution of payments between Eligible Sellers and Eligible Owners; cut-off dates for vehicle purchases, leases, or lease termination; and re-assembled, flooded, or stolen vehicles.

Response: The overarching goal of the Consent Decree is to obtain appropriate environmental injunctive relief under the authorities of the CAA and the CHSC. The buyback, lease termination and emissions modification program mandated under the

Decree are all part of a comprehensive vehicle recall program that aims to remove vehicles that emit NOx in excess of applicable standards from the roads and highways of the United States. The Consent Decree and the Related Settlements use the same definitions of Eligible Vehicle, Eligible Owner, and Eligible Lessee. EPA and CARB believe that this will increase the likelihood that the buyback and lease termination program will be successful in removing from the road or repairing as many affected vehicles as possible. However, issues related to consumer restitution payments for economic injuries, wrecked, totaled, or stolen cars, or payments to former owners or lessees, are consumer issues outside the scope of the Consent Decree and are appropriately addressed in the Related Settlements. Furthermore, comments that relate to eligibility for payment under the Related Settlements are also outside the scope of the Consent Decree.

9. **Volkswagen Not Punished.** Some commenters stated that the settlement does not punish Volkswagen – buyback payments that are given to VW Credit to pay off outstanding loans are simply a form of Volkswagen paying itself and don't count as a financial deterrent. Others argued that the consumer and environmental aspects of the settlement together are still insufficient to properly punish Volkswagen for its fraudulent conduct.

Response: The proposed Consent Decree addresses the 2.0 Liter Subject Vehicles on the road and the associated environmental consequences resulting from Settling Defendants' conduct and the past and future excess emissions from those vehicles. The proposed Consent Decree does not address (and reserves all rights concerning) civil penalties, prospective injunctive relief to prevent future violations, or any criminal liability. *See* Partial Consent Decree at ¶ 75; Mem. in Supp. of Motion to Enter Partial Consent Decree at Sec. VI.C.

II. Appendix C – ZEV Investment Commitment

10. **Range of Technologies and Types of Investments Considered.** Commenters submitted a number of comments that suggested the ZEV investment commitments should target certain alternative zero emission technologies. Commenters emphasized such projects as zero emission school buses, charging stations, heavy duty vehicles and transit, heavy duty charging infrastructure, and non-road equipment such as forklifts, cranes, and locomotives. Certain commenters also recommended that the ZEV investments include such items as solar, wind, hydroelectric, and biodiesel technologies. Other commenters requested that the investment plan include funds for research and development of emerging technologies and point-of-sale incentives for consumer purchases of electric vehicles.

Response: The ZEV Investment component of the proposed Consent Decree requires Settling Defendants to make business investments that will address the harm caused by Settling Defendants' marketing of the 2.0 liter TDI vehicles as "clean diesel" vehicles.

The Decree requires Settling Defendants to invest in ZEV programs, technologies, and infrastructure as a means of offsetting that harm. The Decree provides that Settling Defendants will only receive credit under the Consent Decree for investment expenditures that satisfy the terms of Appendix C. The required ZEV investments are intended to support the burgeoning market in ZEV vehicles by making the necessary technology and infrastructure more available. The Decree explicitly provides that the investments must be neutral among manufacturers and not favor Volkswagen or Audi vehicles over other vehicles. In addition, Settling Defendants' investment plans are spaced over a ten-year period, so that investment plans have the flexibility to be responsive to new research and information about what investments are most effective, as well as market information about consumer preferences, market competition and innovation.

Settling Defendants may receive credit for a range of possible ZEV investments, albeit not all those mentioned by commenters. Appendix C allows Settling Defendants to claim as Creditable Costs (in satisfaction of the obligation imposed under Appendix C) certain specific investments, including investments in ZEV infrastructure, as defined in Section 1.10.1, but nothing in Appendix C precludes Settling Defendants from investing in other activities related to zero-emission technologies. Sections 2.1 and 3.3 of Appendix C provide further details about the types of investments Settling Defendants may claim as eligible for Creditable Costs under the plans subject to approval by EPA ("National ZEV Investment Plan") and CARB ("California ZEV Investment Plan"), respectively. Appendix C appropriately emphasizes light duty ZEV technologies, recognizing that Settling Defendants' actions with respect to light duty vehicles are the focus of EPA's and CARB's enforcement action.

Under either the National ZEV Investment Plan or the California ZEV Investment Plan, investments in charging infrastructure, including light duty charging stations, are listed as potentially creditable investments (Sections 2.5.4 and 3.3.2.5). Under Section 1.9.3, the definition of ZEVs includes "on-road heavy-duty vehicles," and Section 1.10.1 includes investments in "new heavy-duty ZEV fueling infrastructure" as potentially creditable investments under the California ZEV Investment Plan. Additionally, certain ZEV and infrastructure projects – including some heavy-duty vehicles and non-road equipment – are eligible for partial funding under the Environmental Mitigation Trust detailed in Appendix D.

Appendix C allows Settling Defendants flexibility in selecting the types of creditable investments that can be made in the next ten years. Therefore, technologies such as solar, wind, and hydroelectric technologies could be a part of one of the National Investment Plans or California ZEV Investment Plans if they meet the definition of "ZEV Investment" in Section 1.10 and if Settling Defendants were to choose those technologies as investment undertakings. Biodiesel and other diesel-related

technologies are not "zero-emission" and therefore do not fall within the scope of Appendix C.

Point-of-sale incentives or other ZEV rebate programs are not included as creditable investments because Appendix C is intended to credit investments that support the use of ZEVs from all manufacturers, not strictly ZEVs manufactured or sold by Settling Defendants.

Appendix C Section 2.5.7 requires that Settling Defendants take into account literature and research to support their findings in the submitted plan. However, investment in research and development is not anticipated to be allowed as a creditable cost because it is unlikely to be incurred for the sole purpose of implementing approved ZEV investment projects or activities. App. C-1 at ¶ 1.3.

11. **Emphasis on Environmental Justice.** A number of comments advocated for an emphasis in ZEV investment for communities with Environmental Justice concerns, economically disadvantaged communities, and communities that have been historically underserved by investments in new and emerging green technologies.

Response: The Consent Decree includes consideration of ZEV investment in these communities. Section 2.5.5 of Appendix C provides that the National ZEV Investment Plan shall describe planned "measures to increase access in underserved areas." Section 3.3.2.1 requires the Draft California ZEV Investment Plan to include a "description of measures to increase access in underserved areas," which may include areas of Environmental Justice concern. Section 2.3 requires Settling Defendants to solicit input from, among other entities, municipalities, federally-recognized Indian tribes, and relevant federal agencies, many of which may offer input on ways to address ZEV investment toward underserved communities.

The ZEV investment requirements of Appendix C do not mandate the placement of any ZEV investments in any specific area. Appendix C is intended to allow for an adaptive approach to ZEV investment strategies that is capable of responding to evolving research and customer demand. Appendix C requires that ZEV infrastructure support and advance the use of ZEVs in the United States by addressing an existing need or supporting a reasonably anticipated need. Consequently, Appendix C requires Settling Defendants: (1) in the plan submission stages, to provide an explanation that the planned ZEV Investment will have a high likelihood of utilization, satisfy an existing or reasonably anticipated need, and be regularly used (Section 2.5.7); and (2) in the process of seeking approval for claims for Creditable Costs, to provide the utilization rates of new ZEV infrastructure (Section 2.9.2). Settling Defendants have the flexibility to identify locations and targets of ZEV investments that would satisfy these requirements.

Separate and apart from the ZEV Investment Commitment, under the Environmental Mitigation Trust in Appendix D, Beneficiary states and tribes may choose to fund additional ZEV infrastructure projects in any area, including in economically disadvantaged communities, using funds from the Environmental Mitigation Trust.

12. **Geographic Distribution of Investments.** Commenters offered various perspectives on where the ZEV investments should occur geographically. Some advocated for an emphasis on Section 177 states and states that had adopted the California ZEV mandate. Others said that the ZEV investments should specifically *not* target those states that have already made the ZEV mandate commitment. Some commenters argued that the ZEV investments should be focused on geographic areas that do not currently meet ambient air quality standards under the Clean Air Act. Some comments indicated that the 40% share of ZEV investments in California (i.e., $800 million of the $2 billion total commitment) is excessive. Certain comments argued for specific dollar figure allotments for all states (not just California), or argued that the investments should be focused in large population centers.

Response: The United States incorporates its response to Comment 11 above and adds the following. The National ZEV Investment Plan is intended to promote use and availability of ZEVs throughout the country, and is not limited to the "Section 177 States" or some smaller subgroup of states in the United States. California will receive 40% of the total ZEV Investment and will manage its own plan. This structure and allocation is consistent with (a) CARB's unique role in mobile source regulation under the Clean Air Act; (b) California's status as a party to the Consent Decree; and (c) the fact that the Consent Decree partially resolves not only federal environmental claims under the Clean Air Act, but also California's claims under its state environmental and unfair competition laws. Allocating each state outside of California a set amount on the basis of a formula is inconsistent with the concept of encouraging Settling Defendants to make investments that will achieve the goals of Appendix C. The ZEV investments envisioned under Appendix C include the installation and operation of ZEV infrastructure, education and public outreach, and increasing access to ZEVs. Because both the National and California ZEV Investment Plans require ZEV Investments to address an existing need or support a reasonably anticipated need, it is likely that Settling Defendants' initial investment cycles will focus on large population centers or infrastructure that connects such population centers (i.e., corridor charging). Requiring placement in such areas, however, would prevent Settling Defendants from addressing reasonably anticipated needs as the market for ZEVs increases over the next ten years and would run counter to the structure of Appendix C as a whole, which allows Settling Defendants to develop ZEV investments that are responsive to the latest research and evolving markets and innovation.

13. **Fair Market Principles.** A number of industry and non-profit commenters stressed that the ZEV investment commitment should be administered in such a way as to protect

competition in emerging technology markets, preserve customer choice and incentives for innovation, and not allow Settling Defendants to enter or influence the markets for ZEV charging. Commenters cited to the recently finalized Guiding Principles to Promote Electric Vehicles and Charging Infrastructure announced by the White House in July of this year, and emphasized that the ZEV Investment Commitments should be consistent with these Guiding Principles.

Response: Appendix C is consistent with the Guiding Principles to Promote Electric Vehicles and Charging Infrastructure announced by the White House on July 21, 2016, including supporting competition and encouraging innovation, because the National and California ZEV Investment Plans will: (1) make it easier for consumers to charge their electric vehicles; (2) promote electric vehicle adoption by increasing access to charging infrastructure; (3) promote a robust market for vehicle manufacturers; and (4) leverage private investment in electric vehicle deployment. Pursuant to Appendix C, any DC charging facilities installed by Settling Defendants are required to be accessible to all vehicles utilizing non-proprietary connectors (Sections 1.10.1, 2.5.4). Although the ZEV Investment under Appendix C is expected to be a meaningful addition to the current ZEV landscape, other entities are likely to increasingly engage in ZEV investments in the coming years, allowing for continuing competition in these emerging markets.

14. **Transparency and Accountability.** Some commenters argued that the ZEV investment commitment must be independently administered by regulators or a third party not affiliated with Settling Defendants. Others wrote to say that the ZEV investments need mechanisms to ensure transparency, accountability, and opportunity for public review and comment before investment plans are finalized. Commenters advocated for a public and competitive process to identify viable investment opportunities, and argued that states, municipalities, non-profit organizations, and clean air advocacy groups should have a special role in participating and cooperating with the development and implementation of ZEV investment plans.

Response: Appendix C allows Settling Defendants to undertake investments in ZEV technology that are responsive to evolving research and market conditions. Although the ZEV Investment Commitment must be consistent with the requirements of the Consent Decree and must be approved by EPA or CARB as meeting those requirements, it is not a government program, and comments suggesting that ZEV investments be administered by regulators or third parties are proposing a structure that is fundamentally different than the framework set forth in Appendix C. The ZEV Investment Commitment is an investment plan to be undertaken by Settling Defendants. However, the Consent Decree contains a number of features designed to allow stakeholder input into the plan and to support innovation, as well as ensure appropriate transparency and accountability. Before the approval of any investment plan, Settling Defendants are required to conduct public outreach that will specifically

solicit input from municipalities, states, federally-recognized Indian tribes, and other federal agencies, providing each entity an opportunity to inform the company of viable investment opportunities (Section 2.3). Both the National ZEV Investment Plan and the California ZEV Investment Plan proposed by Settling Defendants are subject to approvals, prior to their implementation, by the agencies (Sections 2.4, 2.5, 3.3). Appendix C governs EPA and CARB's approval of investment costs as Creditable Costs (Sections 2.8 and 3.5). Only those investment costs incurred by Settling Defendants that meet the definition of "Creditable Costs" and the detailed requirements of Appendix C-1 (Creditable Cost Guidance and Attestation Requirements) can satisfy the requirement to spend $2 billion over the next ten years. The Creditable Cost Guidances ensure that only costs that are "reasonable, necessary, directly connected and directly allocable" for ZEV investments are actually credited, and specifically excludes many types of costs (Sections 2.1 through 2.10 of Appendix C-1). To ensure compliance with Appendices C and C-1, Settling Defendants are required to retain a Third Party Reviewer that will attest to such costs. Section 2.7 of Appendix C sets forth detailed requirements regarding the selection of the Third Party Reviewer, which requires the United States' approval. Finally, all Annual ZEV Investments Reports, which will describe all completed activities/projects and all incurred costs, will be made publicly available on a web site (Section 2.9).

15. **Miscellaneous Receipts Act, Legislative Intent.** Two commenters state that the ZEV investment commitments are improper because they do not share a relationship or nexus to the underlying violation, and do not represent an appropriate remedy that can be ordered by the Court via settlement. These commenters also argue that the ZEV investment plans are a form of impermissible lawmaking that violates separation of powers, and the plans violate the Miscellaneous Receipts Act (MRA).

Response: As an initial matter, the United States disagrees with the commenters' fundamental premise that the ZEV investment commitment does not bear a relationship to the violations. As Settling Defendants acknowledged in the Consent Decree, Appendix C is intended to address the adverse impacts from the violations by requiring Settling Defendants to direct $2 billion of investments over ten years into actions that will support increased use of zero emission vehicle technology in the United States. Consent Decree, p.4, para 6 and Appendix C, p 1. Settling Defendants sold approximately 500,000 vehicles in the United States that they aggressively marketed as "green," "lower emitting," and "clean diesel" vehicles. By marketing these cars as environmentally friendly clean diesels, Settling Defendants undoubtedly affected the emerging market for clean light-duty vehicles, whose introduction into the market would improve air quality. The effect on the clean vehicle market arises from consumers' unwitting purchase of vehicles that they thought were environmentally friendly but were not, thereby depriving the environment of the potential benefit from those consumers purchasing vehicles that were in fact lower emitting or zero emission vehicles. Moreover, by retarding the market for ZEVs, Settling Defendants' conduct

likely stunted investment in additional ZEV infrastructure that would have advanced truly environmentally beneficial light-duty vehicle technology further. This settlement attempts to undo the harm by requiring Settling Defendants, through their investments, to promote development and use of clean vehicle technologies. As a component of the settlement, Appendix C achieves this result without the time and expense of litigation, and is consistent with the overall air quality goals of the Clean Air Act.

Commenters further argue that the district court's authority to order injunctive relief in this case is limited to the authority provided to the court by Clean Air Act Section 204, *i.e.*, to "restrain violations." Thus, they argue that the court only has authority to order "forward looking" injunctive relief, and not to address past violations, like the ZEV investments program included in the Decree. One commenter also argues that because of the strictures in Section 204, the court has no authority to approve a decree where the settlors have agreed to this relief, since it allegedly conflicts with the statute.

Commenters are incorrect in both lines of argument. First, Section 204's explicit grant of authority to the court to "restrain violations" in no way circumscribes the court's general grant of equitable authority, which allows a court to order restitution or other equitable remedies that further the purposes of the statute, even if not explicitly provided for in the statute. "Unless a statute in so many words, or by a necessary and inescapable inference restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946). *See, also, e.g., Mitchell v. Robert De Mario Jewelry, Inc.*, 361 U.S. 288, 290-92 (1960); *United States v. Holtzman*, 762 F.2d 720, 724 (9th Cir. 1985) (interpreting Clean Air Act Section 204 to include full grant of equity jurisdiction). Here, the ZEV investment program addresses the impacts from the violations and furthers the purposes of the Clean Air Act, as discussed above.

In this regard, the United States disagrees with commenters' reliance on *Meghrig v. KFC Western*, 516 U.S. 479, 488 (1996), for their assertion that Clean Air Act Section 204 limits the court to "restraining violations." In that case, the Court narrowly interpreted the remedies that were provided in the *citizen suit provisions* of a statute. Numerous courts have distinguished *Meghrig's* restrictive reading of remedies provisions on this, and other, bases. *See, e.g., United States v. Cinergy Corp.*, 582 F. Supp. 2d 1055, 1059-60 (S.D. Ind. 2008); *United States v. Rx Depot, Inc.*, 438 F.3d 1052, 1055-57 (10th Cir. 2006); *United States v. Land Labs-USA Inc.*, 427 F.3d 219, 230-31 (3rd Cir. 2005).

Second, even if Section 204 provided some limitation on the court's equitable authority to order a remedy, which it does not, this would not restrict what can be included in a consent decree. Courts may enter consent decrees that "spring from and serve to resolve a dispute within [their] subject matter jurisdiction," come within the "general scope of the case," and "further the objectives of the law." *Local No. 93*,

Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 525 (1986). As the Court further explained:

> [I]t is the agreement of the parties, rather than the force of the law upon which the complaint was originally based, that creates the obligations embodied in a consent decree. Consequently, whatever the limitations Congress placed [in the statute] . . . on the power of federal courts to impose [remedial] . . . obligations, these simply do not apply when the obligations are created by a consent decree.

Id. at 522-23; *see also id.* at 525 ("A federal court is not necessarily barred from entering a consent decree merely because the decree provides broader relief than the court could have awarded after a trial."); *see also, e.g.*, *Bragg v. Robertson*, 83 F. Supp. 2d 713, 721 (S.D. W. Va. 2000). Further, almost any affirmative relief obtained in a settlement, beyond a directive to obey the law, will necessarily encompass broader relief than that required by the underlying statute. *Rufo v. Inmates of Suffolk Cty. Jail*, 112 S. Ct. 748, 762-63 (1992).

In short, the ZEV investments come within the "general scope of the case" and further Clean Air Act objectives. As noted above, the ZEV investments will bring about lower emissions in the future, thus supporting Clean Air Act goals and addressing harm caused by Settling Defendants' conduct at issue in the lawsuit. The fact that the ZEV investment program does not "restrain violations" is irrelevant to the court's approval of this settlement.

One commenter's argument that Appendix C violates the MRA rests on its speculation about the impacts of this commitment on any future penalty negotiations. In particular, the commenter hypothesizes that only forthcoming concessions on civil penalties could explain Settling Defendants' agreement to make the ZEV-related investments called for in the Consent Decree, and that because the compromise is unrelated to Settling Defendants' violation, the United States must be diverting a civil penalty due to the Treasury. Commenter's speculation is unfounded; the Parties entered into no such agreement to provide a credit against a civil penalty for this relief. The MRA requires "money for the government" to be deposited into the U.S. Treasury. The MRA applies to funds (such as civil penalties) that have been received or "constructively received" by the government. *Effect of 31 U.S.C. § 484 on the Settlement Authority of the Attorney General (In re Steuart)*, 4B O.L.C. 684, June 13, 1980. No funds have been, are or will be constructively received or diverted from the Treasury here, where the Settling Defendants are being required to expend money to remedy the adverse environmental impacts from their violations. *Cf. Application of 31 U.S.C. § 3302(b) to Settlement of Suit Brought by the United States (In re Olin)*, 7 O.L.C. 36, Feb. 18, 1983 ("An equitable remedy obtained by the Government in litigation, albeit one with financial cost to the defendant, is simply not within the

purview of [the MRA], either by its terms or its purpose."). Settling Defendants' commitment under Appendix C to invest $2 billion in increased ZEV technology in the United States and in California is an equitable remedy, not money received by the government, constructively or otherwise. Moreover, the potential for injunctive commitments to become arguments in any penalty assessment does not make this settlement a violation of the MRA; otherwise the government could never settle injunctive relief claims before penalties.

The commenters also mistakenly refer to EPA's Supplemental Environmental Project (SEP) policy to argue that the relief afforded under Appendix C does not have a relationship or nexus to the Complaint. A SEP is an environmentally beneficial project or activity that is not required by law, and that a defendant agrees to undertake as part of a settlement of an enforcement action that resolves civil penalty liability. *See* U.S. Environmental Protection Agency, *Supplemental Environmental Projects Policy 2015 Update* at 6-7, 21 (Mar. 10, 2015), https://www.epa.gov/enforcement/2015-update-1998-us-epa-supplemental-environmental-projects-policy. Appendix C is not a SEP and is therefore outside the purview of that policy. Notwithstanding that, as noted above, the relief afforded under Appendix C does have a nexus to and is intended to remedy harm from the violations alleged in the Complaint.

Commenters also argue that the proposed settlement violates the MRA because the Decree grants the government substantial post-settlement control over how, when, and where Settling Defendants deploy those funds. The commenters are incorrect that the government retains substantial control over Settling Defendants' ZEV investments. Commenters assume that a consent decree containing detailed requirements is somehow equivalent to post settlement control. But the Consent Decree itself is the operative document, and the Consent Decree makes clear that Settling Defendants are responsible for selecting and implementing ZEV investments, consistent with Appendix C. Furthermore, a commenter argues that the Decree gives the government "substantial input into and veto authority" over the ZEV investments. That is not the case. Although Settling Defendants must submit a proposed ZEV investment plan to EPA for approval, such approval is merely to ensure that the proposed plan complies with the requirements of the Consent Decree.

Lastly, commenters argue that Appendix C violates separation of powers principles and impermissibly augments appropriations by funding unenacted presidential policy preferences. Commenters argue that Congress did not adopt the President's proposals to promote electric vehicle technology, and instead adopted the 2015 Fixing American's Surface Transportation Act, and therefore this Consent Decree cannot be used to further those objectives that Congress rejected. Commenters also argue that the FAST Act differs in material ways from Appendix C, and one commenter argues that in fact the two conflict.

The fact that Congress has enacted legislation in a certain subject area does not preclude a Court from approving appropriate injunctive relief to remedy a violation, just because that relief touches the same subject matter. The ZEV Investment Commitment in this Consent Decree is not a government program, but a remedy to be performed by private parties to address the harm from their conduct. Further, the commenter identifies nothing in the FAST Act that prohibits the relief obtained here, so there is no conflict.

III. Appendix D – Mitigation Trust

A. Allowable Mitigation Projects. The Consent Decree requires VW to establish and fund an Environmental Mitigation Trust to be used by State and tribal Beneficiaries to implement NOx reduction projects, to mitigate the excess tons of NOx emitted by the violating 2.0 Liter Subject Vehicles. The United States received a number of comments asking that the list of eligible mitigation projects be expanded. Appendix D of the proposed Consent Decree allows trust Beneficiaries to use trust funds to implement NOx reduction projects that fall within nine enumerated categories of Eligible Mitigation Actions, as well as to use trust funds for their non-federal match or voluntary match under EPA's Diesel Emission Reduction Act ("DERA") program for projects that are not included in the nine specifically enumerated categories (known as "Option 10"). *See* Consent Decree Appendix D-2. Since the DERA program was established in 2005, EPA has gained considerable experience in implementing NOx mitigation projects and has extensive knowledge about which types of projects are most cost-effective at reducing NOx from diesel emissions. Based on its experience, EPA concluded that the nine enumerated categories include actions that have a proven track record, are cost-effective, are relatively straightforward, and can be approved by the Trustee and implemented by state and tribal Beneficiaries in an efficient and expeditious manner. By limiting the trust to a defined set of proven and cost-effective projects, the Trust allows Beneficiaries flexibility to implement a range of projects within their jurisdiction, while still ensuring that the Trust is effective at accomplishing its goal of fully mitigating the excess NOx attributable to the subject vehicles. In addition, to the extent that a Beneficiary wishes to fund a specific NOx mitigation project that does not fall within one of the enumerated categories, it may still apply, under Option 10, to use trust funds to pay for their non-federal match pursuant to a DERA state or tribal grant. States also remain free to undertake additional NOx reduction projects outside the context of this Consent Decree.

16. <u>Eligible Non-Road Equipment</u>. Many comments stated that the non-road equipment categories should be expanded to include additional shorepower, construction, and agriculture equipment and generators. Commenters stated that projects to replace or re-power ferries and tugs should include river barge towboats, large diesel-powered river cruise boats and other types of commercial vehicles that operate locally. A number of port authorities wrote to advocate for the inclusion of additional port equipment beyond forklifts, including yard tractors, rubber-tired gantry cranes and electric bus bars. Also in the category of eligible non-road equipment, commenters requested that additional

locomotive engines (other than switcher engines) be considered eligible – including commuter rail and line-haul locomotives. Commenters stated that the trust should include projects to allow for electrifying diesel powered commuter rail lines.

Response: The United States has considered these comments and, with the agreement of the other Parties to the Consent Decree, has made the following changes to Consent Decree Appendix D:

- The category of "ferries/tugs" has been clarified to include towboats, which are essentially the same as tugboats. River cruise boats, however, do not typically have the same annual usage and therefore are not included in Eligible Mitigation Action #4.

- The category of "forklifts" has been clarified to include other similar cargo moving equipment, such as yard tractors/hostlers, top pickers, side loaders, reach stackers, straddlers, and rubber-tired gantry cranes. Some of these types of equipment are also found at airports and therefore may also be eligible under Eligible Mitigation Action #7.

- Eligible Mitigation action #5 "ocean going vessels shorepower" inadvertently left out installation costs as eligible under this mitigation action. Eligible Mitigation action #5 now includes the word "installation."

- Eligible Mitigation action #5 "ocean going vessels shorepower" now includes Great Lakes vessels. These vessels are often as large and often emit as much NOx as ocean going vessels and therefore should be included in this Eligible Mitigation Action.

Commenters suggested a wide array of other possible non-road equipment projects that are not included as specific Eligible Mitigation Actions. It is not practical to expand the eligible project list to include all types of non-road projects. Many additional suggested categories of non-road equipment are potentially too complex for the Trustee to approve or evaluate, and inclusion on the Eligible Mitigation Actions list would undermine the objective of the settlement to provide for more traditional projects that can be approved and implemented in a reasonable timeframe. As noted above, other types of projects not enumerated in the trust are eligible for funding through Eligible Mitigation Action #10, pursuant to a DERA State or Tribal grant.

17. **Limitations on Heavy Duty Diesel Replacements.** A significant number of comments argued that the model year eligibility for truck and bus replacements and repowers under Appendix D-2 is too limited. Some argued that trucks from 2007 through 2012 should be eligible for replacement under the trust for all Beneficiaries and not just certain states that already have mandates to replace older vehicles. Others argued that any truck that

doesn't meet the most current, most stringent emission standard should be eligible. Commenters also argued that the truck and bus replacement projects should be "technology neutral" – i.e., the trust shouldn't favor one type of technology over another, and all types of engines (electric, diesel, compressed natural gas, liquefied natural gas, petroleum, hybrid, etc.) should be funded equally or funded according to various metrics proposed by the commenters. Some commenters argued that the trust should predominantly or exclusively fund low-NOx diesel engines, with a special preference for engines meeting the California Optional Low NOx standard. Others argued that the trust should explicitly not fund any diesel projects, and should instead be directed only toward non-diesel technologies such as CNG or biofuels. Finally, commenters wrote to say that the definition of "Eligible Large Trucks" was confusing because it was limited to tractor trucks but included examples such as waste haulers, dump trucks, and concrete mixers which are often referred to as "straight trucks" rather than "tractor trucks."

Response: The United States has considered these comments and, with the agreement of the other Parties to the Consent Decree, has made the following changes to Consent Decree Appendix D:

- The Eligible Projects List has been expanded to allow for projects that fund the replacement or repowering of model year 2007, 2008, and 2009 diesel engines. Current NOx standards were not fully phased in until 2010, and therefore replacement of engines in the model year range of 2007-2009 can still yield significant NOx reductions.

- The definition of "Class 8 Local Freight, and Port Drayage Trucks (Eligible Large Trucks)" has been clarified to include not only "tractor" trucks within this category but all kinds of trucks that otherwise meet the definition.

- For diesel to alternate fuel or all electric projects, Appendix D has been clarified to state that the new vehicle/engine must be the model year in which the project occurs OR one model year prior. This will allow some flexibility in case the most recent model is not available for purchase by Beneficiaries.

Engines eligible for replacement under the terms of the Environmental Mitigation Trust emit a significant amount of NOx and therefore replacement with newer model year engines is an appropriate type of Eligible Mitigation Action.

Replacement of these older diesel engines to cleaner technologies can be valuable and effective projects. Therefore, replacement with engines that operate on fuels like CNG is an option for Beneficiaries, and trust funds may provide a significant portion of the total cost of such replacements. Appendix D allows for a higher cost share for certain technologies specifically because some technologies are more expensive. However, because such options are expensive, and may not always be feasible, Beneficiaries also

have the option to replace older diesel engines with newer diesel powered engines, including low-NOx diesel engines meeting the California Optional Low NOx standard.

18. **EV Charging Infrastructure.** Commenters argued that the 15% cap on allocating funds toward electric vehicle (EV) charging infrastructure projects should be removed. – i.e., Beneficiaries should be allowed to spend a greater share of their allocation on EV charging. Other commenters argued that the EV charging option should be eliminated entirely because it will conflict with the ZEV investment commitments in Appendix C, or because it is not as effective at mitigating NOx as other categories of projects listed in Appendix D-2 that are directed at larger sources, or it is otherwise not a proper use of NOx mitigation funds.

Response: Appendix D strikes the appropriate balance between the concerns raised by these commenters. On the one hand, light duty EV charging infrastructure promotes greater use of zero emission vehicles which, in turn, leads to a general reduction in NOx emissions from mobile sources. By allowing trust funds to be used for EV charging infrastructure in addition to the other categories of projects, Appendix D allows Beneficiaries to choose from a wide range of projects that address both heavy duty and light duty vehicles. On the other hand, as some commenters noted, EV charging infrastructure projects are aimed at reducing emissions from lower-emitting sources. By limiting the amount of funds that can be spent on EV charging infrastructure, Appendix D ensures that sufficient moneys are available to fund projects that address higher-emitting sources such as those targeted in Eligible Mitigation Actions 1-8.

Appendix C also includes significant investment in light duty charging infrastructure, although those investments may not be located in every state, tribe, or territory. Appendix C investments may also not be the same type of investment that interest a state, tribe, or territory. Thus, Beneficiaries may use 15% of an Appendix D allocation to fund charging infrastructure projects.

19. **Truck Stop Electrification.** The single largest comment received on the settlement came from roughly 550 long haul and tractor trailer truck drivers who wrote to say that truck stop electrification ("TSE") should be included as an eligible mitigation project under Appendix D-2. Other commenters on this topic acknowledged that the DERA program funds TSE projects, but the commenters argued that the DERA option is not sufficient because it does not provide enough funding for TSE and the mechanism by which to obtain TSE funding is unduly cumbersome.

Response: Appendix D allows Beneficiaries to receive funding for TSE projects through Eligible Mitigation Action #10, the DERA option. The trust does not include TSE as a specifically enumerated project not because of the lack of potential NOx emission reductions, but instead because TSE projects traditionally involve a number of partners, including the TSE industry, private fleets, local governments and others,

requiring extensive coordination and an analysis of potential costs/benefits. TSE thus does not fit within the core concept of mitigation projects enumerated in the trust – those projects with a proven track record that can be readily evaluated and approved and can be implemented in a relatively short timeframe. As mentioned above, to the extent a Beneficiary has the resources and the interest in undertaking a TSE project, trust funding is available through Eligible Mitigation Action #10. Commenters may also find EPA's FAQ document for Beneficiaries helpful, specifically FAQ 3.4, https://www.epa.gov/enforcement/faqs-beneficiaries-vw-mitigation-trust-agreement.

20. **Alternative Mitigation Programs.** Some of the comments suggested that trust Beneficiaries should be allowed to fund a number of alternative types of mitigation projects that are not listed in Appendix D-2. These alternative projects included such activities as air quality research, asthma clinics, grant programs or revolving loan programs to be administered by the Beneficiaries, energy efficiency and renewable energy projects, education and outreach programs, and additional funding for air modeling to assist states in monitoring SIP compliance.

Response: Appendix D includes a specific, well-defined list of Eligible Mitigation Actions. The purpose of such specificity is to guarantee NOx emission reductions and to allow for a straightforward assessment by a trustee of which actions are eligible for funding. Research and modeling, while indeed important, do not result in a guarantee of NOx emission reductions. Such activities take significant time and may lead to a better assessment of air quality but by themselves do not result in emission reductions. Similarly, education and outreach programs may lead to a better informed public about the NOx benefits of individual actions or purchasing decisions, but do not by themselves result in a guarantee of NOx emission reductions. Lastly, while energy efficiency and renewable energy programs are indeed very positive and highly beneficial to the environment, they are not as directly tailored to mitigating the precise harm caused by the violations in this case as are the NOx mitigation projects enumerated in Appendix D-2.

21. **State Flexibility to Design Projects.** A number of commenters argued for greater Beneficiary flexibility to propose or implement mitigation projects that are not specifically listed under the mitigation trust appendix D-2. These commenters argued that the Trustee should have the authority to allow Beneficiaries to implement additional alternative projects that are not listed in the trust documents if the Beneficiary can show that the alternative project(s) provide similar or superior environmental benefits. These commenters stated that an open-ended or flexible category for new projects would also allow the trust to accommodate new or unforeseen advances in technology.

Response: The purpose of a narrowly defined list of Eligible Mitigation Actions is to guarantee NOx emission reductions and to allow for a straightforward assessment by a trustee on which actions are eligible for funding. An open-ended category as an

Eligible Mitigation Action would not provide this necessary level of specificity and certainty. NOx emission reductions depend on the type of vehicle, model year of the engine, and other factors that take expertise to assess. Open-ended categories would require a trustee to spend trust fund resources to hire such expertise, thereby reducing the overall funds available to Beneficiaries for NOx reducing actions. Project ideas that are not on the Eligible Mitigation Action list, but are eligible through the DERA grant program may be funded through DERA, i.e. Eligible Mitigation Action #10.

B. Trust Administration. Some comments raised questions regarding the administration of the Environmental Mitigation Trust, including how Beneficiaries would account for administrative costs and how certain reporting obligations would be handled under the Trust. Overall administration of the Trust will be the responsibility of the Trustee, who will be selected by the Court in accordance with a process that is set forth in Consent Decree. *See* Decree at ¶ 15.

22. **Allowable Funding Percentages.** Commenters had multiple and conflicting views on how the various funding percentages and matching funds should be set under Appendix D-2. Many states agencies commented that the Beneficiaries should be granted the flexibility to fund up to the specified amounts, rather than have the required funding percentage be fixed. Some argued that the minimum cost share for all projects should be 50%, or that the maximum cost share for any project should be no more than 80%. Commenters argued that various types of technologies (particularly for diesel engines and zero-emission electric engines) should have adjusted cost shares.

Response: The United States has considered these comments and, with the agreement of the other Parties to the Consent Decree, has made the following change to Consent Decree Appendix D:

- Appendix D has been modified to state that Beneficiaries may fund *up to* x% of an Eligible Mitigation Action. That is, Beneficiaries are allowed to fund a project at less than the maximum allowed amount if they choose.

Appendix D is informed by the DERA incremental cost expertise and utilizes the same incremental cost principle as a "cost share" for each Eligible Mitigation Action. As a result, several Eligible Mitigation Actions appropriately have different cost share requirements, and there is no general "minimum" or "maximum" cost share for all Eligible Mitigation Actions. EPA generally interprets "incremental costs" under the DERA program as the difference in cost between, for example, a higher-polluting engine and a lower-polluting engine. This cost difference must reflect the difference in purchase price, operating and maintenance costs, and any potential financial loss incurred by the vehicle owner resulting from retiring an existing vehicle before the end of its useful life and scrapping, instead of selling or trading, the existing vehicle. EPA's DERA program evaluates all of these incremental cost factors and assigns an associated incremental cost with the purchases associated with each type of

diesel emission reduction project. The EPA DERA program then only provides grant funding for this incremental cost, e.g. 25% of a total project cost.

It is appropriate for the mitigation trust to employ adjusted types of cost shares for different technologies. Some Eligible Mitigation Actions have higher cost shares and some have lower cost shares, based on the associated incremental cost of that action. For example, an engine repower receives a greater cost share percentage than a full vehicle replacement, because the funds are only paying for the incremental cost of a new engine and the emissions reduction technology (In other words, funds are not paying for tires, chassis, seats, etc). Similarly, an engine replacement from diesel to all-electric receives a greater cost share percentage than an engine replacement from diesel to diesel because the incremental cost of the all-electric choice is higher.

23. **Limitation on Beneficiary Administrative Costs.** Commenters stated that Beneficiaries' administrative costs should be eligible for funding up to 15% of the project cost (not limited to 10%). Commenters also stated that Beneficiaries should be allowed to draw up to one percent of their allocation for administrative expenses in advance of submitting project proposals, in order to fund project development and solicitation costs. Potential Beneficiaries argued that they should be able to submit reimbursement for costs needed to develop the Beneficiary mitigation plan and costs for overall management and administration of a state's participation in the trust. Commenters stated that the Trustee should be able to disburse funds directly to third-parties without having to go through the Beneficiary. Many commenters were not clear on whether administrative expenses could be borne by third party vendors and how much of the administrative expense could be borne by third party vendors.

Response: The United States has considered these comments and, with the agreement of the other Parties to the Consent Decree, has made the following changes to Consent Decree Appendix D:

- The Eligible Administrative Expenditures section has been modified to include a sentence confirming that administrative expenses may be used by third party vendors as well as the Beneficiary.

- The Eligible Administrative Expenditures section has been modified to include a cap of 15% instead of 10%. This higher administrative expenditure cap reflects the importance of attention to administration, record-keeping and transparency by the Beneficiaries, and should allow for adequate personnel in that regard. Beneficiaries will be required to include in their detailed budget & costs timeline (including costs associated with funding project development and solicitation), details regarding the funds budgeted for administrative costs as a component of the total budget.

- Eligible Administrative Expenditures has been changed to use the word "including" instead of "includes" for clarity purposes. This change clarifies that, for example, "personnel" is an eligible expenditure, "including" costs of employee salaries and wages.

- Eligible Administrative Expenditures has been changed to delete the word "Equipment." Equipment is not an administrative expenditure and therefore does not belong in this list. Equipment is part of the cost of a project. Therefore, for example, where D-2 states that Beneficiaries may draw funds from the Trust in the amount of %x of the "cost" of a repower, this includes equipment costs.

The word "implementing" here includes administrative costs associated with funding project development and solicitation costs. There is no limitation in Appendix D on when the administrative expenditures that are eligible for up to 15% recovery must be made relative to the funding request.

24. **Reporting Obligations for Beneficiaries.** Commenters wrote to say that Beneficiaries' reporting obligations under the trust should be clarified so that the Beneficiaries have adequate notice of what is required under the terms of the trust agreement. Commenters stated the settlement should provide greater detail on the record-keeping and reporting obligations of Beneficiaries so that states are aware of the data requirements prior to applying to become a Beneficiary.

Response: Appendix D mandates certain semiannual reporting that ensures Beneficiaries are properly accounting for the receipt and expenditure of trust funds. Under the requirements of Appendix D Section 5.3, Beneficiaries are required to make semiannual reports to the Trustee "describing the progress implementing each Eligible Mitigation Action during the six-month period leading up to the reporting date (including a summary of all costs expended on the Eligible Mitigation Action through the reporting date)." Section 5.3 requires that each report include "a complete description of the status (including actual or projected termination date), development, implementation, and any modification of each approved Eligible Mitigation Action." Where a Beneficiary is implementing a project using the DERA option, the Beneficiary may submit its DERA Quarterly Programmatic Reports in satisfaction of the Beneficiary's reporting obligations for that particular project. Beneficiaries seeking further guidance on what reporting is required may submit their questions to the Trustee once the Trustee is selected.

25. **Public Reporting of Environmental and Health Benefits.** Some commenters argued that the NOx reduction and health benefits of the projects should be publicly reported, or there should be an accounting or auditing of the effectiveness of the programs that is made publicly available or published to a trustee website.

Response: Appendix D Section 4.1 requires Beneficiaries to submit and make publicly available a "Beneficiary Mitigation Plan" that summarizes how the Beneficiary plans to use the mitigation funds allocated to it under this Trust, addressing: (i) the Beneficiary's overall goal for the use of the funds; (ii) the categories of Eligible Mitigation Actions the Beneficiary anticipates will be appropriate to achieve the stated goals and the preliminary assessment of the percentages of funds anticipated to be used for each type of Eligible Mitigation Action; (iii) a description of how the Beneficiary will consider the potential beneficial impact of the selected Eligible Mitigation Actions on air quality in areas that bear a disproportionate share of the air pollution burden within its jurisdiction; and *(iv) a general description of the expected ranges of emission benefits the Beneficiary estimates would be realized by implementation of the Eligible Mitigation Actions identified in the Beneficiary Mitigation Plan*.

Appendix D Section 5.2 also requires that with each funding request for a specific Eligible Mitigation Action, the Beneficiary must report to the Trustee "*an estimate of the NOx reductions anticipated as a result of the proposed Eligible Mitigation Action*."

C. Participation in the Mitigation Trust. Commenters raised questions that concerned how the Mitigation Trust works vis-à-vis its Beneficiaries, and what types of entities may serve in a Beneficiary role. Under the terms of the Trust, the several states, Washington, D.C., Puerto Rico, and federally-recognized Indian Tribes are all eligible to become trust Beneficiaries. To become a Beneficiary, these jurisdictions must make the required certifications to the Court, including a waiver of injunctive claims for mitigation arising from the 2.0 liter vehicles. App. D at ¶ 4.2. By limiting the universe of possible Beneficiaries to these defined groups, the Mitigation Trust allows the states – which have the primary responsibility of air pollution control under the Clean Air Act – to be the central figures in choosing the appropriate NOx mitigation activities for their respective jurisdictions.

26. **Participation by Non-Beneficiaries.** DOJ received a number of comments from municipalities, state and local air quality non-profit groups, privately owned port authorities, and other entities that argued that the list of Beneficiaries should be expanded beyond states, tribes, the District of Columbia, and Puerto Rico. Some advocated for the inclusion of municipal services agencies such as trash haulers or other groups that operate large fleets. Commenters stated that the state Beneficiaries should be directed to conduct public outreach and receive and respond to public comment before submitting their mitigation plans to the Trustee.

Response: Appendix D establishes a system of allocation to Beneficiaries. The allocation system is designed to be simple and straightforward, allowing state, territorial, and tribal governments to implement Eligible Mitigation Actions. As noted above, Beneficiaries are required to seek and consider public input on the Beneficiary Mitigation Plans, and other entities, including port authorities, air quality non-profit

groups, and municipalities, can use this process to identify and actively engage Beneficiaries on specific Eligible Mitigation Actions of interest.

27. **Tribal Allocation Concerns.** DOJ received three comments from Native American tribes or tribal-affiliated organizations. These comments advocated for a designated tribal trustee who is separate from the at-large trustee, or alternatively that the Trustee should be directed to appoint and support a Tribal Advisory Council to assist the Trustee in evaluating tribal funding requests. Other comments from the tribes requested a broader range of mitigation projects with fewer restrictions for tribes, including renewable energy projects, wind and hydroelectric power, fewer restrictions on administrative and oversight costs, and technical assistance for administrative expenditures.

Response: A separate trustee for the Tribal Allocation Subaccount would greatly increase administrative costs, create the potential for confusion in interpretation of Appendix D of the Consent Decree, and reduce the amount of money available to tribal Beneficiaries for NOx mitigation projects. Thus, to reduce complexity and expense, the Consent Decree does not employ a separate trustee for the Tribal Allocation Subaccount. Nonetheless, the Decree does set aside a portion of the tribal allocation for administrative expenses and authorizes the Trustee to use those funds to hire consultants or tribal experts as necessary to administer the Tribal Allocation Subaccount. EPA encourages the Trustee to exercise this authority and retain appropriate trial expertise to assist in administering the trust. Targeted outreach to tribes will ensure that their interests are effectively and efficiently represented, consistent with the objective to keep administrative costs as low as possible while maximizing the money available to tribal Beneficiaries to implement NOx reduction projects. As part of the consultation that was held regarding the Tribal Allocation Subaccount many of the commenters suggested that the administrative account be used to support a Tribal Advisory Council to advise the Trustee in evaluating tribal funding requests. The decision whether to use the administrative account funds to support a Tribal Advisory Council and comments regarding funding technical assistance for tribes will be addressed separately in a response to the consultation comments.

D. Other Considerations. The United States received other comments on the Mitigation Trust that relate to aspects of the Trust not discussed above. These comments focused on: 1) how the Trust provides funding for government vehicle fleets as opposed to non-government vehicle fleets; 2) how the trust addresses issues of Environmental Justice; and 3) the trust's intersection with the Diesel Emissions Reduction Act (DERA) program.

28. **Preference as to Government and Non-Government Fleets.** Commenters argued that the list of eligible mitigation projects unfairly provides greater funding for the replacement or re-powering of government-owned vehicles over non-government owned vehicles. Several commenters also noted that the definition of what constitutes a

"government" fleet is unclear because the requirement that such entities have jurisdiction over "transportation and air quality" is confusing and possibly inaccurate. For example, a port is listed as a government entity but does not have jurisdiction over transportation and air quality. Commenters also argued that non-government fleets are typically larger and drive more miles, and replacing non-government vehicles therefore provides more cost-effective environmental benefits. Additionally, some commenters noted that privately owned school bus fleets *are* given the same levels of funding as publicly owned school buses, and this arrangement should be extended beyond just school buses (i.e., privately owned trash collectors and waste haulers that contract explicitly with the government should be treated as government-owned vehicles). Some commenters stated that the option to fund government fleets should be expanded to include light duty vehicles.

Response: The United States has considered these comments and, with the agreement of the other Parties to the Consent Decree, has made the following change to Consent Decree Appendix D:

- The definition of "Government" has been clarified to include a specific list of entities regardless of whether those entities have jurisdiction over transportation and air quality.

The mitigation trust strikes an appropriate balance between making funds available for both public and privately owned vehicle fleets. Beneficiaries may use only allotted trust funds to pay for a specific amount of an Eligible Mitigation Action. The rest of an Eligible Mitigation Action's costs must be borne by other, non-trust sources of funds as a "cost share." One primary goal of a cost share is to focus trust fund expenditures on the incremental cost difference between an old engine and a new engine to maximize the cost-effectiveness of actions in terms of NOx emission reduction. For example, allowing trust funds to pay for 100% of an electric transit bus project would allow those funds to be used not only for the engine itself but for an entirely new bus. Thus, allowing Beneficiaries to pay for 100% of an Eligible Mitigation Action would lead to a large amount of trust funds going towards actions that do not contribute to actual NOx emission reductions.

However, Appendix D makes an exception to the limited scope of reimbursement for diesel reduction projects for cost share requirements for *government owned* vehicles. While it is crucial to reduce emissions in both private and public fleets, Appendix D requires no cost share for government vehicles because these vehicles are funded by the public and directly serve the public. In addition, private owners would profit from an Eligible Mitigation Action beyond the environmental public good. Appendix D also makes an exception for private school bus fleets serving public schools. Such vehicles can be funded at the same "no cost-share" level as government school buses because in addition to NOx reductions, these projects reduce air pollution for children, a particularly vulnerable population.

29. **Focus on Environmental Justice.** Commenters wrote to emphasize that mitigation projects should target environmental justice communities of concern, historically disadvantaged communities, and densely populated regions that are designated as not meeting air quality standards.

Response: Under Appendix D Section 4.1, Beneficiaries are required to consider environmental justice concerns in drafting their Beneficiary Mitigation Plans. Specifically, Appendix D Section 4.1 requires Beneficiaries to submit and make publicly available, a Beneficiary Mitigation Plan that summarizes how the Beneficiary plans to use the mitigation funds allocated to it under this Trust and must address: (i) the Beneficiary's overall goal for the use of the funds; (ii) the categories of Eligible Mitigation Actions the Beneficiary anticipates will be appropriate to achieve the stated goals and the preliminary assessment of the percentages of funds anticipated to be used for each type of Eligible Mitigation Action; (iii) *a description of how the Beneficiary will consider the potential beneficial impact of the selected Eligible Mitigation Actions on air quality in areas that bear a disproportionate share of the air pollution burden within its jurisdiction*; and (iv) a general description of the expected ranges of emission benefits the Beneficiary estimates would be realized by implementation of the Eligible Mitigation Actions identified in the Beneficiary Mitigation Plan.

Additionally, the Beneficiary must explain the process by which it shall seek and consider public input on its Beneficiary Mitigation Plan. This public outreach requirement promotes transparency and offers opportunities for community engagement so that communities with environmental justice concerns can identify the geographic areas that warrant particular attention and the mix of allowable projects that will best serve those communities' needs.

30. **Compatibility with DERA Program.** Commenters argued that the "DERA option" included in Appendix D-2 is problematic because DERA receives its funding from Congress, and Beneficiaries cannot rely on DERA receiving appropriated funds every year. Others raised a concern that the certification and reporting requirements under the trust are different from or inconsistent with DERA, or that the trust will compete with DERA, and Beneficiaries should have to certify that they will maintain current funding for all existing air quality programs before receiving funds under the mitigation trust. Some commenters argued that the DERA option should be eliminated, because the trust should only be used to fund projects that would otherwise receive no funding.

Response: The United States has considered these comments and, with the agreement of the other Parties to the Consent Decree, has made the following changes to Consent Decree Appendix D:

- Eligible mitigation action #10 has been clarified to include the statutory citation for the tribal DERA program in addition to the State DERA program. It has also

been clarified to address commenters' confusion as to the distinction between the non-federal match and a required cost share.

Appendix D does not rely on DERA, but instead only lists use of DERA as one possible option for eligible mitigation projects because some Beneficiaries may be interested in using the same existing state resources for DERA programs as for the Appendix D Trust process. The DERA option in Appendix D-2 is intended to allow projects that are not specifically enumerated in the appendix to still receive funding if a Beneficiary chooses to implement them. Commenters are correct that the DERA Eligible Mitigation Action option is only available if Congress continues to appropriate funds for DERA. However, because the DERA option is only one choice in Appendix D-2, the goal of the trust to mitigate excess tons of NOx is still achievable through Eligible Mitigation Actions 1-9.

IV. Other Consent Decree Comments

31. **Compliance with State SIP Requirements.** One commenter wrote to argue that the terms of the approved emissions modification as allowed under Appendix B violates Virginia's State Implementation Plan (VA SIP) as approved by EPA. This commenter wrote to say that the settlement "violate[s] Federal and Virginia Law because [it does] not enforce 9 VAC 5-40-5670(A)(3)." This commenter objects to the settlement in part because the 85% recall requirement under Appendix A "allows 15% of the Dirty Diesels to stay on the road without penalty to Volkswagen." The commenter argues that EPA's statement that the vehicles remain legal to drive was incorrect in Virginia due to 9 VAC 5-40-5670(A)(3).

Response: The Partial Consent Decree does not violate the Clean Air Act (CAA) or the VA SIP. The Clean Air Act prohibits the introduction into commerce of a new motor vehicle which is not covered by a certificate of conformity, and prohibits tampering with new or in-use motor vehicles. 42 U.S.C. § 7522(a). The Act also generally prohibits states from adopting or enforcing "any standard relating to the control of emissions from new motor vehicles or new motor vehicle engines." 42 U.S.C. §7543(a). States retain authority to "otherwise control, regulate, or restrict the use, operation, or movement of registered or licensed motor vehicles," 42 U.S.C. § 7543(d), which includes the adoption of certain prohibitions such as 9 VAC 5-40-5670(A)(3), which prohibits the operation of vehicles whose pollution control systems have been tampered with after the initial sale of the vehicle, and which is a provision of state law that has been incorporated into the VA SIP pursuant to Section 110 of the Clean Air Act, 42 U.S.C. § 7410.

The commenter's assertion that EPA does not seek to enforce the VA SIP is true, but is not the salient point. Here, the United States is addressing the same problem relating to these vehicles that the SIP targets through the most appropriate means, namely an action under Title II of the Clean Air Act. Rather than suing the vehicle

owners under state SIPs, the United States' enforcement under Section 203(a) is national in scope, covers new motor vehicles and in-use vehicles, and proceeds against the Settling Defendants responsible for the nonconforming vehicles' manufacture and wide distribution. The United States is not addressing the nonconforming vehicles through piece-meal enforcement of state SIPs, which would be inefficient, require significant agency resources, and potentially lead to different results in different states. EPA is entitled to discretion in deciding how to best enforce and further the objectives of the CAA, and such discretion includes the decision to not enforce against innocent consumers. *See Heckler v. Chaney*, 470 U.S. 821, 831 (1985) ("[A]n agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing.").

Using its authority under Title II, the United States has secured a robust remedy for these vehicles. The commenter is incorrect to assert that the 85% capture requirement of the vehicles is inadequate. The Partial Consent Decree requires Volkswagen to offer to buy back 100% of the 2.0 Liter Subject Vehicles, and provides for the installation of an approved emissions modification (AEM) if one becomes available for each of the vehicles. The offer of an AEM must remain open indefinitely. The 85% capture requirement merely provides that if the Settling Defendants fail to modify or remove at least 85% of the vehicles from the road, they must pay additional substantial sums to the mitigation trust (in addition to the $2.7 billion the Settling Defendants must initially commit to mitigation, which is designed to remedy the effect of NOx emissions from all 2.0L Subject Vehicles over their entire lives, regardless of installation of any AEM). The 85% capture requirement is aggressive when measured against other recalls for passenger vehicles, *see* "Auto Safety: NHTSA Has Options to Improve the Safety Defect Recall Process," U.S. Government Accountability Office, June 2011 at 26 ("[F]rom 2000 through 2008, the average recall completion rate was 67 percent for passenger cars…."), and when considering that the Settling Defendants have no legal mechanism to force owners to participate in the recall and therefore must rely solely on the monetary incentives. This result not only furthers EPA's goals in implementing the CAA, but it also advances the underlying goals SIPs must meet: to implement, maintain, and enforce national ambient air quality standards. *See* 42 U.S.C. § 7410(a)(1).

It is true that, in light of this VA SIP provision, and the citizen suit provision of the CAA, 42 U.S.C. §7604(a), it is possible that the Commonwealth of Virginia, or a citizen, could bring a claim against innocent owners of any Subject Vehicle that was

tampered with after the initial sale of the vehicle (although if states become Beneficiaries of the mitigation trust established in Appendix D, they cannot refuse to register 2.0 liter Subject Vehicles based solely on the presence of the illegal defeat devices or on the basis that a vehicle obtained an AEM. *See* Partial Consent Decree, Appx. D at 4.2.9.). However, such a suit might well face a number of challenges in light of this comprehensive settlement, and in any event such a speculative proposition does not call into question the appropriateness of EPA's enforcement approach or this settlement's resolution of EPA's Section 203(a) claims.

Accordingly, the United States' enforcement of this matter and the Partial Consent Decree resolving certain claims against the Settling Defendants is fair and reasonable in the substantive relief it secures and from whom the relief is secured. EPA's decision that the Clean Air Act's objectives are best served by pursuing and settling Section 203(a) claims against the Settling Defendants is committed to EPA's discretion.

32. **Resale of Modified Vehicles.** Some commenters argued that, while an approved emissions modification is a reasonable alternative for current vehicle owners who want to keep their vehicle, Settling Defendants should not be allowed to sell, lease, or export modified vehicles that do not meet the emissions standard to which they were certified.

Response: In the case where Settling Defendants have proposed an emissions modification that substantially reduces a vehicle's emissions, and EPA and CARB have approved that modification in accordance with Appendix B, allowing Settling Defendants to sell or re-sell vehicles meeting that standard is an environmentally responsible measure that avoids the adverse environmental consequences of mandating 100% scrapping of all vehicles returned to Settling Defendants through the buyback program. Appendix A requires Settling Defendants to perform an approved emissions modification on any vehicle that Settling Defendants currently possess or re-acquire in the future if they intend to resell the vehicle. EPA estimates that the modification will reduce NOx emissions from the vast majority of these vehicles by 80 to 90 percent compared to their original condition. U.S. EPA, *Volkswagen Clean Air Act Partial Settlement* (2016), https://www.epa.gov/enforcement/volkswagen-clean-air-act-partial-settlement. The scope and structure of the Environmental Mitigation Trust ensures that all excess emissions – including any emissions that might be attributable to vehicles that receive an Approved Emissions Modification in the future – will be fully mitigated through implementation of the trust mitigation projects.

33. **Registration of Vehicles.** Several commenters opposed and/or wanted clarification on states' ability to deny registration to vehicles covered by the Decree and wanted it made clear that non-participating states' claims are not impeded by the Decree. Additionally, clarification was sought regarding which party/parties are responsible for identifying which vehicles have and have not been repaired if/when a fix is identified and approved.

Response: The proposed Consent Decree does not limit or affect the rights of any entities not a party to the Consent Decree. Decree at ¶ 82. As noted in Consent Decree ¶ 81, the United States and California do not, by their consent to entry of the Decree, "warrant or aver in any manner that Settling Defendants' compliance with any aspect of this Consent Decree will result in compliance with provisions of the CAA or with any other provisions of United States, State, or local laws, regulations, or permits." States remain free to exercise their authority consistent with applicable law with regard to registration of the vehicles that are the subject of this settlement. The Consent Decree does require, however, that states choosing to become Beneficiaries of the Environmental Mitigation Trust must abide by the requirements of Paragraph 9 in Appendix D-3 of the Mitigation Trust. That paragraph requires Beneficiary states to certify that they will not deny registration for any vehicle based solely on the presence of a defeat device covered by the resolution of claims in the Consent Decree, nor will a Beneficiary state deny registration to any vehicle based solely on the vehicle receiving an Approved Emissions Modification. These provisions thus acknowledge that once a state has chosen to become a Beneficiary and accepted trust funds for NOx mitigation, implementation of the mitigation projects contemplated in Appendix D-2 will fully mitigate all past and future excess NOx emissions from the noncompliant vehicles. Appendix D-3 also contains other important provisions relating to Beneficiaries' certification with respect to registration of vehicles.

Nothing in the Consent Decree requires states or vehicle registration authorities to identify or maintain a record of which vehicles have received an Approved Emissions Modification. However, Settling Defendants are required to label all vehicles receiving an Approved Emissions Modification in accordance with the requirements of Appendix B.