

ATTORNEYS GENERAL OF GEORGIA, HAWAII, IDAHO, IOWA, MAINE,
MARYLAND, NEW HAMPSHIRE, NEW JERSEY, NEW YORK, TENNESSEE,
UTAH, VERMONT, VIRGINIA, WASHINGTON, WISCONSIN, AND WYOMING

August 5, 2016

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Submitted by electronic mail to pubcomment-ees.enrd@usdoj.gov.

Re: Public Comment on proposed Partial Consent Decree, *In re: Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation*, Case No: MDL No. 2672 CRB (JSC)

Dear Assistant Attorney General Cruden:

The Attorneys General of Georgia, Hawai'i, Idaho, Iowa, Maine, Maryland, New Hampshire, New Jersey, New York, Tennessee, Utah, Vermont, Virginia, Washington, Wisconsin, and Wyoming (collectively "States"), submit the following comments on the above-referenced proposed Partial Consent Decree ("Consent Decree"), which the United States lodged on June 28, 2016. These comments primarily concern Appendix D-2 of the Consent Decree entitled Eligible Mitigation Actions and Mitigation Action Expenditures. Please note that some of the States signing on to this letter are separately submitting additional comments.

By submitting these comments on the Consent Decree, the States do not consent to the jurisdiction of the federal courts for any purpose. Nor should these comments be interpreted to waive any rights of the States to pursue relief in any form against Volkswagen AG, Audi AG, Volkswagen Group of America, Inc., Volkswagen Group of America Chattanooga Operations, LLC, Dr. Ing h.c. F. Porsche AG and Porsche Cars North America, Inc. (collectively "Volkswagen").

I. Introduction and General Comments.

The States commend the Department of Justice ("DOJ"), the Environmental Protection Agency ("EPA"), and the State of California for obtaining Volkswagen's commitment to get its unlawful 2.0 liter vehicles off the road and to mitigate the unlawful vehicles' excess emissions of nitrogen oxides (NO_x). We appreciate the significant effort your staffs have devoted to this matter over the last several months, culminating in lodging of the Consent Decree.

As you know, the Consent Decree requires Volkswagen to pay \$2.7 billion into a trust, which the fifty states, the District of Columbia, Puerto Rico and Indian Tribes may use for mitigation projects designed to reduce NOx emissions. The trust funds may only be used for Eligible Mitigation Actions listed in Appendix D-2 to the Consent Decree. This funding of Eligible Mitigation Actions is intended to fully mitigate the total, lifetime excess NOx emissions from the 2.0 liter vehicles that are the subject of the Consent Decree. Consent Decree, p. 5.

The States generally support the framework established by the proposed Mitigation Trust Agreement (Consent Decree Appendix D) for trust administration by a trustee appointed by the court, allocation of trust funds among states that elect to participate as trust beneficiaries, and disbursement of funds for mitigation actions in response to funding requests submitted by beneficiaries. However, as has been previously communicated to you, the States believe that the list of Eligible Mitigation Actions set forth in Appendix D-2 contains ambiguities and is overly restrictive.

For the reasons explained below, the States respectfully request that you modify Appendix D-2 as set forth below before moving for entry of the Consent Decree.

Moreover, to avoid any possible confusion about the intended purposes of the “The ZEV Investment Commitment” (Consent Decree Appendix C), the Consent Decree should clearly state that The ZEV Investment Commitment is not intended to offset or reduce fines or penalties for which Volkswagen may be liable under federal, State, or local laws. Specifically, the Consent Decree should state: “By funding The ZEV Investment Commitment, Settling Defendants are not entitled to any reduction or offset of any fines or penalties under applicable federal, State, or local laws, regulations, or permits with respect to any 2.0 or 3.0 Liter vehicles. The ZEV Investment Commitment shall not be considered as a Supplemental Environmental Project (“SEP”) under any federal, State, or local statute, regulation, rule, or policy.”

II. Requests for Changes to Eligible Mitigation Project List.

A. Requests for Clarification.

The States request the following changes to clarify matters that are unclear and/or ambiguous. It is important to clarify these issues now for two reasons: (1) so that the States understand the full meaning and breadth of the Eligible Mitigation Action list; and (2) to prevent issues from arising during trust administration that may require the trustee to spend trust funds to resolve, and may ultimately require resolution by the Court. Such expenditures would reduce the funds available for

NOx reduction projects. In evaluating a proposed consent decree, a district court “should pay special attention to the decree’s clarity.” *U.S. v. Microsoft Corp.*, 56 F.3d 1448, 1461 (D.C. Cir. 1995). It is appropriate for the court to insist on “precision concerning the resolution of known issues” to make resolution of subsequent disputes reasonably manageable. *Id.* at 1461-62.

1. Clarify Category 1, Definition of Eligible Large Trucks.

This definition currently reads as follows:

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

Appendix D-2, p.11. We understand that you added “waste haulers, dump trucks and concrete mixers” to the definition to make clear that these types of trucks would be eligible for funding under Category 1. However, the definition still lacks clarity as written because the vast majority of Class 8 waste haulers, dump trucks and concrete mixers are straight trucks which do not have a detachable tractor. While the parenthetical at the end of the definition would appear to include vehicles that do not have detachable tractors, defining the category as “truck tractors” may be read to exclude most such vehicles.

Further, it appears that you have incorporated the weight rating of the U.S. Department of Transportation’s classification system into your definitions. Under this classification system, both straight trucks and truck tractors (the tractor portion of tractor trailer trucks, but not including the trailer portion) may be classified as Class 8 vehicles. We request that you modify the definition to read as follows to ensure that both Class 8 straight trucks and truck tractors are within the category (new language underlined):

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

This is an important issue to the States. Many of the vehicles which emit the highest levels of NOx- for which the greatest emissions reductions can be achieved through replacement or engine repowering- are straight trucks within the Class 8 weight definition. For example, approximately 94% of Vermont’s government-owned fleet of model-year 1992-2006 Class 8 Local Freight Trucks are straight trucks. Vermont and other states would likely seek to target a number of Class 8 straight trucks for replacement or repowering using the mitigation fund, but may be

unable to do so unless the definition is clarified. Thus, clarifying the definition would serve not only to prevent disputes down the road, but also would make clear that the states may use the funds to address some of the largest mobile sources of NOx emissions in furtherance of the purposes of the Consent Decree.

2. Clarify the Definition of Government.

Appendix D-2 at Page 11, states:

“Government” shall mean a State agency, school district, municipality, city, county, tribal government or native village, or port authority that has jurisdiction over transportation and air quality. . . .

This definition appears to control eligibility for 100% funding of repowering or replacement of “Government Owned” vehicles or equipment under Paragraphs 1.f (Large Trucks) 2, (Buses), 3.e (Freight Switchers), 4.e (Ferries/Tugs); 5.c (Marine Shorepower), 6.e (Medium Trucks), 7.e (Airport Ground Support Equipment), and 8.e (Forklifts), and eligibility for 100% funding of light duty electric vehicle supply equipment on Government Owned Property under Paragraph 9.c.1. The definition is unclear and not appropriate for a number of reasons.

First, while the States interpret the phrase “that has jurisdiction over transportation and air quality” to modify only “port authority,” this is not clear.

Second, while large port authorities such as the Ports of New York and New Jersey and the Port of Long Beach are involved in efforts to protect air quality, including planning and monitoring, the States are not aware of any port that has jurisdiction over air quality as that term is typically used.

Third, to the extent that the phrase “that has jurisdiction over transportation and air quality” is intended to modify “State agency, school district, municipality, city, county, tribal government or native village,” most such entities other than state departments of environmental quality or the equivalent do not have jurisdiction over air quality. The States are not aware of any school district that has jurisdiction over air quality.

Fourth, use of “jurisdiction over transportation” is also problematic. For example, while school districts provide transportation services, they do not have jurisdiction over transportation as that term is typically used.

It appears that the concept of “jurisdiction over transportation and air quality” has been borrowed from the DERA program, where the phrase “jurisdiction over transportation or air quality” appears in a number of program documents. See, eg., <https://www.epa.gov/sites/production/files/2015-11/documents/fy14-ports-dera->

faq-12-04-14.pdf However, in the context of the DERA program the phrase is used to indicate who may apply for funding, and is not used to restrict the ownership of vehicles or equipment eligible for funding. For example, under DERA, port authorities, state or local governments with jurisdiction over transportation or air quality may apply for funding, and a private party's repowering or replacement project may be funded through partnering with the applicant. In contrast, under the Volkswagen Mitigation Trust only a designated lead state agency may submit funding requests to the trustee. It is incongruous to import the DERA language, as modified, into Appendix D-2 to limit the Government ownership eligible for 100% funding.

Further, as stated, the definition could severely restrict eligibility for 100% funding for Government owned vehicles. For example, state department of transportation fleets may be ineligible if the department is found to lack jurisdiction over air quality. School district bus fleets may be ineligible if the school district is found to lack jurisdiction over air quality or transportation.

The States propose that the definition be modified to read:

"Government" shall mean a State agency, school district, municipality, city, county, tribal government or native village, or port authority.

3. Clarify the Description of Administrative Expenditures for Which Trust Funds May Be Used.

Appendix D-2, at Page 10, states:

For any Eligible Mitigation Action, Beneficiaries may use Trust Funds for actual administrative expenditures (described below) associated with implementing such Eligible Mitigation Action, but not to exceed 10% of the total cost of such Eligible Mitigation Action.

Please clarify this paragraph to indicate whether only the Beneficiary's administrative expenses may be paid with trust funds, or whether the administrative expenses of the recipient who performs the Eligible Mitigation Action (referred to as "vendor" in Sections 5.2.5 and 5.2.6 of the proposed Mitigation Trust Agreement) may also be paid with trust funds. If both the Beneficiary's and recipient's administrative expenses may be paid, please also clarify whether the 10% cap applies to the total of both, or whether it applies only to one.

4. Clarify that a Beneficiary May Pay Less than the Specified Percentages for Eligible Mitigation Actions.

Please clarify whether a beneficiary may elect to pay less than the percentages specified in Appendix D-2, Paragraphs 1.d, 1.e, 1.f, 2.d, 2.e, 3.d, 3.e, 4.d, 4.e., 5.b., 5.c, 6.d., 6.e., 7.d., 7.e., 8.d, 8.e, 9.c. for an Eligible Mitigation Action. The States favor the flexibility to pay less because it would allow them to spread their allocations among a greater number of NOx emission reducing projects. This intent could be clarified by changing the phrase “in the amount of” in each of the referenced paragraphs to “in an amount of up to.”

5. Clarify Eligible Reimbursement Costs for Ocean Going Vessels Shorepower.

Category 5 states that Marine Shorepower components eligible for reimbursement are limited to cables, cable management systems, shore power coupler systems, distribution control systems, and power distribution. Appendix D-2, p.5. Please clarify whether the eligible costs include the costs of installation of these components. Because installation costs are typically a major component of project costs it is essential that they be eligible for reimbursement to induce interest in Marine Shorepower projects under the Mitigation Trust.

III. Requests for Broadening of Eligible Mitigation Actions and Funding.

The States request a number of changes for the purposes of broadening the list of Eligible Mitigation Actions or otherwise easing restrictions on the States’ use of mitigation trust funds. Providing the States with additional flexibility will assist them in targeting sources of NOx emissions for mitigation actions in the manner most effective to achieve the Consent Decree’s goal of reducing NOx emissions. It would also assist the States in meeting other important obligations and policy goals, including their State Implementation Plan (“SIP”) obligations and priorities for promoting light duty zero emission vehicle (“ZEV”) usage.

A. Deference to the States’ Requests for Broadening the List of Eligible Mitigation Actions is Appropriate:

Deference to the States’ requests for expanding the list of Eligible Mitigation actions is appropriate for a number of reasons.

First, the States have superior knowledge regarding mobile sources of NOx within their borders, which are potential candidates for mitigation actions. The States’ departments of motor vehicles, or the equivalent, maintain registration data on both government and privately owned vehicles. The States themselves own vehicles that may be the subject of mitigation actions, and the States are in much

closer contact than the Department of Justice or the Environmental Protection Agency with other in-state vehicle owners, including county and municipal governments and private businesses. Additionally, many of the states have extensive experience administering DERA programs. The States have superior knowledge regarding the mobile sources of NOx within their borders and the likelihood that vehicles of various types and under various ownership may be candidates for mitigation actions.

Second, the Clean Air Act's cooperative federalism framework places primary responsibility for selecting the sources from which emissions reductions will be obtained on the states and local governments. "[A]ir pollution prevention (that is the reduction or elimination, through any measures, of the amount of pollutants produced or created at the source) and air pollution control at its source is the primary responsibility of States and local governments." 42 U.S.C. § 7401(a)(3). Thus, in the context of SIP development "the Supreme Court has emphasized that '[i]t is to the States that the Act assigns primary responsibility for deciding what emissions reductions will be required from which sources.'" *Hall v. United States Environmental Protection Agency*, 273 F.3d 1146, 1153 (9th Cir. 2001) (quoting *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 470-72 (2001)); see also 42 U.S.C. § 7407(a); *Train v. Natural Resources Defense Council, Inc.*, 421 U.S. 60, 79 (1975).

Third, states that elect to participate will play a critical role in implementing the Mitigation Trust Agreement to achieve its NOx emissions reduction benefits. Participating states will assume substantial obligations in doing so, and must relinquish significant claims in order to participate.

Under the Mitigation Trust Agreement, the EPA steps aside, the Mitigation Trust is administered by a trustee, and it is up to the states to identify eligible mitigation projects and secure funding from the trustee. Participating states must develop, submit, and then seek public input on a Beneficiary Mitigation Plan, submit funding requests for individual Eligible Mitigation Actions, and comply with reporting requirements for each Eligible Mitigation Action funded. Mitigation Trust Agreement, Appendix D to Consent Decree §§ 4.1, 5.2 & 5.3. Participating states are even required to notify federal agencies with control of lands within their borders of the availability of mitigation funds for use on such lands. *Id.* § 4.2.8; Certification for Beneficiary States, Appendix D-3 to Consent Decree § 8.

In order to participate, states must sign a certification expressly waiving all claims for injunctive relief to redress environmental injury caused by the 2.0 Liter Subject Vehicles. Mitigation Trust Agreement, Appendix D to Consent Decree § 4.2.6; Certification for Beneficiary States, Appendix D-3 to Consent Decree § 6. Participating states must also agree not to deny registration to Subject Vehicles based on, among other things, the presence of defeat devices, and emissions resulting from defeat devices. Mitigation Trust Agreement, Appendix D to Consent

Decree § 4.2.9(a)-(b); Certification for Beneficiary States, Appendix D-3 to Consent Decree § 9(a)-(b). This may effectively preclude states from enforcing laws that prohibit registration of vehicles that do not meet emissions standards, although the Mitigation Trust Agreement and the Certification explicitly reserve the ability of states to deny registration in certain circumstances. Mitigation Trust Agreement, Appendix D to Consent Decree § 4.2.9(d); Certification for Beneficiary States, Appendix D-3 to Consent Decree § 9(d).

While participating states may draw on the trust fund to cover administrative expenses for up to 10% of the total cost of an Eligible Mitigation Action, the States' experience with the DERA program suggests that this may not be sufficient to cover all state administrative costs. Under the DERA program states are permitted to draw up to 15% of project costs to cover administrative costs. Some states have found the 15% limit insufficient. Thus, the States may well incur financial costs in participating in the Mitigation Trust.

Although DOJ considered requests from states, DOJ did not seek the states' approval of the Consent Decree or the Mitigation Trust Agreement prior to lodging.¹ This, despite the significant responsibilities that participating states will assume and the claims they will relinquish, and despite the fact that participation of *all* states in the mitigation trust is essential to its success.

Additionally, it is not entirely clear that a state's decision not to participate in the Mitigation Trust Agreement would be without consequence to the state. The share of the trust funds of a state that elects not to participate would be allocated among the participating Beneficiaries rather than returned to Volkswagen. Moreover, the United States' Complaint asserts claims for injunctive relief to redress excess NOx emissions from all of Volkswagen's unlawful 2.0 liter vehicles sold anywhere in the United States. The proposed Consent Decree indicates that it would resolve those claims of the United States along with claims for injunctive relief asserted by California. Consent Decree ¶ 74. The proposed Consent Decree and Mitigation Trust Agreement also indicate that they are intended to "fully mitigate the total, lifetime NOx emissions from the 2.0 Liter Subject Vehicles" in the United States. Consent Decree P. 5; Mitigation Trust Agreement, Appendix D to Consent Decree p. 1. Thus, if a nonparticipating state files suit in state court to obtain redress for environmental injury in the state from the 2.0 liter Subject Vehicles, it may face an argument from Volkswagen that such harm has already been mitigated through the Mitigation Trust Agreement. While

¹ States who signed a confidentiality order were permitted to review the Mitigation Trust Agreement prior to lodging. However, not all states were permitted pre-lodging review of the Consent Order and The ZEV Investment Commitment. Vermont was not provided copies of the Consent Order before lodging despite repeated requests.

the state would have a strong argument that this is not the case because mitigation funds would not have been spent within that state, it is difficult to predict how a court would rule on this issue.² The proposed Consent Decree should state clearly that the Consent Decree will have no impact on any claims by those States electing not to participate in the Mitigation Trust Agreement.

The provisions of the proposed Consent Decree which describe the Consent Decree's impact on other claims, would provide a non-participating state no comfort in this regard. The proposed Consent Decree repeatedly states: "Nothing in this Consent Decree is intended to apply to, or affect, Settling Defendants' obligations under the laws or regulations of any jurisdiction *outside the United States*." Consent Decree, Recital P.7 & ¶ 78 (emphasis added). Elsewhere, the Consent Decree states that it "does not limit the rights of third parties, not party to this Consent Decree, against Settling Defendants, *except as otherwise provided by law*." Consent Decree ¶82 (emphasis added). Thus, while the States' dispute that it would be a correct result, non-participating states may be unable to obtain any redress for the environmental injury attributable to the 2.0 liter subject vehicles.

A district court reviews a proposed consent decree to determine whether it is "fundamentally fair, adequate and reasonable." *United States v. Chevron U.S.A., Inc.*, 380 F. Supp. 2d 1104, 1110 (N.D. Cal. 2005) (quoting *United States v. Oregon*, 913 F.2d 576, 580 (9th Cir. 1990)). Additionally, a proposed consent decree "must conform to applicable laws." *Id.* at 1111 (quoting *Oregon*, 913 F.2d at 580). "[T]he Court must avoid giving a 'rubberstamp approval' and instead must conduct an independent evaluation." *Id.* at 1111 (quoting *United States v. BP Exploration & Oil Co.*, 167 F. Supp. 2d 1045, 1050 (N.D. Ind. 2001)).

The court's review of a consent decree is conducted in light of the public policy favoring settlement. *Id.* Typically, strong deference is granted to a consent decree "negotiated by the Department of Justice on behalf of the EPA which is an expert in its field." *Id.* (citing *United States v. Akzo Coatings of AM, Inc.*, 949 F.2d 1409, 1436 (6th Cir. 1991)). However, such deference is not appropriate here due to the States' superior knowledge of the sources which are candidates for Eligible Mitigation Actions and the States' primary responsibility under the Clean Air Act for selecting sources to control to achieve emissions reductions.

Heightened scrutiny is appropriate where a consent decree affects the public interest and third parties. See *Oregon*, 913 F.2d at 581. Heightened scrutiny is appropriate here because the proposed consent decree would impose significant

² Beneficiaries under the Environmental Mitigation Trust Agreement, on the other hand, are assured through their Certification and Beneficiary Status that "This waiver [of claims for injunctive relief] does not waive, and the Beneficiary expressly reserves, its rights, if any, to seek fines or penalties." Appendix D-3, Paragraph 6.

obligations on states that elect to participate in the Mitigation Trust and may affect the interests of states who elect not to participate. Again, although DOJ considered input from states, the consent of the states was not sought prior to lodging, and it has not been sought to date.

Although the Court should not rewrite a proposed consent decree, if the Court identifies problems it should advise the parties of its concerns and allow them the opportunity to revise the agreement before making a final ruling on a motion to enter the decree. See *United States v. Colorado*, 937 F.2d 505, 509 (10th Cir. 1991); *United States v. Microsoft*, 231 F. Supp. 2d 144, 200-02 (D.D.C. 2002); *Environmental Technology Council v. Browner*, 1995 W.L. 238328 (D.D.C. 1995).

B. Changes Requested to Broaden the List of Eligible Projects and Funding.

The States request the following changes for the purposes of broadening the list of Eligible Mitigation Projects and easing funding restrictions:

1. Category 9, Light Duty Zero Emission Vehicle Supply Equipment.

This category allows each beneficiary to use up to 15% of its allocation of Trust Funds for acquisition, operation and maintenance of new light duty zero emission vehicle supply equipment. The States request an increase to 25%, and expansion of this category to allow funds to be used for incentives to purchase light duty ZEVs.

There is no question that investment in light duty ZEV infrastructure can be an effective means to reduce NOx emissions. The proposed Consent Decree recognizes this by including as part of the overall proposed settlement The ZEV Investment Commitment, Consent Decree Appendix C, which requires Volkswagen to spend \$2 billion on ZEV related infrastructure. The portion of The ZEV Investment Commitment that may be spent on light duty ZEV infrastructure is not limited.

Expansion of ZEV use, including light duty ZEV use, as a means to reduce air pollution from the transportation sector is a priority of a number of states. Nine states (Connecticut, Maine, Maryland, Massachusetts, New Jersey, New York, Oregon, Rhode Island, and Vermont) have adopted California's ZEV standards, which require automobile manufacturers to produce ZEVs to improve air quality and reduce emissions contributing to climate change. In October 2013, seven of those states (Connecticut, Maryland, Massachusetts, New York, Oregon, Rhode Island and Vermont, and California) entered into a State Zero-Emissions Vehicle Programs Memorandum of Understanding ("MOU"). Pursuant to the MOU, these

states agreed to work together to support implementation of their respective ZEV programs through, among other things participating in a ZEV Program Implementation Task Force; to achieve a collective target of 3.3 million ZEV vehicles on the road in the eight states by 2025; and to establish a fueling infrastructure to support those vehicles. Action Plans developed through the task force and adopted by these states in 2014 enumerated priority actions and strategies, including: (1) promoting the availability and effective marketing of all plug-in electric vehicle models; (2) providing consumer incentives to enhance the ZEV ownership experience; (3) leading by example through increasing ZEVs in state, municipal, and other public fleets; (4) encouraging private fleets to purchase, lease, or rent ZEVs; (5) promoting workplace charging; and (6) promoting ZEV infrastructure planning and investment by public and private entities. *See, e.g., Vermont Zero Emission Vehicle Action Plan (September 2014), available at http://anr.vermont.gov/sites/anr/files/specialtopics/climate/documents/ZEV/FinalVTZEVActionPlan_080114.pdf.*

A number of other states also have enacted laws or regulations and/or adopted policies to promote light duty ZEV use. For example, Washington State exempts electric vehicles from the state sales tax (RCW 82.08.809; RCW 82.12.809) and, with Oregon and California, Washington is part of the Pacific Coast Collaborative to develop the West Coast Electric Highway (*see Pacific Coast Collaborative Agreement on low carbon transportation (section II)*). *See also, e.g.,* Section 291-71, Hawai'i Revised Statutes (parking facilities of 100 stall or more that are open to the public must have an electric vehicle charging station); 20 ILCS 627/5 (finding that the adoption and use of electric vehicles would benefit the State of Illinois by, among other things, improving the health and environmental quality of the residents of Illinois through reduced pollution); N.J.S.A. 26:2C-8.15 (legislative findings in support of ZEV incentives); -8.18 (ZEV credit bank); N.J.S.A. 54:32B-8.55 (sales tax exemption for ZEVs); N.J.A.C. 7:27-29.6 (ZEV sales requirement); and -29.7 (ZEV credit bank).

Given the states' primary responsibility under the Clean Air Act for identifying the sources of pollution to be controlled and the states' prioritization of expanding light-duty ZEV use it is both unreasonable and inconsistent with the Clean Air Act's cooperative federalism framework to limit their spending on light duty ZEV infrastructure to 15%. This is particularly true given that no state other than California is guaranteed any expenditure of the \$ 2 billion ZEV Investment funds within its borders. Additionally, there is a very strong nexus between promotion of light duty ZEV's and the light duty 2.0 vehicles whose excess NOx emissions are responsible for the harm to be mitigated.

The ZEV Investment Commitment requires Volkswagen to spend \$800 million in California and \$1.2 billion in unspecified areas of the United States other than California. Thus, in California there is a potential for light-duty ZEV

spending of up to 15% of its mitigation fund allocation, plus \$800 million. In every other state there is no assurance that more than 15% of the state's mitigation fund share may be spent on light duty ZEV infrastructure. The States recognize California's special status as a pioneer in regulating mobile source emissions and its severe non-attainment issues attributable in part to mobile source emissions. However, these circumstances alone do not justify the huge disparity in opportunities for light duty ZEV investment under the Consent Decree. Under the circumstances, and especially given the States' commitments to the expansion of light duty ZEV use, an increase in the 15% limitation to 25% would be fair and reasonable. It would also be fully consistent with the proposed Consent Decree's goal to reduce NOx emissions.

It is also reasonable to expand this category to allow the states to provide purchase incentives for light duty ZEVs. ZEV infrastructure will provide little benefit in reducing NOx emissions unless sufficient numbers of ZEVs are on the roads. With gasoline prices down, plug-in electric vehicle sales plunged 17% during 2015 despite record total vehicle sales during that year. <http://www.bloomberg.com/news/articles/2016-01-06/plug-in-electric-vehicles-left-behind-in-u-s-autos-record-year>. A combination of light duty ZEV infrastructure investment and incentives for purchase of light duty ZEVs is likely to be more effective in reducing NOx than investment in light duty ZEV infrastructure alone.

2. Add a New Category for Non-Road Vehicles and Equipment.

The States request the addition of a new category of Eligible Mitigation Actions for non-road vehicles and equipment. This category could be defined as "non-road vehicles or equipment used in construction, handling of cargo (including at a port or airport), or agriculture."

The types of non-road vehicles and equipment currently listed in Appendix D-2 are limited to freight switchers, ferries and tugs, ocean going vessels and marine shorepower equipment, airport ground support equipment and forklifts. A number of states, particularly rural and landlocked states, do not have many of these types of sources. Many of these same states, however, have an abundance of other types of non-road vehicles and equipment, including those used in construction and agriculture.

Additionally, while Category 8 covers forklifts, which are used at ports and other locations where freight is handled, the requested new category for non-road vehicles and equipment would also permit NOx reductions to be achieved from other types of cargo handling vehicles and equipment, including cranes and straddle carriers.

The States understand that some of these other types of non-road vehicles and equipment are eligible for funding through the DERA option (Appendix D-2, Category 10). However, given DERA's much stricter eligibility criteria and lower reimbursement rates for government owned vehicles and equipment (in many cases 25% versus 100%), it is unlikely that states will be able to spend a significant portion of their mitigation fund allocations on these sources. The more stringent DERA eligibility criteria include more restrictive model year ranges (in some cases only up to 2003 model year vehicles are eligible for replacement), a requirement that non-road engines or equipment have at least seven years useful life remaining, a requirement that replacement not be scheduled to take place within 3 years, and the ineligibility of Class 4 vehicles. See <https://www.epa.gov/sites/production/files/2016-03/documents/420b16046.pdf>

A number of the States have years of experience implementing state DERA programs since its initial funding in 2008. Many states struggle to find sufficient projects to spend their DERA allocation due to stringent match requirements and more stringent eligibility requirements as discussed above. This despite incurring administrative costs beyond the 15% of the DERA allocation permitted to be spent on administrative expenses. The States' experience suggests that the DERA option is not a viable means for spending a significant portion of a state's allocation of mitigation funds on non-road vehicles and equipment.

Nonroad vehicles and equipment are a significant source of NOx emissions, particularly in more rural states. For example, nonroad mobile sources (including vehicles and equipment) are responsible for 21% of Vermont's NOx emissions. <http://dec.vermont.gov/air-quality/mobile-sources> In order to provide the states sufficient flexibility to address these sources, we request that you add a new category of Eligible Mitigation Actions for non-road vehicles and equipment.

3. Expand Eligible Model-Year Ranges.

Categories 1 (Eligible Large Trucks), 2 (Eligible Buses), and 6 (Medium Trucks) are limited to 1992-2006 model year vehicles. In each case, an exception is made for states with regulations that require upgrades to those model year vehicles, which also allows eligibility for 2007-2012 model year vehicles. However, most of the states are not in a position to take advantage of this exception.

The 1992-2006 Model Year range is unreasonably restrictive, especially considering the 15-year life of the Mitigation Trust. By 2027, the likely 10-year anniversary of the trust, Eligible Mitigation Actions would be limited to vehicles more than 20 years old. This restrictive date range is likely to be especially problematic for northern states where the corrosive effects of winter salt use on roadways leads to more frequent fleet turnover. At the same time, the States do not perceive a valid reason for excluding vehicles that pre-date the 1992 model year.

The States request that the model-year ranges for Categories 1, 2, and 6 be modified to include 2009 model-year and older vehicles for all states. The most recent NOx standards for heavy-duty trucks were fully phased in effective starting with model-year 2010 vehicles. Therefore, replacement or repowering of model year 2010 and newer vehicles would result in no net reductions in NOx emissions. At the same time, significant NOx reductions would be obtained through expanding eligibility to 2007-2009 model-year vehicles. The States also request the addition of language stating that the eligible model year ranges may be adjusted periodically to allow for additional NOx emissions reductions that may be achievable following future tightening of emissions requirements.

4. Expand 100% Government Reimbursement Option to Cover Privately Owned Trucks and Transit Buses Under Contract With a Government.

Category 2 provides for 100% funding of replacement or repowering of Privately Owned School Buses Under Contract with a Public School District. This reasonably reflects the fact that school districts often contract with private entities for transportations services. Similarly, government entities often contract with private entities for truck services (such as municipalities contracting with private refuse haulers), and transit bus services. Accordingly, it would be appropriate to modify Paragraphs 1(f), 2(e) and 6 (e), to provide that privately owned Large and Medium Trucks and Transit Buses which operate exclusively under contract with a government entity qualify for up to 100% funding. As revised these paragraphs could read as follows:

(1)(f): “For Government Owned Eligible Class 8 Large Trucks, and Eligible Class 8 Large Trucks Which Operate Exclusively Under Contract with a Government Entity, Beneficiaries may draw funds from the Trust in an amount of . . .”

(2)(e): “For Government Owned Eligible Buses, Privately Owned School Buses under Contract with a Public School District, and Privately Owned Transit Buses Which Operate Exclusively Under Contract with a Government Entity, Beneficiaries may draw funds from the Trust in an amount of . . .”

(6)(e): “For Government Owned Eligible Medium Trucks, and Eligible Medium Trucks Which Operate Exclusively Under Contract with a Government Entity, Beneficiaries may draw funds from the Trust in an amount of . . .”

5. Add a New Category for Investment in Compressed Natural Gas and Propane Infrastructure.

Within the current Categories 1, 2, 3, 4, and 6 (Eligible Large Trucks, Eligible Buses, Freight Switchers, Ferries/Tugs, and Medium Trucks), investments in Alternate Fueled engines, specifically those fueled by compressed natural gas (“CNG”) and propane (and hybrid or all-electric), are eligible Mitigation Trust expenditures. The decision to invest in CNG and propane powered engines is in part dependent upon access to infrastructure capable of supporting use of CNG and propane. As currently structured, the proposed Consent Decree provides no mechanism for investment in CNG and propane infrastructure, but does provide at least two mechanisms for investment in ZEV infrastructure components via the current Category 9 (Light Duty ZEV Supply Equipment) and The ZEV Investment Commitment. Investment in CNG and propane infrastructure promotes the Mitigation Trust’s goal of reducing NOx emissions. Accordingly, the States request that you include such investments among the Eligible Mitigation Actions. Investments in light-duty CNG and propane infrastructure could be included in the cap that applies to Category 9 (Light Duty ZEV Supply Equipment), which the States have requested be increased to 25%, such that the total of any state’s combined spending on Category 9 and light-duty CNG and propane infrastructure would be limited to 25% of its mitigation fund allocation.

6. Increase the Funding Limit for Repowering Projects.

Appendix D-2, Paragraphs 1.d, 1.e, 2.d, 3.d, 4.d, and 6.d place a limit of 40 percent on funding for the eligible cost share of projects that repower vehicles, tugs or ferries with newer, cleaner diesel or Alternate Fueled engines. The Mitigation Trust should provide at least 50 percent of the funding for the eligible cost share of these projects, as many of the businesses likely to consider these projects—specifically, railroads and tugboat operators – seek at least a 1-for-1 match of their funding to make the project cost effective. Higher levels of project funding for diesel-to-diesel repowers will lead to more opportunity to fund diesel-to-diesel repower projects, which are extremely cost-effective. Locomotive and tugboat engines have a long operational life in excess of twenty-five years, which makes investing in their repowering especially cost-effective in reducing NOx.

The rail industry in some states, including Georgia, has converted some higher-emitting locomotives to cleaner technology through the Congestion Mitigation and Air Quality Improvement (CMAQ) program. Their focus has been on converting unregulated or TIER 0 locomotives to clean locomotives meeting EPA TIER 3 Line Haul and EPA TIER 2 Switcher Duty Standards. These projects are cost effective at reducing NOx emissions. The CMAQ program provides 70% funding. The Volkswagen Mitigation Trust does not provide sufficient incentive for these types of conversions.

7. Add a New Category for Commuter Rail Diesel Locomotives and Electrifying Diesel Powered Commuter Lines.

The States request the addition of a new category of Eligible Mitigation Actions for repowering or replacement of commuter rail diesel locomotives, and for electrifying existing diesel-powered commuter lines, with cost share provisions that follow those set forth in Category No. 3 (Freight Switchers), but with an increased funding limit for repowering projects as set forth in Paragraph 6, above. In the alternative, the existing Category 3 (Freight Switchers) could be amended to cover commuter rail diesel locomotives.

Replacing or repowering commuter rail diesel locomotives, or electrifying commuter lines and replacing diesel with electric locomotives, is an effective means of reducing NOx emissions. For example, Tier 0 and Tier I diesel locomotives emit over six times more NOx than Tier 4 locomotives. Because locomotives have a long useful life, NOx emission reduction benefits would continue over a long period of time. Additionally, as commuter rail systems tend to operate in urban areas, the NOx reductions would be concentrated in urban areas.

8. Expand Category 4 to Include Other Commercial Vessels.

Category 4 as written allows Trust Funds to be used to repower certain ferries and tugs. Ferries and tugs are significant sources of NOx in port areas with air quality problems. Other types of commercial vessels also have substantial NOx emissions, which contribute to shoreline air quality problems. The States request that you expand Category No. 4 to include other commercial vessels which operate locally, and to allow for repowering of ferries/tugs currently powered by coal.

9. Add a New Category for Idle Reduction Technology for Trucks, Buses, Freight Switchers, Ferries/Tugs, Commuter Rail Diesel Locomotives, and Emergency Response Vehicles.

The States request the addition of a new category of Eligible Mitigation Actions for installation of Idle Reduction Technology on Large Trucks (Category 1), Buses (Category 2), Freight Switchers (Category 3), Ferries/Tugs (Category 4), Medium Trucks (Category 6), the requested new Commuter Rail Diesel Locomotive category (Paragraph 7, above), and for emergency response vehicles. Idle Reduction Technologies, such as auxiliary power units, reduce NOx emissions, as well as emissions of PM 2.5, greenhouse gases, and volatile organic compounds. Idle Reduction Technology is only eligible under the DERA program in conjunction with an emission control measure such as a diesel oxidation catalyst ("DOC") or particulate filter. However, model year 2007 and newer vehicles are equipped with DOCs and particulate filters. As a result, Idle Reduction Technology under DERA is only available for model year 2006 and older vehicles. Three years ago Maryland

operated an idle reduction technology program and over 85% of participating vehicles were 2007 or newer. The Eligible Mitigation Action for Idle Reduction Technology should be available for all model year vehicles.

10. Increase the Percentage of Eligible Mitigation Action Costs that Beneficiaries May Use for Administrative Expenditures.

Appendix D-2 at Page 10 limits the use of Trust Funds for administrative expenditures to 10% of the total costs of an Eligible Mitigation Action. The States request an increase in this limit to 15%, which would match the limit under the DERA Program.

As stated above, some states have found that DERA's 15% limit has been insufficient to cover their administrative costs under the DERA program. Thus, the more stringent 10% limit applicable to the Mitigation Trust would likely cause the states to incur significant, unreimbursed expenses. It may even cause some states to refrain from participating in the program to the full extent of their share of the Trust Funds. Increasing the limit to 15% would assist states in covering their administrative costs and promote full utilization of Beneficiaries' shares to ensure that the Mitigation Fund's NOx emission reduction goals are fully realized.

IV. Conclusion.

The States reiterate their appreciation for the efforts of DOJ and EPA on this matter, and respectfully request that DOJ make the changes requested above prior to moving for entry. The undersigned are available to discuss this matter at a mutually convenient time. Thank you.

Respectfully submitted,



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