

**APPENDIX D-3**  
**Certification for Beneficiary Status**  
**Under Environmental Mitigation Trust Agreement**

**APPENDIX D-3**

**CERTIFICATION FOR BENEFICIARY STATUS  
UNDER ENVIRONMENTAL MITIGATION TRUST AGREEMENT**

1. Identity of Lead Agency

Commonwealth of Virginia (“Beneficiary”), by and through the Office of the Governor (or, if not a State, the analogous Chief Executive) of the Appendix D-1 and Appendix D-1A entity on whose behalf the Certification Form is submitted: (i) hereby identifies Department of Environmental Quality (“Lead Agency”) as the Lead Agency for purposes of the Beneficiary’s participation in the Environmental Mitigation Trust (“Trust”) as a Beneficiary; and (ii) hereby certifies that the Lead Agency has the delegated authority to act on behalf of and legally bind the Beneficiary for purposes of the Trust.

**BENEFICIARY’S LEAD AGENCY CONTACT INFORMATION:**

|                 |  |
|-----------------|--|
| <b>Contact:</b> | Michael G. Dowd, Director of Air Division, Department of Environmental Quality |
| <b>Address:</b> | 1111 East Main Street, 14th Floor, Richmond, VA 23219                          |
| <b>Phone:</b>   | (804) 698-4284   |
| <b>Fax:</b>     |  |
| <b>Email:</b>   | Michael.Dowd@deq.virginia.gov  |

2. Submission to Jurisdiction

The Beneficiary expressly consents to the jurisdiction of the U.S. District Court for the Northern District of California for all matters concerning the interpretation or performance of, or any disputes arising under, the Trust and the Environmental Mitigation Trust Agreement (“Trust Agreement”). The Beneficiary’s agreement to federal jurisdiction for this purpose shall not be construed as consent to federal court jurisdiction for any other purpose.

3. Agreement to be Bound by the Trust Agreement and Consent to Trustee Authority

The Beneficiary agrees, without limitation, to be bound by the terms of the Trust Agreement, including the allocations of the Trust Assets set forth in Appendix D-1 and Appendix D-1A to the Trust Agreement, as such allocation may be adjusted in accordance with the Trust Agreement. The Beneficiary further agrees that the Trustee has the authorities set forth in the Trust Agreement, including, but not limited to, the authority: (i) to approve, deny, request modifications, or request further information related to any request for funds pursuant to the Trust Agreement; and (ii) to implement the Trust Agreement in accordance with its terms.

4. Certification of Legal Authority

The Beneficiary certifies that: (i) it has the authority to sign and be bound by this Certification Form; (ii) the Beneficiary’s laws do not prohibit it from being a Trust Beneficiary; (iii) either (a)

the Beneficiary's laws do not prohibit it from receiving or directing payment of funds from the Trust, or (b) if the Beneficiary does not have the authority to receive or direct payment of funds from the Trust, then prior to requesting any funds from the Trust, the Beneficiary shall obtain full legal authority to receive and/or direct payments of such funds within two years of submitting this Certification Form; and (iv) if the Beneficiary does not have the authority to receive or direct payment of funds from the Trust and fails to demonstrate that it has obtained such legal authority within two years of submitting this Certification Form, it shall become an Excluded Entity under the Trust Agreement and its initial allocation shall be redistributed among the Beneficiaries pursuant to subparagraph 5.0.1 of the Trust Agreement.

5. Certification of Legal Compliance and Disposition of Unused Funds

The Beneficiary certifies and agrees that, in connection with all actions related to the Trust and the Trust Agreement, the Beneficiary has followed and will follow all applicable law and will assume full responsibility for its decisions in that regard. The Beneficiary further certifies that all funds received on account of any Eligible Mitigation Action request that are not used for the Eligible Mitigation Action shall be returned to the Trust for credit to the Beneficiary's allocation.

6. Waiver of Claims for Injunctive Relief under Environmental or Common Laws

Upon becoming a Beneficiary, the Beneficiary, on behalf of itself and all of its agencies, departments, offices, and divisions, hereby expressly waives, in favor of the parties (including the Settling Defendants) to the Partial Consent Decree (Dkt. No. 2103-1) and the parties (including the Defendants) to the Second Partial Consent Decree (Dkt. No. 3228-1), all claims for injunctive relief to redress environmental injury caused by the 2.0 Liter Subject Vehicles and the 3.0 Liter Subject Vehicles (jointly, "Subject Vehicles"), whether based on the environmental or common law within its jurisdiction. This waiver is binding on all agencies, departments, offices, and divisions of the Beneficiary asserting, purporting to assert, or capable of asserting such claims. This waiver does not waive, and the Beneficiary expressly reserves, its rights, if any, to seek fines or penalties.

7. Publicly Available Information

The Beneficiary certifies that it will maintain and make publicly available all documentation and records: (i) submitted by it in support of each funding request; and (ii) supporting all expenditures of Trust Funds by the Beneficiary, each until the Termination Date of the Trust pursuant to Paragraph 6.8 of the Trust Agreement, unless the laws of the Beneficiary require a longer record retention period. Together herewith, the Beneficiary attaches an explanation of: (i) the procedures by which the records may be accessed, which shall be designed to support access and limit burden for the general public; (ii) for the Beneficiary Mitigation Plan required under Paragraph 4.1 of the Trust Agreement, the procedures by which public input will be solicited and considered; and (iii) a description of whether and the extent to which the certification in this Paragraph 7 is subject to the Beneficiary's applicable laws governing the publication of confidential business information and personally identifiable information.

8. Notice of Availability of Mitigation Action Funds

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

9. Registration of Subject Vehicles

The Beneficiary certifies, for the benefit of the Parties (including the Settling Defendants) to the Partial Consent Decree and the Parties to the Second Partial Consent Decree (including the Defendants) and the owners from time-to-time of Subject Vehicles, that upon becoming a Beneficiary, the Beneficiary:

- (a) Shall not deny registration to any Subject Vehicle based solely on:
  - i. The presence of a defeat device or AECD covered by the resolution of claims in the Partial Consent Decree or in the Second Partial Consent Decree; or
  - ii. Emissions resulting from such a defeat device or AECD; or
  - iii. The availability of an Approved Emissions Modification, an Emissions Compliant Recall or the Buyback, Lease Termination, and Owner/Lessee Payment Program.
- (b) Shall not deny registration to any Subject Vehicle that has been modified in accordance with an Approved Emissions Modification or an Emissions Compliant Recall based solely on:
  - i. The fact that the vehicle has been modified in accordance with the Approved Emissions Modification or the Emissions Compliant Recall; or
  - ii. Emissions resulting from the modification (including, but not limited to, the anticipated emissions described in Appendix B to the Partial Consent Decree and Appendix B to the Second Partial Consent Decree); or
  - iii. Other emissions-related vehicle characteristics that result from the modification; or

iv. The availability of an Approved Emissions Modification, an Emissions Compliant Recall or the Buyback, Lease Termination, and Owner/Lessee Payment Program.

(c) May identify Subject Vehicles as having been modified, or not modified, in accordance with the Approved Emissions Modification or the Emissions Compliant Recall on the basis of VIN-specific information provided to the Beneficiary by the Defendants.

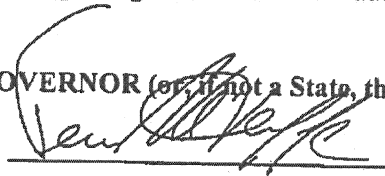
(d) Notwithstanding the foregoing, the Beneficiary may deny registration to any Subject Vehicle on the basis that the Subject Vehicle fails to meet EPA's or the Beneficiary's failure criteria for the onboard diagnostic ("OBD") inspection; or on other grounds authorized or required under applicable federal regulations (including an approved State Implementation Plan) or under Section 209 or 177 of the Clean Air Act and not explicitly excluded in subparagraphs 9(a)-(b).

10. Reliance on Certification

The Beneficiary acknowledges that the Trustee is entitled to rely conclusively on, without further duty of inquiry, and shall be protected in relying upon, this Appendix D-3 Certification, or a subsequent communication from the Lead Agency designating new or additional authorized individuals, as setting forth the Lead Agency and the authorized individuals who may direct the Trustee with respect to all of the Beneficiary's rights and duties under the Trust Agreement. The Beneficiary and its delegated Lead Agency, including all authorized individuals, agree to comply with all security procedures, standard payment and signatory authorization protocols, as well as procedures for designating new or additional authorized individuals, as set forth by the Trustee.

FOR THE GOVERNOR (or, if not a State, the analogous Chief Executive):

Signature:



Name: Terence R. McAuliffe

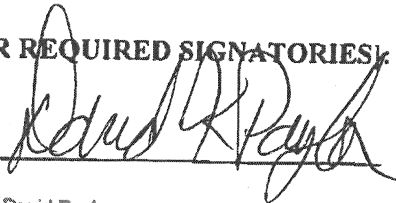
Title: Governor

Date: 10/4/2017

Location: Richmond, VA

[FOR OTHER REQUIRED SIGNATORIES]:

Signature:



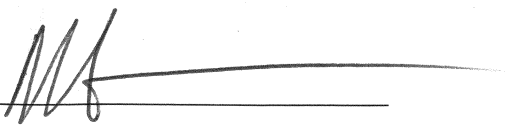
Name: David Paylor

Title: Director, DEQ

Date: 10/0/2017

Location: Richmond, VA

**[FOR OTHER REQUIRED SIGNATORIES]:**

Signature:  \_\_\_\_\_

Name: Matthew L. Gooch

Title: Assistant Attorney General

Date: November 14, 2017

Location: Richmond, Virginia

### Appendix D-3 Certification for Beneficiary Status: Paragraph 7. Publicly Available Information

#### Procedures for Accessing Information Pertaining to Environmental Mitigation Trust (EMT) Funds

Information referenced under Paragraph 7 and submitted to the Trustee in support of funding request for eligible mitigation actions and expenditures of EMT funds will be publically available from the Virginia Department of Environmental Quality (DEQ) public Volkswagen mitigation webpage located at <http://deq.virginia.gov/Programs/Air/VWMitigation.aspx>. The public may also access this information by submitting a Freedom of Information Act (FOIA) request by U.S. mail, fax, e-mail, in person, or over the phone. DEQ's Freedom of Information Act policy (FIOA policy) (<http://deq.virginia.gov/Portals/0/DEQ/ConnectwithDEQ/FreedomofInformationAct/DEQFOIAPolicy.pdf>) delineates the procedures for accessing agency information as well as the treatment and disclosure of certified confidential business information (CBI) or personally identifiable information. DEQ's FOIA policy and procedures are established pursuant to the Virginia Freedom of Information Act (VFOIA) Va. Code §2.2-3700 (<http://law.lis.virginia.gov/vacode/title2.2/chapter37>).

#### Procedures for Requesting and Considering Public Input on the State/Beneficiary Mitigation Plan

Virginia developed a proposed state mitigation plan in 2016 intended to provide the public with insight into the Commonwealth's vision for the eligible uses of the VW Trust mitigation funds (<http://deq.state.va.us/Portals/0/DEQ/Air/VWMitigation/plan.pdf?ver=2016-11-15-100015-493>). The state conducted a public comment period (Nov 17 – Dec 16, 2016) and meeting (Dec 7, 2016) on the proposed mitigation plan. Virginia received 101 comments on the proposed mitigation plan that are currently under review (<http://deq.state.va.us/Portals/0/DEQ/Air/VWMitigation/vwpc2016.pdf?ver=2016-12-22-125501-883>). To further inform the state's understanding of the best use of VW EMT funds, Virginia released Request for Information (RFI)#:17-01-CP in April 2017 seeking early input from governmental and non-governmental entities on the type and scope of projects that they may later submit to compete for VW Trust funds, funding and project evaluation priorities, and methods the state could employ to increase participation in future requests for VW mitigation projects (<http://deq.state.va.us/Portals/0/DEQ/Air/VWMitigation/VWRFI.pdf?ver=2017-04-04-110045-327>). DEQ received a total of 35 responses to RFI#:17-01-CP. Of the 35 responses, 29 organizations submitted 39 project ideas totaling approximately \$600 million, and six organizations exclusively submitted responses to the question section of the RFI (Area 2 – VW Program and Solicitation Design Questions).

Public input on Virginia's mitigation plan and related planning efforts is guided by DEQ's Community Involvement policy (<http://www.deq.virginia.gov/Portals/0/DEQ/ConnectwithDEQ/CommunityInvolvement/CommInvolvePolicy.pdf>). This policy specifies the DEQ processes for engaging the public in effective environmental discussion making, such as creating early and ongoing opportunities for public input in agency decisions beyond the minimum requirements, ensuring that decision-making activities are open and accessible to all interested individuals and organizations, ensuring that the public understands the most effective ways to provide comment to DEQ, and considering and integrating public input into environmental decisions. DEQ's Community Involvement policy supplements existing Virginia regulations that detail public participation requirements applicable to only DEQ's regulatory activities under the Virginia Administrative Process Act Va. Code § 2.2-4007.02 (<http://law.lis.virginia.gov/vacode/title2.2/chapter40/section2.2-4007.02>). These requirements specify the minimum level of participation in regulatory decisions.

#### Applicability to State Laws Governing Confidential Business Information (CBI) and Personally Identifiable information

The certification in Paragraph 7 is fully subject to Virginia's applicable laws governing the publication of confidential business information and personally identifiable information. Va. Code § 2.2-4342(F) provides: "Trade secrets or proprietary information submitted by a bidder, offeror or contractor in connection with a procurement transaction or prequalification application submitted pursuant to subsection B of § 2.2-4317 shall not be subject to the Virginia Freedom of Information Act (§ 2.2-3700 et seq.); however, the bidder, offeror or contractor shall (i) invoke the protections of this section prior to or upon submission of the data or other materials, (ii) identify the data or other materials to be protected, and (iii) state the reasons why protection is necessary." See also Va. Code § 2.2-3705.6(10) (exempting "[c]onfidential information designated as provided in subsection F of § 2.2-4342 as trade secrets or proprietary information by any person in connection with a procurement transaction or by any person who has submitted to a public body an application for prequalification to bid on public construction projects in accordance with subsection B of § 2.2-4317").

The certification is subject to the Commonwealth of Virginia's procurement policies and procedures in the "Agency Procurement and Surplus Property Manual" (APSPM). Available at: [https://dgs.virginia.gov/globalassets/business-units/dps/documents/apspm/apspm\\_all\\_after\\_6-30-2017.pdf](https://dgs.virginia.gov/globalassets/business-units/dps/documents/apspm/apspm_all_after_6-30-2017.pdf). Specifically, Special Term and Condition #59 provides: "The contractor assures that information and data obtained as to personal facts and circumstances related to patients or clients will be collected and held confidential, during and following the term of this agreement, and unless disclosure is required pursuant to court order, subpoena or other regulatory authority, will not be divulged without the individual's and the agency's

**Appendix D-3 Certification for Beneficiary Status: Paragraph 7. Publicly Available Information**

written consent and only in accordance with federal law or the Code of Virginia. Contractors who utilize, access, or store personally identifiable information as part of the performance of a contract are required to safeguard this information and immediately notify the agency of any breach or suspected breach in the security of such information. Contractors shall allow the agency to both participate in the investigation of incidents and exercise control over decisions regarding external reporting. Contractors and their employees working on this project may be required to sign a confidentiality statement."

Additionally, Va. Code § 2.2-3705.1(10) excludes from disclosure under FIOA: "Personal contact information furnished to a public body for the purpose of receiving electronic mail from the public body, provided that the electronic mail recipient has requested that the public body not disclose such information. [ . . . ]"

Finally, the certification is be subject to the Government Data Collection and Dissemination Practices Act, Va. Code §§ 2.2-3800 through -3809. This Act provides some limits on the use of personal information by public agencies. For instance, any "agency maintaining an information system that includes personal information shall [c]ollect, maintain, use, and disseminate only that personal information permitted or required by law to be so collected, maintained, used, or disseminated, or necessary to accomplish a proper purpose of the agency." Va. Code § 2.2-3803(A)(1).