

EXHIBIT 4A

Comments Received by Department of Justice

(VW-2LCMT0000001-VW-2LCMT0000127)

From: Randall Pasek
To: ENRD, PUBCOMMENT-EES (ENRD)
Sent: 8/5/2016 1:35:37 PM
Subject: Fwd: Comments VW Clean Diesel Consent Decree – Case 3:15-md-02672-CRB

Advanced Environmental Group, LLC
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----- Forwarded message -----

From: **Randall Pasek** <randallp@aegtechnology.com>
Date: Fri, Aug 5, 2016 at 10:20 AM
Subject: Comments VW Clean Diesel Consent Decree – Case 3:15-md-02672-CRB
To: pubcomment-ees.enrd@usdoj.gov
Cc: Ruben Garcia <rubeng@aegtechnology.com>, "Capt. John Holmes" <johnh@aegtechnology.com>, Ron Moore <ronm@aegtechnology.com>

We at Advanced Environmental Group LLC (AEG), are pleased to submit comments on the VW Clean Diesel Consent Decree. AEG has developed and has the exclusive right to own and operate the Advanced Maritime Emissions Control System (AMECS) and the Advanced Locomotive Emissions Control System (ALECS). AMECS is California Air Resources Board (CARB) approved as an alternative technology for compliance with California's at-berth regulation for ocean going vessels. Both AMECS and ALECS use the same emissions control system and have been proven to control greater than 95% control of the NOx, SOx, and PM emissions from the diesel powered engines used on ships and locomotives.

Our comments are specific to ocean going vessel (OGV) and locomotive emission reduction projects. Because OGV and locomotive diesel engines are quite large and in the case of OGV can burn high emitting fuel, their emissions are significant. In addition, ships and trains typically operate in or near communities that have historically borne a disproportionate proportion of the adverse impacts of such emissions, and as a result, their control should be an important part of VW's environmental mitigation actions portfolio. Appropriately, both OGV and locomotive projects are eligible.

We note that eligible mitigation actions are limited to shore-side shorepower systems and locomotive switcher repowers. We would strongly encourage that in addition to these actions, alternative technologies that offer similar cost effective emission reductions from OGV and locomotives also be allowed. For example, a single AMECS unit can reduce up to 70 tons per year of NOx, 7 tons of SOx, and close to one ton of PM emissions. More importantly, the AMECS could be used by many more vessels and vessel types as no retrofitting of the ship is needed as is required to use the shorepower equipment, resulting in more opportunities to generate emission reductions at lower overall cost. Similar emission reduction opportunities are available at rail yards with the use of the ALECS.

Overall we believe there are opportunities to build and operate several AMECS and ALECS units in California which would generate significant emission reductions at lower cost. We recommend that alternative technologies that offer equivalent or better cost effective emission reductions be included in the eligible environmental mitigation actions. We appreciate your consideration of our comments and please feel free to contact me at [REDACTED] or randallp@aegtechnology.com should you have any questions.

Best Regards,

Randall Pasek, VP

Technology and Government Relations

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August 5, 2016

Assistant Attorney General,
U.S. DOJ--ENRD, P.O. Box 7611,
Washington, D.C. 20044-7611.
By email to pubcomment-ees.enrd@usdoj.gov.

In re: Volkswagen ``Clean Diesel'' Marketing, Sales Practices, and Products Liability Litigation, Case No: MDL No. 2672 CRB (JSC), and D.J. Ref. No. 90-5-2-1-11386.

Dear Sir or Madam,

We, the undersigned parties, appreciate this opportunity to comment on this partial settlement. We represent a diverse coalition of organizations working for clean air and public health in Texas. It is our hope that these funds be used to mitigate air pollution in Texas in a way that is fair, equitable, and effective. We hope that Texas will add these funds to its existing programs to mitigate air pollution. We also hope that some of these funds are dedicated to programs that specifically benefit the low income communities of color throughout Texas that are disproportionately impacted by air pollution.

I. Receipt of settlement funds should be conditioned on full funding for existing NOx mitigation programs.

There are several existing programs in Texas that provide funding for NOx mitigation from mobile sources, including the Texas Emission Reduction Plan (TERP) and AirCheckTexas Drive a Clean Machine — Vehicle Repair Assistance Program (LIRAP). These programs have been part of our state's ozone State Implementation Plan (SIP) for years. Their continued administration is necessary to bring Texas' ozone nonattainment areas—Houston and Dallas—into attainment of the ozone National Ambient Air Quality Standard (NAAQS). Each biennium in Texas, our organizations engage in budget negotiations at the state legislature with the goal of securing as much funding for these programs as possible. They are proven, cost-effective programs to mitigation NOx pollution from mobile sources and work toward attainment of the ozone NAAQS.

The funds available in this settlement are likewise necessary to mitigate air pollution created by Volkswagen vehicles. Because Volkswagen is responsible for more mobile source pollution than was previously accounted for, it is necessary to use these funds to mitigate this pollution. Without these additional funds, Texas cannot hope to reduce ozone precursor pollution enough to bring our nonattainment areas into compliance with the NAAQS.

In other words, Texas needs each of the above funding mechanisms to reduce mobile source air pollution. Texas cannot reduce its allocations to TERP and LIRAP in anticipation of receipt of VW

settlement funds. To do so would be to jeopardize efforts to bring the state into attainment of the ozone NAAQS. We recommend that receipt of settlement funds be conditioned on states not reducing any existing allocations for NOx mitigation programs. In Texas, this will include the TERP and LIRAP programs.

II. Fund should provide for asthma clinics and asthma interventions in environmental justice communities.

Asthma clinics would provide significant health benefits in Houston's environmental justice (EJ) communities. A 2013 survey by the Healthy Port Communities Coalition found that 27.5% of residents of Houston's Ship Channel communities suffering from asthma or another respiratory illness. This compares to a statewide rate of 12.7%. These higher asthma rates are likely due to the higher burden of pollution in these communities and the lower overall self-reported health and access to healthcare.

In the Houston Independent School District, the schools with the highest asthma rates are located on the east and south sides of Houston—in Houston's EJ communities. Many of the schools with the highest asthma rates lack full time nurses on staff. Additional asthma clinics in these communities would be very beneficial to public health. Other methods to improve health outcomes in these schools and communities include: hiring full time nurses for schools; training for school nurses, coaches, and administrators in asthma recognition and treatment; provision of spirometers and other equipment for asthma screenings; and public education about asthma and its causes and treatment.

III. Conclusion

Air pollution is a serious public health threat in Texas. It is our fervent hope that Texas use funds available from this settlement to mitigate air pollution from mobile sources in ways that are effective, equitable, and efficient. This settlement must not negatively impact existing programs in Texas to mitigate mobile source pollution. These funds must also account for the disproportionate burden of pollution on the health of Texas' environmental justice communities.

Thank you for the opportunity to provide these comments. If you wish to discuss these proposals further, we can be reached at adrian@airalliancehouston.org or 713-528-3779.

Respectfully,

Adrian Shelley
Executive Director
Air Alliance Houston

Tom "Smitty" Smith
Texas Director
Public Citizen

Karen Hadden
Executive Director
Sustainable Energy and Economic Development (SEED) Coalition

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August 1, 2016

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In Re: Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation, Case No: MDL No. 2672 CRB (JSC), and D.J. Ref. No. 90-5-2-1-11386

Dear Sir/Madam:

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

As a presumptive mitigation trust beneficiary, the State of Alabama suggests that, in addition to the eligible mitigation actions listed in Appendix D-2 of the settlement, an open category should be created to allow for the use of funds for more cost effective mitigation projects, including those not directly related to combustion engine emissions.

Again, we appreciate the Department of Justice's actions in reaching this proposed settlement and the opportunity to comment on the proposed consent decree. If you have any questions please contact Larry Brown at 334-271-7878 or email lwb@adem.alabama.gov.

Sincerely,

Ronald W. Gore, Chief
Air Division
Alabama Department of Environmental Management

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Alliance of the Ports of Canada, the Caribbean, Latin America and the United States

Seaports
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August 3, 2016

Submitted by email

Assistant Attorney General
U.S. Department of Justice, Environment and Natural Resources Division
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*In re: Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation,
Case No: MDL No. 2672 CRB (JSC), and D.J. Ref. No. 90-5-2-1-11386*

The American Association of Port Authorities (AAPA) represents the unified and collective voice of the seaport industry, and our comments today reflect the views of our U.S. members. AAPA was pleased to learn that the partial negotiated settlement included two programs that could help reduce emissions in port areas and benefit the communities that surround ports. AAPA is specifically interested in the \$2.7 billion mitigation trust fund and the \$2 billion to promote zero emissions vehicles. Our comments today are offered in order to help ensure that seaports can be strong partners in helping our nation achieve NO_x reductions.

Zero Emission Vehicle (ZEV) Definition. Page 2 of Appendix C provides a definition of ZEV to apply only to on-road vehicles. In port areas, some of the greatest opportunities for achieving zero emissions includes off-road equipment. AAPA, therefore, requests that the definition be expanded to include off-road use.

Appendix D-2. Eligible Mitigation Actions and Mitigation Action Expenditures

Beneficiaries. The proposed consent decree calls for states to be the only beneficiaries of the environmental mitigation trust agreement. Port authorities, as independent state, local and bi-state agencies, should be allowed to apply directly to the trustee for funds rather than apply through the states. This is similar to how the Diesel Emissions Reduction Act (DERA) program works: a percentage of the annual appropriation goes to EPA regional offices, and for the remaining percentage of funding, port authorities apply directly to EPA. AAPA fears that some states will not make ports a funding priority, as not all states are familiar with how port authorities function or the emissions reduction programs they currently employ.

However, some port authorities prefer to work with states to present a coordinated and prioritized list of projects. While port authorities should be allowed to directly submit to the trustee as public beneficiaries, the final settlement should make it clear that port authorities are not precluded from participating through state beneficiaries, and their applications should not be affected adversely when participating through state beneficiaries.

Appendix D-2. Government Versus Non-Government Expenditures

AAPA was pleased to learn that Appendix D-2 includes several categories that could help reduce emissions in port areas including Section 1—Local Freight Trucks and Port Drayage Trucks; Section 3—Freight Switchers, which could be used for on-dock rail; Section 4—Ferries/Tugs; Section 5—Ocean Going Vessels Shorepower; Section 8—Forklifts; Section 9—Light Duty Zero Emission Vehicle Supply Equipment; and Section 10—Diesel Emissions Reduction Act Option. The proposed settlement, however, makes a significant distinction between government-owned and non-government-owned equipment. AAPA believes the lower percentage allowed for non-government-owned equipment will limit the effectiveness of this program's ability to reduce emissions in port areas, as many terminals developed by public port agencies are then leased to private terminal operators, who also own the equipment and vehicles used to move cargo in and around marine terminals.

In addition to the private nature of most terminal operators, drayage trucks are privately owned, either by independent owner-operators or private companies that employ drivers. Drayage truck drivers are some of the lowest paid workers in a port complex, and successful truck replacement programs have required significantly higher government cost-sharing than what is provided in the proposed settlement.

Because of the prevalence of privately-owned vehicles and equipment in and around marine terminals—even those terminals operating on public port authority-owned land—the higher allocations for reducing emissions from government-owned vehicles will not provide much benefit to port communities, even if the money comes through a public entity like a port authority. AAPA asks the parties to agree to a higher level of support for equipment that is part of a public port authority-run or -sponsored program and/or make non-government-owned equipment subject to the same reimbursable rate as government-owned equipment.

Appendix D-2. Section 1—Definition of "New Engine"

AAPA's members have a long history of implementing clean truck programs at ports and have learned what works and what does not. Often the most polluting trucks are the oldest trucks, and it is often more successful and cost-effective to offer an improvement over the current truck year rather than require the most recent model year as the only replacement option. Because drayage trucks do not go long distances, many in the drayage truck industry see limited benefit of expensive new technology, which is often designed to increase fuel efficiency and reduce emissions over long trips. Many drayage truck owners do not believe it is worth the cost-share to buy the newest possible trucks/engines.

AAPA suggests that "any vehicle that produces lower emissions and is newer than the current model" should serve as the definition of "new engine" for the drayage fleet. This definition would allow pre-2007 engines to be replaced with 2007 trucks meeting EPA emission standards rather than requiring 2011-compliant engines. The court might consider a higher reimbursement rate for 2011 engines to encourage greater adoption of the newer technology. Many port truck programs incentivize adoption of newer engines and technology this way. However, AAPA believes 2007 trucks that are emissions-compliant should be permitted if allowed locally. Because AAPA expects higher participation rates from truck owners who can choose between 2007- and 2011-compliant technology depending on their ability to provide a lower or higher private cost-share, adding this option to the settlement would result in more emissions reductions for port communities.

Appendix D-2. Section 5—Ocean Going Vessels (OGV) Shorepower

Section 5 of Appendix D-2 notes that Ocean Going Vessels Shorepower equipment is an eligible expenditure. AAPA suggests that this be expanded to a broader group of technologies that can reduce emissions from ships while berthing at ports, including scrubbers (e.g., METS-1 and AMECS). AAPA recommends that eligible expenditures include any California Air Resources Board (CARB)- or EPA-verified technologies that reduce NO_x, as well as any other technologies the beneficiaries would like to fund. While AAPA supports the CARB and EPA technology verification programs, they often are slow and aren't good fits for small innovative manufacturers. Allowing the beneficiaries additional flexibility to reduce emissions from ocean going vessels would be welcome.

As noted above, AAPA also supports a higher and more equal cost-share for government and non-government sources. At times, shorepower equipment is located on a private terminal within a port authority-owned facility. It also may be more efficient to contract with barge operators for scrubber/bonnet services that can pull up to ships to capture emissions from the stacks of ships.

Appendix D-2. Section 8—Forklifts

AAPA recommends that this section be expanded beyond forklifts to other off-road terminal equipment including yard tractors, rubber-tired gantry cranes (RTGs) and electric bus bars. RTGs, for example, have replaced many forklifts in the port environment because they can handle significantly heavier cargo.

Additionally, the parties are asked to reconsider the requirement that eligible forklifts must be scrapped. AAPA recommends that engine conversions that would reduce diesel emissions by 90 percent or more should not require the engine to be destroyed. As noted above, AAPA also requests that there should be no distinction between the cost reimbursements for non-government-owned and government-owned equipment, and/or the final agreement should classify as government-owned equipment that is part of a public port authority program.

Appendix D-2. Section 10—Diesel Emission Reduction Act (DERA) Option

The DERA program has greatly increased the ability of ports throughout the United States to reduce diesel emissions in their communities. AAPA strongly supports using this successful program as a model. We urge that the trustee be allowed to approve an expansion of current DERA grants, not just be allowed to waive cost-share of future activities. DERA awards have been well-vetted and often have the ability to be expanded very quickly, which would realize reductions in NO_x in port communities more expeditiously.

U.S. ports look forward to helping mitigate the NO_x emissions in their communities by working with the trustee, states and Volkswagen on implementation of the mitigation program and zero-emission programs.

Sincerely



Kurt Nagle
President & CEO



August 5, 2016

The Honorable John C. Cruden
Assistant Attorney General
**United States Department of Justice,
Environment and Natural Resources Division**
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**RE: Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation,
Case No: MDL No. 2672 CRB (JSC), and D.J. Ref. No. 90-5-2-1-11386**

Dear Assistant Attorney General Cruden:

The American Bus Association (ABA) appreciates the opportunity to file comments in response to the Department of Justice's (DOJ) notice opening a period for public comment on the proposed Partial Consent Decree with the United States District Court for the Northern District of California in the lawsuit entitled *In re: Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation*, Case No: MDL No. 2672 CRB (JSC) (Decree). The Decree is intended to partially resolve Clean Air Act and various California claims (including under the California Health and Safety Code) against Volkswagen Group of America, Inc., and others, concerning certain noncompliant 2.0 liter diesel vehicles.

The ABA is the leading trade association representing private and over-the-road passenger motor carrier operators who transport the public and serve the motorcoach industry. ABA has been in operation for 90 years and has over 800 bus operating company members, including both large and small; rural and urban; and intercity, charter and tour operators. Our members provide all manner of passenger transportation services, including intercity scheduled service, charter and tour operations, airport and employee shuttle services, and commuter operations (including subcontracted public transit operations). In addition, ABA membership includes hotels, convention and visitors' bureaus, attractions, restaurants, motorcoach manufacturers and companies providing services to the motorcoach industry.

Motorcoach companies move more than 605 million passengers a total of 65 billion miles annually. These efforts and efficiencies are undertaken as a commercial venture, but also with the goal of improving our environment through reduced pollution and the congestion mitigation benefits that the over-the-road bus industry provides to its passengers and our society as a whole. Based on a 2014

report from MJ Bradley¹ and Associates, motorcoaches are the most environmentally friendly form of surface transportation. It is in this context ABA offers the following comments to Appendix D of the Decree, relating to the Environmental Mitigation Trust. Our comments are offered in the interest of ensuring consistent use of terminology, and to achieve optimum environmental mitigation benefits from projects to be funded from trust payments. Specifically, ABA requests DOJ to consider making the following modifications to Appendix D of the Decree, 1) the applied definitions of Eligible Buses; 2) provide parity between government and non-government buses and diesel engine repowers, with other eligible mitigation activities; and 3) adding outreach and education activities, as an additional mitigation action.

1. Definitions of Eligible Buses

In terms of facilitating execution of Appendix D to the Decree, ABA believes the document would benefit from incorporation of an existing federal term and definition within Eligible Buses, specific to motorcoaches. Although motorcoaches currently fall within the definition of class 4-8 buses, and as such are recognized under DERA, inclusion of the term over-the-road bus or OTRB, as defined in section 301 of the Americans with Disabilities Act of 1990 (42 USC 12181), would provide more specificity. Based on the broad use and acceptance of the term OTRB such as in the Federal Transit Administration's Circular 9040.1E for its rural bus transportation grant programs, the Department of Homeland Security's grant guidance for the intercity bus security grant program and throughout Federal Motor Carrier Safety Administration's policies and procedures, we believe that OTRB is an appropriate term to be added to the Decree. For the purposes of consistency and ease in execution of Appendix D, ABA recommends modifying the description of Eligible Buses under category 2 of Appendix D-2 to explicitly include the term over-the-road bus, as defined in federal law.

2. Parity for Diesel Engine Repowers

The ABA also requests DOJ reconsider distinguishing between government and non-government owned vehicles in terms of buses under category 2 of Appendix D-2, and specifically requests this section be modified to increase the amount available for a diesel engine repower from 40% to 75% or higher. Initially, there is no basis to distinguish between the environmental benefits derived from governmental versus non-governmental vehicles. As previously noted, motorcoaches provide the most environmental friendly mode of surface transportation. There is no basis to discriminate against the private sector in this case, considering motorcoaches fulfill the *same* federal goal of reducing congestion and pollution as public providers, and do so at a lower cost to the Federal Government.

Further, we see no reason for there to be a bias under this program towards electric engines. This is particularly true considering that under the current CMAQ program guidelines, which the Decree adopts in part, the eligible cost share is typically 80% or higher. As well, under the DERA program, all-electric engine repowers are capped at a 60% subsidy level. As the fundamental basis for establishing the Environmental Mitigation Trust is to fund projects to fully mitigate the total lifetime excess emissions from tainted diesel engines, ABA would like to see diesel engines supported at an equal to or higher level as other available engine technologies.

¹ "Updated Comparison of Energy Use & CO₂ Emissions From Different Transportation Modes

3. Support Outreach and Education Activities

Finally, ABA requests DOJ consider adding another mitigation action to the existing list of actions described in Appendix D-2. Based on the success of existing programs and in the interest of being comprehensive, ABA believes an appropriate mitigation action for inclusion in Appendix D-2 would be outreach and education activities. These activities are a large part of the success for both the DERA and CMAQ programs, and have a lasting effect beyond a simple vehicle life. We urge you to consider adding explicitly outreach and education activities to Appendix D-2. We note that “educational publications” are mentioned under Eligible Mitigation Action Expenditures within Appendix D-2, but in the interest of clarity and consistency with existing federal definitions, ABA suggests incorporating language from 23 USC 149.

The ABA appreciates the opportunity to comment on the Decree. We support DOJ’s efforts to address violations of the Clean Air Act, as part of our longstanding commitment to improving air quality and the environment, and look forward to continuing to be part of that solution. We hope you will consider our suggestions and requests related to defining Eligible Buses, funding parity for vehicles and mitigation actions, and supporting educational outreach activities. We are happy to answer any questions you may have regarding the motorcoach industry. We can be reached at 800-283-2877, direct dial (202) 218-7227 or via email at bbuchanan@buses.org.

Sincerely,

A handwritten signature in black ink, appearing to read "Brandon Buchanan". The signature is fluid and cursive, with a long horizontal flourish extending to the right.

Brandon Buchanan
Director of Regulatory Affairs

From: IdleAir TSE Partners
To: ENRD, PUBCOMMENT-EES (ENRD); info@idleair.com
Sent: 8/4/2016 11:04:22 AM
Subject: Re: Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation, Case No: MDL No. 2672 CRB (JSC), and D.J. Ref. No. 90-5-2-1-11386

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

In re: Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation, Case No: MDL No. 2672 CRB (JSC), and D.J. Ref. No. 90-5-2-1-11386.

Dear Mr. Cruden:

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

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

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

Thank you for your consideration.

Sincerely,

Andy Warcaba
Title: President
Organization: American Idle Reduction, LLC
Email: [REDACTED]

Additional Comments: Thank you for assistance in this matter



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August 4, 2016

The Honorable John C. Cruden
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U.S. Department of Justice
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Re: *Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation*, Case No: MDL No. 2672 CRB (JSC), and D.J. Ref. No. 90-5-2-1-11386

Dear Mr. Cruden:

On behalf of the American Lung Association, I am writing to provide our comments on *Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation*. The American Lung Association is the nation's oldest voluntary health organization. Our mission is to save lives by improving lung health and preventing lung disease. There are more than 33 million Americans living with chronic lung disease, and according to our 2016 *State of the Air* report, more than 166 million people live in counties that receiving a failing grade for ozone or particulate matter pollution. On behalf of all these individuals who are at high risk of adverse health effects from breathing polluted air, we offer our comments on the proposed consent decree.

The continued use of these high emitting Volkswagen vehicles threatens the health of millions of Americans each day. We commend the U.S. Department of Justice, the U.S. Environmental Protection Agency, the California Attorney General and the California Air Resources Board for working diligently to reach this settlement promptly and to send a signal to Volkswagen and others about the importance of compliance with vehicle emission standards.

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In September 2015, we wrote to the Attorney General outlining our concerns about the magnitude of violation and our recommendations for enforcement actions and mitigation. We are encouraged by many elements of the proposed consent decree designed to mitigate the excess oxides of nitrogen (NO_x) emissions from the Volkswagen vehicles. However, we believe that this settlement could provide greater protection for the public from the significant health threats discussed below.

Volkswagen's Intentional Actions Pose Serious Threats to Human Health

The health effects of air pollution are well established. Excess emissions from the Volkswagen diesel vehicles creates nitrogen dioxide and contributes to ozone and particulate matter. These pollutants cause premature deaths and other well-documented adverse health effects. The reckless and deliberate violation of the law by Volkswagen created thousands of tons of additional pollution that continues to impact the health of the American people.

Nitrogen dioxide

Nitrogen dioxide (NO₂) has long been recognized as a widespread and harmful air pollutant. As EPA concluded in the 2016 *Integrated Science Assessment* for this pollutant (ISA), nitrogen oxides, including NO₂, cause a range of harmful effects on the lungs, including increased inflammation of the airways; worsened cough and wheezing; reduced lung function; increased risk of asthma attacks; greater likelihood of emergency department and hospital admissions; and increased susceptibility to respiratory infection, such as influenza. Greater evidence now exists showing that long-term exposure to NO₂ likely causes the development of asthma in children. New evidence also links short- and long-term exposure to cardiovascular harm, diabetes, premature death, poor birth outcomes and cancer.¹

Children, older adults, and people with asthma or other lung disease and people with cardiovascular disease are at greatest risk. These categories include millions of people. For example, there are an estimated 24 million people, including 6.3 million children, with asthma in the U.S.²

In addition, people who work, live or attend school along major highways also face increased risk, especially those living within 300 feet of a 4-lane or larger highway, railroad or airport.³ In 2008, EPA cited the most current assessment of that population at 47.8 million people, based on the 2003 American Housing Survey.⁴ EPA cited the likelihood that "[p]eople living or spending time near or on roads" would face "increased risk for NO₂-related health effects" as one of the major findings in this current review of the science in the 2016 ISA.⁵

Ozone

Oxides of nitrogen are primary precursors in the formation of ozone, one of the nation's most widespread air pollutants. As documented in the 2013 *Integrated Science Assessment*, ozone poses multiple risks to human health. The strongest research documents the impact of ozone on respiratory symptoms, lung function changes, emergency department visits for respiratory disease, and hospital admissions, particularly for children with asthma. Evidence has also accumulated about the cardiovascular effects of ozone, particularly for increased risk of premature death. New studies warn that short- or long-term exposure to ozone may affect cognitive abilities and pose reproductive and developmental harms.⁶

Particulate matter

Nitrogen oxides form particulate matter in the atmosphere. Particulate matter can stay suspended in the atmosphere for days or weeks and be transported into nearby neighborhoods or even hundreds of miles, affecting people in neighboring cities and states. Once inhaled, fine and ultrafine particulate matter bypasses clearance mechanisms and penetrates deep into the lung, and crosses into the cardiovascular and other systems carrying with it other toxic substances.⁷

Exposure to particulate matter can kill. Multiple long-term studies have confirmed that breathing high levels of particulate matter pollution day in and day out can be deadly.⁸ In late 2013, the International Agency for Research on Cancer, part of the World Health Organization, concluded that particle pollution could cause lung cancer.⁹

Several Provisions in the Proposed Consent Decree Must Be Strengthened

We have significant concerns about the following provisions and believe these inadequacies must be addressed in the proposed consent decree or through the civil penalties and injunctive relief that is still to come.

Buyback and Repair

We object to the provisions of Appendix A VII 7.2.3 Sale and Export of Returned Vehicles of the consent decree that indicates that Volkswagen may sell, resell or export returned vehicles, provided the Approved Emission Modification has been made. The proposed consent decree indicates that even after such an approved modification is made, the vehicles will continue to emit NOx well in excess of the levels that were required by the certification standards. This means that the public will continue to breathe additional air pollution emitted from the tailpipes of these vehicle in their communities. This is unacceptable because it will perpetuate the excess pollution burden for more than a decade. As has been shown through numerous studies of

communities with elevated levels of pollution, continuing to allow excess emissions disproportionately burdens the people living, working or attending school there.

We believe that ALL vehicles should be repaired to comply with the Clean Air Act new vehicle certification and in-use compliance requirements. We strongly object to the provisions of the proposed consent decree that permit Volkswagen to resell any vehicle it or its dealers buy back from a customer unless such vehicle can be repaired in such a way that it complies with its original certification standards and the original in-use standard.

Volkswagen should be required to scrap returned vehicles that cannot be repaired to full compliance with the original certifications standards. Volkswagen should be prohibited from selling or exporting these high-emitters, which will halt the continued harm to public health and air quality from their excess pollution.

We acknowledge that some individual consumers will not want to sell their vehicles back to Volkswagen. To ensure that such consumers comply with the recall, it may be prudent to allow that smaller number of vehicles to be repaired with a fix that partially mitigates the damage as much as is technically feasible, rather than having those vehicles continue to operate with the defeat devices in use. We appreciate that the proposed consent decree includes incentives to encourage consumer participation and penalties on Volkswagen if the 85 percent compliance threshold is not met.

Registration of 2.0 Liter Subject Vehicles

We strongly object to the provisions of Appendix D 4.2.9 and Appendix D-3 paragraph 9 that preclude states from preventing the registration of noncompliant vehicles. States should not waive their rights to protect the health of their citizens by using all available tools, including the denial of registrations to vehicles that do not participate in the recall and repair. Many communities continue to be burdened with unhealthy levels of air pollution. States should be able to enact and enforce state regulations to require that vehicles that emit up to 40 times the allowable limit of air pollution comply with the recall. The proposed consent decree includes significant financial incentives for vehicle owners to comply with the recall and repair of their vehicles. States should not be required to waive their rights to maximize compliance with the recall program.

Mitigation Fund and Reporting

The American Lung Association strongly supports the creation of the mitigation fund. The ten categories of projects present opportunities for significant pollution reduction and strongly support the provisions that require the scrappage of eligible vehicles. However, we see elements in the proposed consent decree that must be addressed.

We are concerned about the lack of transparency and reporting of the expected NOx reductions from the mitigation actions. Appendix D 3.3 requires financial accounting and reporting, but section 3.3.1.7 requires only a "brief description of all action," and section 4.1 (iii) requires a description of the "potential beneficial impact ... on air quality in areas that bear a disproportionate share of air pollution and 4.1 (iv) "a general description of the expected ranges of emission benefits" ... and "only provide the level of detail reasonably ascertainable at the time of submission."

This reporting is woefully inadequate. The proposed consent decree is designed to mitigate the excess NOx pollution of approximately 500,000 vehicles that were willfully designed to circumvent certification tests and greatly exceed emission standards. The breathing public has a right to know that the mitigation fund will underwrite cleanup strategies that will actually mitigate all the past and future excess NOx pollution.

We strongly recommend that the proposed consent decree be modified to provide detailed public reporting and auditing. At minimum, the semiannual reports required by Appendix D Section 3.3. should include a detailed listing of each project, including the model year or manufacturing year of the original vehicle and the relevant NOx emissions profile for such vehicle and, where applicable, the mileage or hours of operation and expected remaining useful life for the vehicle and/or engine. In addition, the primary operating location of the vehicle should be reported. The report also must include NOx emissions certification standard for the replacement.

The expected NOx reductions should be calculated and reported for each vehicle on an annualized basis for the remaining useful life of the replaced vehicle or engine. These reports should be published on a publicly accessible website within 30 days of their receipt by the U.S. Environmental Protection Agency. Further, a comprehensive report on total NOx emission reductions by state should be compiled and published on a publicly available website.

Finally, an independent auditor should be engaged to review and audit all the semiannual reports and the annual comprehensive report. The audit findings must be published on a publicly accessible website.

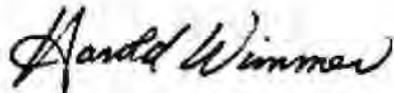
ZEVs

We support the ZEV Investment Commitment. We believe the program would be strengthened if the annual and final reporting included data on NOx emission reductions or NOx emissions avoided as a result of the ZEV investment.

Conclusion

Volkswagen's willful violation of Clean Air Act and California law is inexcusable. It is clear that the public will continue to bear the burden of additional air pollution for many years. We appreciate that the proposed consent decree strives to mitigate the harm. We urge you to address the concerns we raise to show to the public that there is a robust program to offset the excess the pollution.

Sincerely,



Harold P. Wimmer
National President and CEO

CC. The Honorable Charles R. Breyer, Senior District Judge, U.S. District Court, Northern District of California
The Honorable Gina McCarthy, Administrator, U.S. Environmental Protection Agency
The Honorable Kamala Harris, Attorney General, State of California
The Honorable Mary Nichols, Chair, California Air Resources Board



¹ U.S. Environmental Protection Agency. Integrated Science Assessment for Oxides of Nitrogen – Health Criteria. EPA/600/R15/069. January 2016.

² Centers for Disease Control and Prevention. National Center for Health Statistics. National Health Interview Survey, 2007-2010 and 2014. Analysis performed by American Lung Association Epidemiology and Statistics Unit using SPSS software.

³ U.S. EPA, 2016.

⁴ U.S. EPA, "Primary National Ambient Air Quality Standards for Nitrogen Dioxide, Final Rule." 75 *Fed. Reg.* 126 (9 February 2010).

⁵ U.S. EPA, 2016. Executive Summary, page lxxxvii.

⁶ U.S. Environmental Protection Agency. Integrated Science Assessment for Ozone and Related Photochemical Oxidants. EPA/600/R-10/076F. February 2013.

⁷ U.S. Environmental Protection Agency. Integrated Science Assessment for Particulate Matter. EPA 600/R-08/139F. December 2009.

⁸ U.S. EPA, 2009.

⁹ Hamra GB, Guha N, Cohen A, Laden F, Raaschou-Nielsen O, Samet JM, Vineis P, Forastiere F, Saldiva P, Yorifuji T, and Loomis D. Outdoor Particulate Matter Exposure and Lung Cancer: A Systematic Review and Meta-Analysis. *Environ Health Perspect.* 2014; 122: 906-911.



ARKANSAS
Department of Environmental Quality

August 5, 2016

via email: pubcomment-ees.enrd@usdoj.gov

Assistant Attorney General
Environment and Natural Resources Division
United States Department of Justice
U.S. DOJ – ENRD
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In Re: Volkswagen “Clean Diesel” Marketing, Sales Practices, and Products Liability
Litigation, Case No: MDL No. 2672 CRB (JSC), and D.J. Ref. No. 90-5-2-1-11386

Dear Sir/Madam:

The Arkansas Department of Environmental Quality (ADEQ) appreciates the opportunity to comment on the Partial Consent Decree in Case No: MDL No. 2672 CRB (JSC) as stated in the “Notice of Lodging of Proposed Partial Consent Decree under the Clean Air Act.” With regard to Appendix D-2, Eligible Mitigation Actions and Mitigation Action Expenditures, ADEQ encourages consideration of the following three NOx emission reduction strategies for inclusion in the list of eligible mitigation actions:

1. conversion of existing government-owned, light-duty vehicles to natural gas and related infrastructure;
2. repower and replacement of government-owned, light-duty vehicles;
3. truck stop electrification infrastructure; and
4. increasing allowable funding to 100% for school bus repower/replacement for private schools.

ADEQ also suggests that the model year ranges eligible under Action 1 (Class 8 Local Freight Trucks and Port Drayage trucks) and Action 6 (Class 4 – 7 Local Freight Trucks) be updated with each progressive year. For instance, in year one, 1992 – 2006 vehicles would be eligible. In year two, 1992 – 2007 vehicles would be eligible and so forth. A similar progressive vehicle eligibility date should be included if our suggestion to expand eligibility for repower, conversion, and replacement projects to light-duty, government-owned vehicles is heeded.

Opportunities exist for economic development combined with emissions reductions for state and local government automotive fleets. Arkansas, and many other states, have vast natural gas resources that could be further developed to provide infrastructure for fueling natural gas-powered vehicles, thus providing for economic opportunities and job creation as well as significant reductions of nitrogen oxides (NOx), as well as carbon monoxide (CO), carbon dioxide (CO₂), particulate matter (PM), and volatile organic compound (VOC) emissions.

ARKANSAS DEPARTMENT OF ENVIRONMENTAL QUALITY

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VW-2LCMT0000020

Therefore, ADEQ requests that eligibility for repower and replacement be expanded to include government-owned light-duty vehicles. In particular, ADEQ strongly recommends that conversion of government-owned, light-duty vehicles to natural gas be included as an eligible mitigation action. Because light-duty vehicles have different lifespans and uses than do medium- and heavy-duty vehicles, ADEQ suggests that conversion projects be funded at 100 % for light-duty vehicles with model years 2010 and older and at 40 % for light-duty vehicles with model years 2011 and newer. ADEQ also recommends that expansion of alternative fuel-related infrastructure be included as an eligible action under the VW settlement consent decree. Such actions would allow State and local governments in Arkansas to reduce emissions from their fleet by converting older vehicles into vehicles capable of using plentiful, clean-burning natural gas.

Truck stop electrification is the most cost-effective method of achieving NOx emission reductions currently available according to Federal Highway Administration, and it has the co-benefits of reducing fuel use and reducing emissions of other pollutants. Idling of heavy-duty diesel-powered trucks during rest periods is a major source of NOx emissions. Long haul drivers are required to spend eight hours at rest for every ten hours of driving time. Consequently, large numbers of trucks idle at truck stops for required rest periods at all hours of the day and night, nationwide. While on-board electrification technologies are suitable only for appropriately equipped trucks, all trucks may take advantage of off-board technologies. Truck stop electrification allows trucks to maintain power, heat, air conditioning, and other electrified operations while engines are powered off, thus preventing significant NOx, CO₂, CO, PM and VOC emissions. Cost-effectiveness is estimated at \$2,000 per short ton of NOx. In order to achieve the greatest possible amount of NOx reductions with the funds available to states under the settlement, ADEQ encourages the inclusion of truck stop electrification in the list of eligible mitigation actions. ADEQ recommends that truck stop electrification projects should be eligible for funding at 60 – 80 % of the eligible mitigation action, which is consistent with the funding levels for light-duty electric vehicle supply equipment installed at non-government-owned properties.

School buses are ubiquitous in both urban and rural areas throughout the United States. The repower and replacement of school buses with cleaner engines/vehicles affords tremendous opportunity to improve air quality generally. Additionally, decreased emissions from school buses will be protective of students exposed to those emissions both at school and along bus routes. ADEQ requests that school buses serving both public and private schools be eligible for repower/replacement at the 100% funding level.

Once again, ADEQ appreciates the opportunity to provide comments on eligible mitigation actions available under the VW settlement consent decree. We respectfully request thorough consideration of our comments and suggestions.

Sincerely,

A handwritten signature in black ink, appearing to read 'Stuart Spencer', written over a horizontal line.

Stuart Spencer, Associate Director
Office of Air Quality
Arkansas Department of Environmental Quality

Association of TSE Providers
629 North Broadway
Knoxville, TN 37917

August 5, 2015

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

In re: Volkswagen “Clean Diesel” Marketing, Sales Practices, and Products Liability Litigation, Case No: MDL No. 2672 CRB (JSC), and D.J. Ref. No. 90-5- 2-1- 11386.

Dear Mr. Cruden:

The Association of Truck Stop Electrification Providers includes the companies Shorepower Technologies and IdleAir, which own and operate a network of over 3,500 electrified truck parking spaces nationwide. ATSEP appreciates this opportunity to comment on the Notice of Lodging of Proposed Partial Consent Decree Under the Clean Air Act, which was published in the Federal Register on July 6, 2016 (81 Fed. Reg. 44,051). The notice pertains to the proposed partial Consent Decree (CD) with the United States District Court for the Northern District of California in the lawsuit entitled In re: Volkswagen “Clean Diesel” Marketing, Sales Practices, and Product Liability Litigation, Case No: MDL No. 2672 CRB (JSC).

ATSEP recommends that the final settlement provide maximum flexibility for States and Native American tribes to allocate Environmental Mitigation Trust funds to truck stop electrification (TSE), which the EPA considers to be one of the most cost-effective method for reducing NOx emissions. Specifically, we ask that the final settlement expressly list truck stop electrification as an eligible mitigation action within Appendix D-2, along with the nine other activities that already include various forms of diesel retrofits and the marine equivalent of TSE. In addition, we recommend that the settlement allow the Trust to allocate up to 80 percent of the total cost of developing a new TSE facility. Finally, we recommend that the final settlement allow the Trust to fund TSE vouchers to encourage more truckers to use existing TSE facilities.

The scale of emissions from heavy duty truck idling is enormous. According to estimates by the Argonne National Laboratory, rest-period idling wastes about 1 billion gallons of diesel and results in the emission of about 55,000 tons of nitrogen oxide (NOx) released annually in the U.S. This is because most truck drivers idle their engines during overnight stays in order to maintain a safe and comfortable interior environment. In the

TSE is an EPA SmartWay verified technology, which provides long-haul truck drivers with an alternative to overnight idling. Studies conducted by the EPA and the Federal Highway Administration rate TSE as the single most cost effective activity to mitigate mobile sources of NOx emissions (less than one third of the cost per ton achieved through diesel retrofits). Significant NOx mitigation can be achieved through: (1) installation of new TSE locations; and (2) TSE vouchers for truck drivers to encourage more truckers to use existing TSE facilities. These TSE activities should be explicitly listed in Appendix D-2 as “Eligible Mitigation Actions.”

Although TSE is technically eligible under the draft settlement’s DERA Option, the DERA program does not provide adequate incentives to expand the use of TSE. TSE is still an emerging business that is moving toward long term sustainability. In the currently depressed diesel price environment, the DERA reimbursement cap of 25 percent

for new TSE infrastructure has proven insufficient. The TSE industry has only added one new location using DERA funds under the current 25 percent grant cap. In the meantime, three DERA awards for TSE were declined or predominantly scaled back by the applicants in the past year because the economics did not work under the current guidance. And no TSE funding applications were submitted to DERA in 2016. In contrast, IdleAir has developed several new facilities (four in the last year, with five more in our construction queue) using DOT CMAQ funds, which provide a federal cost share of up to 80 percent. In addition, the DERA program does not provide TSE vouchers for truck drivers. A voucher distribution program would be an extremely efficient mechanism to dramatically increase use of existing TSE facilities.

Below we provide additional details on how facilitating the investment of VW settlement funds in TSE will lead to significant reductions of NO_x and other harmful air emissions, while directly benefiting disadvantaged communities.

I. About TSE/ EPS

TSE is verified under the EPA SmartWay program as Electrified Parking Spaces ("EPS"), provides long-haul truck drivers an alternative to idling their main engines to maintain a comfortable cabin temperature, sustain vehicle battery charge and power electronics such as televisions and laptops during their overnight stays.¹ TSE/EPS provides other benefits such as cleaner air with the reduction of black carbon and soot emitted from diesel engines, reduced noise pollution, local job creation, and an increased tax base for the local economy. Truck drivers benefit from improved sleeping conditions without the noise, vibration and exhaust fumes from idling and they are therefore better rested and safer on the road. All motorists benefit from the increased alertness that results from better rested truck driver and an overall cleaner environment. See Appendix A (*Truck Drivers who sleep with their engines turned off while receiving externally supplied filtered air for heating and air conditioning enjoy a significantly improved quality of sleep compared to those who sleep with their truck engines idling. Truck Drivers are an "at risk" population more likely to be involved in crashes due to fatigue secondary to sleep disorders.*)

The basic economic and environmental proposition for is simple - 1.5 kW/hr. hotel load of HVAC centric services can offset a full gallon of typical diesel waste per hour of idling. Even if TSE were using grid power generated exclusively from coal-fired combined cycle power plants, our GHG reduction would still be over 75%, compared to an idling 500 hp diesel engine. Local NO_x, SO_x, and PM 2.5 emissions drop more than 95% when our stationary electric air conditioners replace a roaring truck engine running at idle speeds. Because TSE also offsets VOC emissions on site, there are immediate reductions in ground-level ozone formation that would otherwise impact vulnerable populations living near these facilities.

The trucking industry is heavily regulated and truck drivers themselves face a number of requirements that have a significant effect on their daily routines and quality of life. Hours of Service rules require all Class 8 drivers to take a stationary rest for 10 hours every day after no more than 14 hours of work (made up of no more than 11 hours of driving and a maximum of 3 hours of additional non-driving work). Since drivers are in a confined metal 'box', they are obliged to seek interior comfort by idling their engine when alternatives to idling are not available. This dynamic creates a significant amount of unmet demand for TSE/EPS.

II. TSE/EPS mitigates diesel emissions from OLDER truck engines.

¹ SmartWay Verified List of Idling Reduction Technologies (IRTs) for Trucks and School Buses. Available at <https://www.epa.gov/verified-diesel-tech/smartway-verified-list-idling-reduction-technologies-irts-trucks-and-school>. Accessed July 5, 2016. See listing number 64 and 66 for IdleAir and Shorepower Technologies, respectively, on Verified list.

TSE/EPS users operate disproportionately older trucks, because we serve a disproportionately high population of owner operators. Unlike fleet drivers, owner operators pay for their own fuel, and are therefore most conscious about not wasting their fuel. The enclosed distribution data on IdleAir's customer base indicates that the average engine year is 2006.5. See Appendix B. Accordingly, our service yields a forecastable and larger NOx reduction than services which address a more modern cross-section of the fleet on the road today. Newer model year trucks do emit substantially less NOx. However, diesel APU's and diesel compressors for transport refrigerated units can also be powered down at TSE/EPS enabled parking spaces, to the extent those units are outfitted with electric standby, a feature increasing in adoption. These unfiltered diesel engines often emit even more NOx than the main engine of new trucks, and comprise an increasing proportion of our customer base.

III. Extended truck idling is a LARGE problem with a SIMPLE solution.

The scale of emissions from heavy duty truck idling is enormous. According to estimates by the [Argonne National Laboratory](#), rest-period idling wastes about 1 billion gallons of diesel and results in the emission of about 55,000 tons of oxides of nitrogen (NOx) released annually in the U.S.² This is because most truck drivers have no alternative but to idle their engines during overnight stays in order to maintain a safe and comfortable interior environment. In the past decade, the IdleAir network alone saved drivers 63 million gallons of diesel and 8,366 tons of NOx. The pollution impacts of truck stops have a disproportionate impact on disadvantaged communities where most truck stops and fleet terminals tend to be located. The DERA program flags the communities surrounding truck stops for programmatic priority.

Heavy-duty trucks are the second largest and fastest growing segment of the U.S. transportation sector in terms of emissions and energy use. The trucking industry hauls about 70 percent of all freight in the U.S. Medium and heavy-duty vehicles currently account for about 20 percent of GHG emissions and oil use in the U.S. transportation sector, but are only about 5 percent of the vehicles on the road.³

IV. TSE effectively targets disadvantaged communities.

Truck Stops are typically unwanted local land uses due to the noise, pollution and traffic they cause. As a result, they are often located near disadvantaged neighborhoods, which generally lack the resources and to fight the siting and permitting of truck stops. For example, populations within 1.5 miles of IdleAir's 15 Texas locations consists of 65% more minorities and have per capita income 24% lower than the statewide average. See Appendix C. There is a close correlation between truck stop siting and disadvantaged communities. We maintain that that correlation is more direct than between the operational ranges of older diesel engines and disadvantaged communities, a factor we understand that has helped form the current draft settlement.

V. TSE is HIGHLY cost effective.

To be sure, ATSEP agrees with eligibility of the existing nine enumerated mitigation actions. It is our position, however, that States and Tribes should have equal access to the lowest hanging fruit. The US Department of Transportation, through the Federal Highway Administration⁴, as well as EPA⁵, separately rate truck stop

² See http://www.afdc.energy.gov/uploads/publication/hdv_idling_2015.pdf. Visited August 3, 2016.

³ EPA Phase II, "by the numbers." See

<file:///home/chronos/u-55021f1df8ad9b2ec7117371cf7d27e0b1901fa5/Downloads/By-the-numbers.pdf>

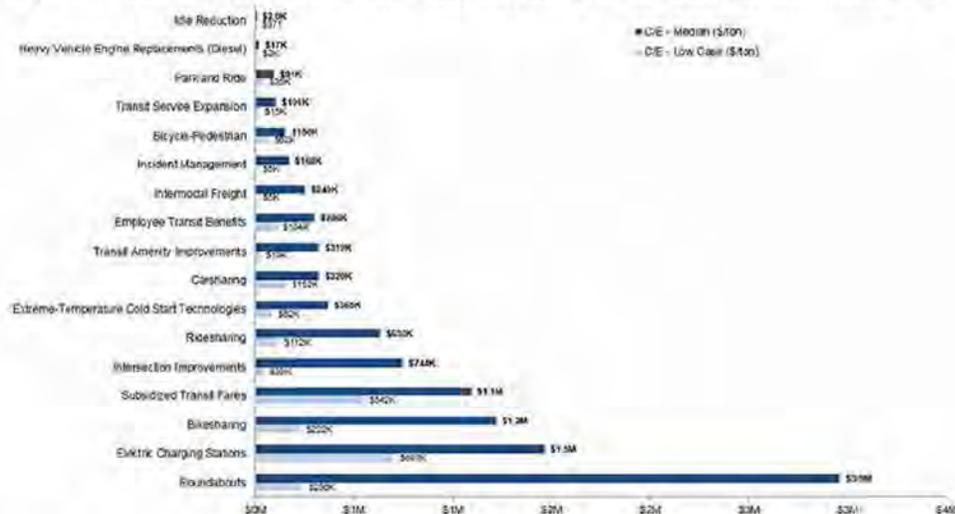
⁴ National Research Council (U.S.) Committee for the Evaluation of the Congestion Mitigation and Air Quality Improvement Program. *The Congestion Mitigation and Air Quality Improvement Program: Assessing 10 years of Experience / Committee for the Evaluation of the Congestion Mitigation and Air Quality Improvement Program*. Available <http://onlinepubs.trb.org/onlinepubs/st/sr264.pdf>. Accessed July 6, 2016.

See also, United States Department of Transportation. *Congestion Mitigation and Air Quality (CMAQ) Improvement Program - Cost Effectiveness Tables Development and Methodology*. Available

electrification as the single most cost effective solution to mitigate NOx emissions. Selected pages from a 2015 DOT report finding on-road idle reduction as the most cost effective technology are appended hereto as Appendix D. The EPA report cited rates TSE as the most cost effective on page 13 at median \$1.7k/ton of NOx (scoring diesel retrofit at a median cost of \$5,950/ton of NOx). We note that this report, while published in 2007, is the most recent EPA analysis on point. Total installation costs for IdleAir, the company informing the data, has decreased by around 50% since the time of the stated assumptions. We also note that sales data demonstrates that even better cost effectiveness can be achieved if limited vouchers are distributed to truck drivers for higher utilization of existing infrastructure during this period of relatively inexpensive fuel. See Appendix E.

See also Figure 3. Titled Median Cost-Effectiveness Estimates (Cost per Ton Reduced) of NOx Emission Reductions. which can be found at the following link:

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



VI. The DERA option will not create significant TSE network improvements.

EPA makes clear that TSE is eligible for settlement funds under the DERA Option. The requirement to fund TSE through DERA, however, is not a simple expansion of the eligibility list. This is especially true for TSE, which has unique obstacles under DERA. States and Beneficiaries will simply not have a fair chance to support TSE under the current draft, for the following reasons:

1. ATSEP does not expect States and Tribes to incur the administrative burden of DERA when they can directly fund nine other mitigation actions. Some States (four we are currently aware of) currently decline their DERA allocations altogether. The VW settlement will allow beneficiaries an alternative to declining federal funds, which will increase the number of beneficiaries that chose alternatives to DERA.
2. Even if beneficiaries are convinced that that the cost effective technology is worth the additional administrative burden, the DERA rules simply do not work for TSE from an industry standpoint. As previously stated, with diesel prices so low (DOE national diesel prices have declined over 40% since 2014 prices averaged more than \$4.00/gallon), the DERA reimbursement cap of 25 percent for new TSE infrastructure has proven insufficient. Within the DERA rules, other technologies have a higher reimbursement cap than TSE, more akin to those caps afforded to the nine enumerated mitigation actions within Appendix D-2 of the settlement. The TSE industry has only grown by one location using DERA funds under the current cap, an IdleAir facility in in Chattanooga, TN. Three DERA awards for TSE were either declined or predominantly scaled back by the applicants in the past year,

http://www.fhwa.dot.gov/environment/air_quality/cmaq/reference/cost_effectiveness_tables/report/costeffreport.pdf. Accessed July 13, 2016.

⁵ Available <https://www3.epa.gov/otaq/stateresources/policy/general/420b07006.pdf>. Accessed August 5, 2016.

and no TSE applications were submitted by any entity under DERA in the 2016 round. In contrast, IdleAir has developed several new facilities (four in the last year, with five in our construction queue) using DOT CMAQ funds, which provides a federal cost share of up to 80 percent. In addition, the DERA program does not provide TSE vouchers for truck drivers. This would be an extremely efficient mechanism to dramatically increase use of existing TSE facilities. ATSEP remains eager to coordinate with the DERA program administrators with feedback on how it can be more viable and fair for TSE, however, the current version is simply a nonstarter in this market environment.

VII. TSE/EPS provides a critical network for APUs, eTRUs, and EV charging corridors.

Long range Transport Refrigeration Units (TRUs) are normally cooled by unfiltered diesel compressors that idle 24-hours per day. TSE/EPS providers are establishing a network for refrigerated fleets to be able to plug in and power down while the trailer is at rest. Long Range TRU fleets are unlikely to abandon diesel backup, but more than 70% of TRU idling can be addressed with hybrid electric TRUs, or eTRUs that can connect to our charging stations and at the terminals of the largest refrigerated fleets in the country, their customer facilities, and public truck stops. The existing EPS network will prop up this nascent industry of TRU conversions to hybrid units.

EPA Phase II expects increased adoption of diesel auxiliary power units. CARB's chief complaint relates to the additional NOx introduced by said APUs. A robust TSE network will a) mitigate the need for many trucks to buy APUs and b) provide for electric standby for the increasing proportion of APUs that are capable of electric standby.

Finally, in addition to the current network of TSE locations, TSE providers have existing master leases with the largest truck stop chains in the country. It is inexpensive and efficient for TSE to collocate with high speed electric vehicle charging infrastructure. In fact, several already are. Support for TSE is supporting the network for EV charging where such stations are needed the most.

VII. Our Proposal.

We ask that the final settlement expressly list truck stop electrification as an eligible mitigation action within Appendix D-2 and provide for support in the following ways:

A. Vouchers. We recommend that Beneficiaries be permitted to allocate a portion of their funds for a TSE a voucher program that is designed to increase utilization at existing facilities within state or tribal lands. The program may decrease the cost of service to drivers by up to \$1.00 per hour. Additionally, beneficiaries may provide a \$20 credit for new drivers to use TSE.

IdleAir's data proves that utilization increase by more than 100% for \$.90 decrease in our hourly price between truckstops @ \$2.37/hour and large fleet terminals @ \$1.47/hour. This effectively reduces the cost per ton of NOx to under \$1,000. We have found that meaningful price elasticity exists for TSE demand all the way down to absolute cost to drivers and fleets at \$.75/hour at our highest volume fleet terminal which has been averaging more than 200% of our normal forecast overnight utilization per parking space. Our composite Large Fleet terminal pricing which averaged \$1.47/hour for YTD 2016 has shown utilization averaging slightly more than 9 hours/space per day in July 2016. Alternatively, we have seen our highest price truckstop-centric utilization among independent Owner Operator drivers decline by more than 35% in 1Q16 as diesel prices for the first time in our operating history actually temporarily dipped below our \$2.37 retail price. DOE national diesel prices bottomed at \$2.00/gallon in February 2016 and it was not until diesel prices rebounded back above \$2.35/gallon combined with a lowering of our own prices that we were able to soften the decline in utilization among this economically challenged segment of our customer base. We believe that a modest investment (less than \$5mm) of vouchers administered responsibly among drivers and fleets can help even the playing field for drivers of older vintage trucks while cost effectively leveraging our existing national truckstop infrastructure. See Appendix E.

B. Infrastructure subsidy. We simply ask that the VW Settlement permits States and Tribes to fund TSE in the same manner that DOT's Congestion Management and Air Quality, with an across the board 80% cap on federal reimbursement. It works, it is simple, and it achieves remarkable cost effectiveness.

ATSEP appreciates the opportunity to comment on the partial consent decree. We share your desire to maximize the air quality mitigation realized from the \$2.7B fund. Thank you for considering our perspective, that allowing States and Tribes flexibility to tackle the 1B gallon/year idling problem will further settlement goals.

Should you wish to have any questions, please feel free to contact me at ethan.garber@idleair.com or (917) 238-9813.

Respectfully,

s/ Ethan Garber and s/ Jeff Kim

CEOs of IdleAir and Shorepower

APPENDIX A

Better Sleep for Long-Haul Truckers: A comparison of three conditions. Engine Idling, Engine Off, & in the Sleep Lab.

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ABSTRACT

Study objectives: To evaluate the sleep of Truck Drivers with full-attended Polysomnography on Truckers in their own trucks and on their own schedules (1) with their engine idling, (2) with their engine turned off, (3) in the Sleep Lab.

Design: Test/Retest pilot study with subjects serving as their own controls.

Subjects: 25 truck driver volunteers (22 male) tested under three conditions.

1. With their engines idling (EO); drivers currently must let their engines run while parked to obtain power for heating or cooling while they sleep in the truck cab.
2. With their engines turned off, using conditioned air provided by the Advanced Travel Center Electrification System of IdleAire (IA) Technologies Corporation.
3. In the Sleep Lab (Lab) with standard rooms.

Settings: Petro Truck Stop; Watt Road exit; Knoxville, TN.

East Tennessee Neurology Clinic; Sleep Lab; Knoxville, TN.

Results: Both objectively by polysomnography and subjectively by questionnaire, sleeping with the engine off (IA) was preferred by 84% of the drivers and provided significantly better ($p=.0023$) Sleep Efficiency (84.96% vs 77.73% EO & 72.89% Lab), and significantly fewer ($p=.001$) EKG arrhythmias (42.24 vs 57.92 Lab & 85.6 EO). SAO₂ was significantly lower ($p=.003$) during EO (81.04% vs 85.39% IA & 86.4% Lab) but no significant difference was observed between IA and Lab.

Significant PLMS (> 10.0) was observed in 80% to 88% of all drivers under each test with a significantly higher index ($p=.003$) observed in the Lab.

Significant RDI (> 5.0) was observed in 52% to 64% of all drivers under each test.

Indices were highest during Engine Idling (EO) but not significantly different.

100% of drivers were observed Snoring at least occasionally under each test.

100% of drivers were observed to have at least four Upper Airway Resistance Syndrome (UARS) events under each test (range 4-118).

64% of all drivers indicated poor sleep hygiene with highly variable Bed & Rise Times.

44% of all drivers scored 10 or higher on the Epworth Sleepiness Scale (ESS).

Mean Body Mass Index (BMI) =33.68 kg/m².

Conclusions: Truck Drivers who sleep with their engines turned off while receiving externally supplied filtered air for heating and air conditioning enjoy a significantly improved quality of sleep compared to those who sleep with their truck engines idling (to provide power for the truck's heating and air conditioning system). Truck Drivers are an "at risk" population more likely to be involved in crashes due to fatigue secondary to sleep disorders. Truckers face unique circumstances contributing to unhealthy lifestyles, increased mortality, and job dissatisfaction.

KeyWords: Truck Driver, Truck Stop, Engine Idling, IdleAire, Diesel Exhaust, Sleep.

Citation: Kabbani SA; Haring RA. Better Sleep for Long-Haul Truckers: A comparison of three conditions, Engine Idling, Engine Off, & in the Sleep Lab. (submission pending).

Introduction

Truck Driving is globally recognized as an unhealthy occupation in which the job itself contributes to poor health by promoting erratic schedules, lack of exercise, stress, weight gain, poor diet & poor sleep.³⁻⁸ Exposure to diesel emissions alone have been linked to several types of cancer in this population including pancreatic⁹, bladder^{10, 11}, laryngeal¹², lung¹³⁻¹⁷, renal cell¹⁸, gastric cardia¹⁹, even TB²⁰ and infant leukemia²¹.

Further, the lack of home amenities (bed, bathroom, TV, internet), inadequate health care, and social isolation on the road can have a profound psychological impact on drivers which contributes to the high driver turnover rate in the trucking industry²²⁻²⁶ and can encourage risky health behaviors such as drug use²⁷⁻³³, and prostitution³⁴⁻³⁷.

Trucking is a rapidly growing industry that has gained significant attention recently, notably from the Department of Transportation's Federal Motor Carrier Safety Administrations (FMCSA) flip-flopping on the revised Hours-of-Service Rule¹. Data was collected during this time (Mar-Aug, 2004).

A primary concern involves wrecks due to tired truckers. There are an estimated 2.5 million drivers in the trucking industry logging 10 billion miles per year in the US⁴⁰. The National Highway Traffic Safety Administration's National Center for Statistics and Analysis (NHTSA/NCSA) states that in 2002 large trucks were involved in 434,000 traffic crashes in the U.S. killing 4,897 people^{41, 41a} which cost an average of \$51,000 per accident and \$2.7 million per accident when fatalities were involved^{42,56}. The National Transportation Safety Board (NTSB) reports that roughly 57% of these crashes are fatigue related². A 2000 study reported that 47.1% of long-distance truck driver survey respondents had fallen asleep at the wheel, 25.4% having done so within the past year⁴³. Crash rates are highest in the early morning hours correlating with highest sleep propensity^{38,39}. Several studies including the most recent "Sleep Habits and Accident Risk Among Truck Drivers: A Cross-Sectional Study in Argentina" (Perez-Chada et al) appearing in *SLEEP* 2005⁹⁰ have shown that truck drivers routinely get fewer hours of sleep per night, have poor sleep hygiene, and are more prone to sleeping disorders. Other risk factors contributing to crashes include youth, inexperience, shift work, alcohol, and drug use⁴⁴⁻⁵⁵. Unfortunately, most of these studies have only utilized questionnaires with little or no correlating objective data having been collected.

This project was designed to determine whether engine idling is a factor in Truck Driver sleep by performing full-attended sleep studies following American Academy of Sleep Medicine (AASM) guidelines⁵⁹ at a truck stop in Knoxville, Tennessee with the drivers in their own trucks and on their own schedules. IdleAire* is a privately held company headquartered in Knoxville, TN. which is installing the first nationwide advanced truck stop electrification ("ATE") network. This service uses an external HVAC unit and externally supplied electrical power to provide filtered in-cab heating and air conditioning, electric shore power, communication, entertainment, and educational services to drivers of heavy-duty class 7 & 8 diesel, long haul trucks. The IdleAire system allows drivers to turn off their engines while they are parked and maintain a comfortable cab temperature. It is being installed in commercial travel centers and other parking facilities across the country where drivers park and idle their truck engines for extended periods thereby permitting Truckers to sleep with their engines turned off during rest periods.

Methods:

25 drivers (22 male) tested under three different conditions: Engine On (EO), Engine Off with IdleAire (IA), and in our Sleep Lab with conventional rooms (Lab). Full attended Sleep Studies performed following AASM standards by monitoring EEG at C3, C4, A1, A2, O1, O2 of the International 10/20 system, EOG, Chin EMG, Nasal/Oral airflow & pressure transducer, Snore microphone, EKG, Chest/Abdominal belts, Leg EMG, pulse/oximetry, Audio/Video (camera/intercom) on portable XLTEK data acquisition units* (Ontario, Canada). Studies were scored blindly using R&K and AASM guidelines.⁶⁰

Participants:

29 drivers originally took part but four dropped out after the first study and their data was not utilized except to note that two of these drivers had significant OSA (RDI of 42 and 66 –the later having a 1min SOL and multiple SAO2 desats into the 40’s). Driver volunteers were chosen on site based on willingness to participate and availability to be in Knoxville, TN on three mostly non-consecutive nights over a three-month period. Drivers were paid \$20 for EO, \$20 for IA, and \$60 for the Lab tests respectively. Drivers were also given free use of IdleAire during that portion of testing. Drivers were further promised anonymity to encourage honest answers. Data was collected from March through August of 2004. We had originally hoped to have all drivers spend the first night in the Lab as first night effect would be expected to be greatest⁶¹ but this quickly proved impossible as drivers were extremely reluctant to leave their trucks unattended. We therefore counterbalanced first night effect by spreading it over treatment conditions.⁶² Of the 25 subjects 22 were males (88%) and 3 were females (12%). Mean age 37.28 years (range 23-57). Mean Ht 5’9.12 feet (range 5’0-6’2). Mean Wt 228.2 lbs (range 120-362). Mean BMI 33.68 (range 18.8-49.6) 12 drivers (48%) had used IA before and 13 (52%) had not. Of the 12 who had used IA: 4 had 1st test on IA, 4 had 1st test with EO, and 4 had 1st test in Lab. Of the 13 who had not used IA: 5 had 1st test on IA, 4 had 1st test with EO, and 4 had 1st test in Lab. Participants were asked to fill out questionnaires and release forms prior to testing as well as post sleep questionnaires after each test. Questionnaires included our standard Sleep Lab Questionnaires, Driver Specific Questionnaire, The Epworth Sleepiness Scale, The Fatigue Scale, The Sleep Hygiene Inventory, and verbal questions during interview and hook-up. Sleep Diary was attempted but only 4 drivers (16%) correctly completed it. CDL requirements vary from state to state but call for drivers to “be able to read and speak English well enough to understand traffic signs, prepare reports, & speak with law enforcement officials and the public”.⁶³ Many drivers however had difficulty filling out the questionnaires.

Results:

-Sleep Efficiency was significantly better ($p=.0023$) with the engines turned off.

IA: 84.96% range 64.6%-98.9%, EO: 77.73% range 45.8%-94.0%, Lab: 72.89% range 25.9%-88.5%

-EKG arrhythmias (includes all premature and irregular beats/rhythms PVC, multifocal PVC, PVC couplets, PVC triplets, bi, tri, & quadgeminal PVCs, PAC, PJC, PAT, SA, SBT, etc) were significantly lower ($p=.001$) with the engines turned off.

IA: 42.24 range 0-271, EO: 85.68 range 0-516, Lab: 57.92 range 0-342.

We consider this finding most intriguing as it indicates a correlation to inhaled diesel emissions and their impact on the heart. Further supported by our findings in SAO2. Several articles show that truck drivers are more prone to heart attack⁶⁸⁻⁷⁰ and heart disease⁷¹. Many smaller studies have even shown changes in heart rate and function while drivers were on the road⁷²⁻⁷⁵. This further correlates well with the Peters study which shows that being in traffic (or that particulate air pollution from traffic)⁶⁴ may trigger or raise the risk of Heart Attack almost three-fold.

Arrhythmias increased insignificantly during the Lab phase. We attribute this to driver stress associated with first night effect from being away from their rigs.⁶¹

-SAO2 (blood oxygen levels %) baseline & nadir (low%) averages were significantly lower ($p=.003$) during the EO phase but no findings were observed between IA & Lab.

-IA: 94.68%, -EO: 93.76%, -Lab: 94.76%

-IA low: 85.39%, -EO low: 81.04%, -Lab low: 86.4%

That SAO2 levels were consistent in both the Lab and IA phases suggests that the difference making SAO2 lowest on the EO phase would be attributable to inhaling increased diesel emissions while the engine was idling.

-Respiratory Disturbance Index (RDI) shows the highest number of respiratory events occurred under the Engine On (EO) treatment condition while indices remained consistent and lower, but not significantly so, for both IA and Lab phases. We attribute this to increased inhalation of diesel emissions during the EO phase.

IA: 12.62, EO: 16.2, Lab: 12.46.

-RDI > 5.0⁷⁷ # of drivers: IA: 16 (64%) range 0-76.9, EO: 16 (64%) range .2-95.8, Lab: 13 (52%) range .2-74.8.

>50% of all truck drivers tested had significant breathing impairment under each treatment condition compared to 2-4% in the general population⁶⁶.

-PLMS was significantly higher ($p=.003$) under the Lab portion of the test. No significant difference observed between EO and IA. Significant night to night variability is known to exist in PLMS^{76,67}. The additional anxiety drivers experienced by having to leave their trucks and cargo while in the lab (most companies require drivers to remain at least within visual range of their trucks and loads)⁶³ may have been a factor. This does correlate with our finding of increased wake time seen in the Lab phase.

IA: 37.45, EO: 40.74, Lab: 50.02.

-PLMSI > 10.0⁷⁶ # of drivers: IA: 20 (80%) range 0-160.9, EO: 20 (80%) range 1.3-138.7, Lab: 22 (88%) range 0-222.

>80% of all drivers tested had significant limb movement disorder (PLMS) under each treatment condition compared to 5% of people between 30-50yrs and 29% of people over 50yrs⁶⁷.

-%Time Awake was significantly higher ($p=.003$) during the Lab phase compared to both EO and IA. Possibly due to increased first night effect from being away from their rigs.

-Arousals were significantly ($p=.003$) increased during the EO phase and lowest on the IA testing phase correlating to lowest PLMS and RDI indices, as sleep efficiency was highest relative to EO & Lab testing phases respectively. Differences were not statistically significant between IA and Lab.

-Stage 1 Sleep% was significantly lower ($p=.0023$) during the IA phase compared to both Lab and EO. This correlates with findings of better sleep efficiency seen during this test. No significant differences were observed in Stages 2, 3, 4, and REM percentages. Total Sleep Time (mean =4hrs 46min. ± 3.52) was not significantly different across conditions although the changing Hours-of-Service Rule¹ encountered during the data collection process of this research may have played a factor.

-Driver Preference:

Drivers were asked to select their preferred sleep environment from the test.

16 drivers (64%) chose IdleAire (non-idling with externally supplied air).

5 drivers (20%) chose the Sleep Lab.

4 drivers (16%) chose Engine On idling.

21 drivers (84%) stated that if IdleAire were available, they would prefer to turn off their engines and use an external source of heating and air conditioning during rest periods rather than leaving their engines idling. A savings in fuel costs while using an external source vs idling played a role in the response of some drivers as an idling engine will consume approximately 1 gallon of fuel per hour⁵⁷.

All test subjects indicated they would prefer to sleep at home. However, many indicated that they need a night or two to adjust after being on the road. This may be due to the change in Engine noise, vibration, or environment.

-Other Driver Information:

20 drivers (80%) use Caffeine or OTC stimulants.

19 drivers (76%) had TST of less than six hours.

16 drivers (64%) have variable bedtimes/risetimes greater than three hours.

14 drivers (56%) report to get less than six hours of sleep routinely.

14 drivers (56%) Smoke.

12 drivers (48%) felt IdleAire/internet access could decrease Sexually Transmitted Diseases (STDs) a significant problem in the trucking industry³⁴⁻³⁷.

11 drivers (44%) have an ESS score of greater than 10 (indicating excessive tiredness).

10 drivers (40%) report Depression.

10 drivers (40%) complain of Pain.

9 drivers (36%) take Naps.

7 drivers (28%) complain of Head Aches.

7 drivers (28%) complain of Stress.

6 drivers (24%) complain of Reflux or GERD.

4 drivers (16%) use Alcohol.

4 drivers (16%) use illicit drugs (methamphetamine, coke, pot, heroin, pain pills, other).

3 drivers (12%) report High Blood Pressure (blood pressure was not taken during tests).

3 drivers (12%) report Diabetes.

2 drivers (8%) report Asthma.

1 driver (4%) reports Hernia.

1 driver (4%) was observed to have Parasomnia (night terrors).

1 driver (4%) was observed to have seizure discharges.

Discussion:

Our findings confirm previous studies showing Truck Drivers to be a particularly unhealthy group. Significant RDIs were seen in > 50% of drivers compared to 2-4% in the general population⁶⁶ and significant PLMS was seen in > 80% of drivers compared to 5% of people 30-50yrs and 29% of people over 50yrs⁶⁷. This is an “at risk” population with unique problems that the general public often cannot relate to, but frequently suffer the consequences from in the form of crashes. Truck drivers also have an increased risk of cancer, heart attack, musculoskeletal disorders^{80,81}, and other ailments⁸²⁻⁸⁵.

Our data suggests that a non-idling sleep environment provides significant health benefits to drivers. Other countermeasures to driver fatigue have been tried without success. These include bright light⁸⁵, temperature variation⁸⁶, Circadian Alertness Simulator⁸⁷, fitness programs⁸⁸, and diet⁸⁹.

In personal interviews & on questionnaires drivers relate that while sleeping with the engine on, whenever the engine coughs or sputters, it causes an arousal with “Reefer Trucks” (refrigeration/freezer trucks) being the worst due to regulating cargo temp. Truck Drivers without an on-board source of electrical power are forced to park where they can and leave the engine running. Drivers state that having to park on an incline such as an On or Off Ramp, will effect sleep and comfort as the direction they park will roll them into or out of bed. “It’s like sawing the legs off one side of your bed at home”. Drivers also try to park where there is food, fuel, restrooms, & showers available, and where radio & TV reception is good as drivers often must spend days, weeks, and months on the road. At the truck stops, noise from other trucks, drivers, prostitutes & drug dealers (going truck to truck looking for business), etc, frequently disturbs sleep^{68,69,78,79}. It was thought that the change from engine vibration to stillness might cause initial Sleep Onset delays but familiarity with the environment (truck cab) seemed to negate this making Sleep Efficiency and wake time poorest in the Lab.

Truck drivers are at greater risk for crash due to factors including decreased Total Sleep Time, increased OSA and PLMS, as well as poor sleep hygiene. Future research should look toward implementing treatment strategies for these patients and assessing their effectiveness and practicality on the road. A comparison between non-idling trucks parked with and without ATE systems would be interesting but not realistic as seasonal temperatures play a great role in both ATE and idling use. It should be noted that several states have enacted “no idling” laws⁵⁸. Idling for over 5 minutes is a ticketable offense regardless of temperature unless a health condition or pet is present.

Disclosure & Acknowledgements: Study sponsored in part by East TN Neurology Clinic, & Sleep Incorporated. The authors each own small portions of IdleAire preferred stock of which some was issued in connection with this study. Special thanks to IdleAire and its employees, Petro Truck Stops, the truck drivers and their companies.

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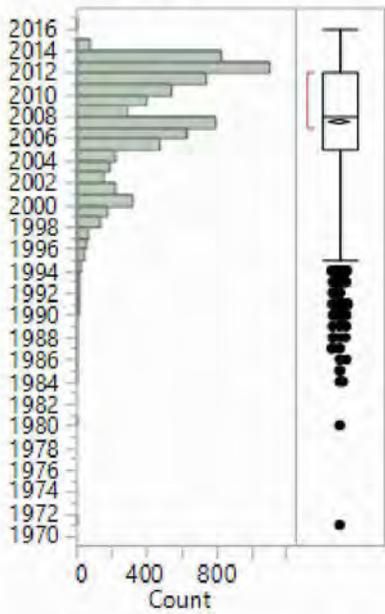
* IdleAire Technologies Corporation. 410 North Cedar Bluff Road, Suite 200, Knoxville, TN 37923. www.idleaire.com

* XLTEK 2004 portable data acquisition units. 2568 Bristol Circle, Oakville, Ontario, Canada, L6H5S1. www.xltek.com

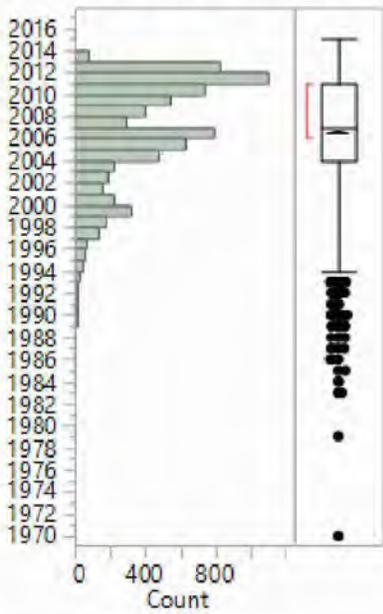
APPENDIX B

Distributions

Truck Model Year



Engine Model Year (truck-1)



Quantiles

| | | |
|------|----------|------|
| 100% | maximum | 2016 |
| 75% | quartile | 2012 |
| 50% | median | 2008 |
| 25% | quartile | 2005 |
| 0% | minimum | 1971 |

Summary Statistics

| | |
|-----------|----------|
| Mean | 2007484 |
| N | 7516 |
| Sum | 15088250 |
| N Missing | 22 |
| N Zero | 0 |
| N Unique | 34 |
| Minimum | 1971 |
| Maximum | 2016 |
| Median | 2008 |
| Range | 45 |

Quantiles

| | | |
|------|----------|------|
| 100% | maximum | 2015 |
| 75% | quartile | 2011 |
| 50% | median | 2007 |
| 25% | quartile | 2004 |
| 0% | minimum | 1970 |

Summary Statistics

| | |
|-----------|----------|
| Mean | 2006484 |
| N | 7516 |
| Sum | 15080734 |
| N Missing | 22 |
| N Zero | 0 |
| N Unique | 34 |
| Minimum | 1970 |
| Maximum | 2015 |
| Median | 2007 |
| Range | 45 |

APPENDIX C

| IdleAir - Current TX Locations - Local Community Demographics - Within 1.5 Mile Radius | | | | | |
|---|-------------------------|----------|-----------------------|------------|-------------------|
| IdleAir Location Name | Address | City | Hwy./ Exit | Minority % | Per Capita Income |
| Conoco - Baytown | 10403 Interstate 10E #A | Baytown | I-10, Exit 797 | 50% | \$ 29,839 |
| Love's #401 - Baytown | 1703-D East Fwy | Baytown | I-10, Exit 789 | 67% | \$ 21,220 |
| Flying J - Dallas | 34100 LBJ Freeway | Dallas | I-20, Exit 472 | 99% | \$ 13,887 |
| DFW Oil/ Exxon | 8181 S. Lancaster Rd. | Dallas | I-20, Exit 470 | 95% | \$ 15,162 |
| Love's #214 - El Paso | 1302 Horizon Blvd. | El Paso | I-10, Exit 37 | 98% | \$ 10,042 |
| Flying J # 728 - El Paso | 1301 Horizon Blvd. | El Paso | I-10, Exit 37 | 98% | \$ 10,042 |
| Pilot #434 -Fort Worth | 2400 Alliance Gateway | Ft Worth | I-35, Exit 65 | 29% | \$ 36,669 |
| Cal Ark - Laredo | 4431 Pan American Blvd. | Laredo | FM 1472 Mines Rd. | 89% | \$ 17,852 |
| Con-Way Truckload Terminal | 14610 Mines Road | Laredo | I-35, Exit 8 | 92% | \$ 18,535 |
| Werner Enterprises Terminal | 1201 Carrier Dr. | Laredo | I-35, Exit 12 | 93% | \$ 18,795 |
| CR England - Laredo | 8422 Amparan Rd. | Laredo | I-35 Exit 8 | 92% | \$ 18,740 |
| Flying J - Laredo | 1011 Beltway Pkwy. | Laredo | I-35 & Exit 13 | 93% | \$ 18,795 |
| Pilot #377 -Laredo | 1101 Uniroyal Drive | Laredo | I-35 & Exit 13 | 93% | \$ 18,795 |
| TSI - Mesquite | 3900 Forney Rd. | Mesquite | I-80 & S.Town E.Blvd. | 72% | \$ 17,799 |
| Pilot #431 -Orange | 2205-B Hwy 62 | Orange | I-10, Exit 873 | 12% | \$ 27,130 |
| Pilot #432 -Robinson | 8055 S I-35 | Robinson | I-35, Exit 328 | 32% | \$ 29,634 |
| TOTAL | | | | 75% | \$ 20,184 |
| <p align="center">Source: EJSscreen ACS Summary Report, July 2016 Compare with state-wide TX: Minority 20.3% and per capita \$ 26,513.</p> | | | | | |

APPENDIX D

CONGESTION MITIGATION AND AIR QUALITY (CMAQ) IMPROVEMENT PROGRAM

Cost-Effectiveness Tables Development and Methodology

Prepared for:

**Office of Natural Environment
Office of Planning, Environment, and Realty
Federal Highway Administration
U.S. Department of Transportation**

December 3, 2015

Prepared by:

**Volpe National Transportation Systems Center
Office of the Assistant Secretary for Research and Technology
U.S. Department of Transportation**

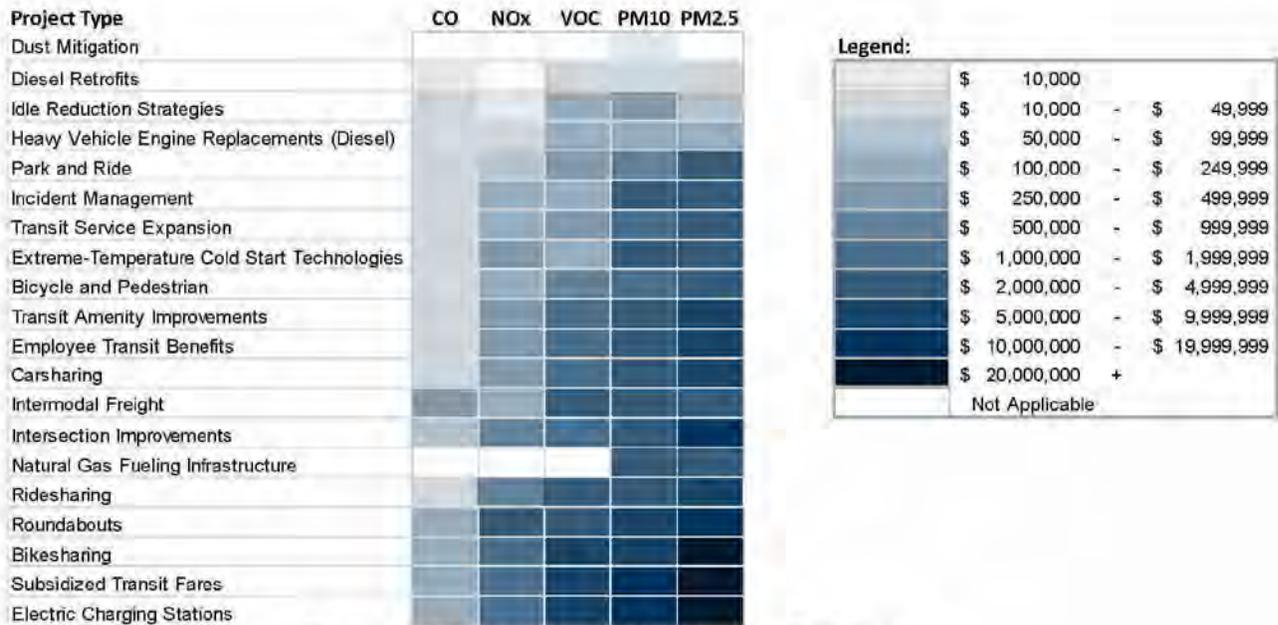


Figure 1. Median Cost-Effectiveness Estimates (Dollars per Ton of Pollutant Reduced).

The analysis yielded a broad range of cost-effectiveness estimates, represented in terms of dollars per ton of pollutant reduced. The most critical findings relate to project types that indicate particularly strong or weak cost-effectiveness, for either individual pollutants or across the range of pollutants.

Project Types with Strong Cost-Effectiveness

Table 1 summarizes the best-performing project types by pollutant, based upon the distributions of cost-effectiveness measures evaluated at the median:

Table 1. Project Types with Strongest Estimated Cost-Effectiveness.

| Project Type | Pollutants with Most Cost-Effective Reduction |
|--|---|
| Idle Reduction Strategies | All pollutants |
| Heavy-Duty Vehicle Engine Replacements | NOx, VOCs, PM ₁₀ , PM _{2.5} |
| Diesel Retrofits (DOCs, DPFs) | CO, PM ₁₀ , PM _{2.5} and VOCs |
| Transit Service Expansion | NOx, VOCs, CO |
| Park and Ride | NOx, VOCs, CO |
| Extreme-Temperature Cold Start | CO and VOCs |
| Incident Management | CO and VOCs |
| Intermodal Freight | NOx |
| Dust Mitigation | PM ₁₀ |

Idle Reduction Strategies

This section reviews the analysis of idle reduction strategies (IR), including idle reduction strategies projects. These projects center on the use of technologies to provide power to heavy-duty trucks when the vehicles are not in motion. By providing means to power heavy-duty trucks that do not rely on idling, IR can support shifts to lower-emission energy consumption by heavy-duty trucks. Additionally, IR reduces localized community and driver exposure to diesel engine emissions. Also, plug-in idle reduction strategies may enable refrigerated trailers to plug in rather than operating a small non-road engine.

Key IR technologies include auxiliary power units (APUs), overhead ducting systems (chiefly, IdleAire) and plug-in electric power and heating and cooling systems (e.g., Shorepower). The set of available project information centered on plug-in systems and IdleAire projects; each of these project sub-types were included in the analysis.

In the analysis, the effects of IR projects were investigated at the heavy-vehicle-fleet-average level for combinations of heavy vehicle model years and road types. The central emission information for the analysis came from MOVES model runs, which reported emission rates for vehicles at idle (in grams per hour), by model year (weighted by the share of vehicles in operation within each model year) and road type. In all, 101 IR scenarios were analyzed.

The steps required to conduct the analysis of IR projects involving plug-in systems include:

- Generate per-hour emission rates for PM_{2.5}, PM₁₀, NO_x, VOC and CO in MOVES2010b for each model year and road type in the analysis;
- Identify estimates of annual vehicle use (idling hours) for vehicles;
- Identify estimates of the technological effectiveness of IR technologies;
- Identify estimates of IR use (percentage of time facilities are used, or hours of idling reduced per day per unit);
- Identify estimates of project lifetimes; and
- Identify estimates of project costs.

The MOVES runs yielded estimates of emission rates (in grams per hour) for each of the pollutants in the study, by model year and road type, using national-average travel profiles. The estimated annual impacts on pollutants were identified by multiplying the estimated effectiveness of IR technology (e.g., a 60-percent reduction in NO_x emissions at idle per device per hour) by the number of idling hours reduced per year and the per-hour emission rates for vehicles at idle.

Lower- and upper-bound values for device utilization rates (15 percent and 60 percent per hour), impact of idling activity (reduction of 25 percent of hoteling and reduction of 100 percent of

hoteling) and project costs (\$4,500 and \$11,500 per space) were used to identify lower- and upper-bound cost-effectiveness estimates. A constant, 15-year project lifetime was assumed.

To estimate individual cost-effectiveness for each model year/road type combination in the analysis, the estimated cost for a given project was divided by the sum of estimated annual emission impacts across project lifetimes. Each estimated annual emission impact was identified as the product of the estimated change in a given emission rate (i.e., with the use of idle reduction versus without) and the assumed annual volume of idling activities for vehicles. This yields a value of dollars per gram of pollutant abated over the project lifetime, which can then be converted to dollars per ton abated.

The analysis of IR projects involving IdleAire was conducted primarily using outputs from the DEQ, and included the following steps:

- Identify the vehicle type toward which the IR strategy would be applied (e.g., Class 8 long-haul truck);
- Identify the model year for the vehicle (endpoints of 1995 and 2010 were selected for the analysis);
- Identify estimates of annual vehicle use (hoteling hours) for vehicles, with the DEQ default values applied;
- Identify estimates of the technological effectiveness of IR technologies, with the DEQ default values applied;
- Identify estimates of IR use (percentage of time facilities are used, or hours of idling reduced per day per unit), with the DEQ default values applied;
- Identify estimates of project lifetimes, with the DEQ default values applied; and
- Identify estimates of project costs.

Sample Analytical Scenario: Idle Reduction Strategy (IdleAire)

As an illustrative example, consider the use of an IdleAire device by model year 2000 heavy-duty trucks traveling on urban unrestricted (i.e., highway) roads.

In this scenario, we assume the following details:

- The effective fleet-average emission rates for MY2000 heavy-duty trucks for travel on urban unrestricted roads are 109.7 grams per hour for NO_x, and 6.096 grams per hour for PM_{2.5};
- the IdleAire device is utilized 60 percent of the time (i.e., 60 percent occupancy rate);
- the IdleAire device reduces 100 percent of idling activity, with no offsetting emissions;
- the facility is used 365 days per year;
- the service life of the technology is 15 years; and
- the cost of the project is \$11,500 per electrified space.

Step One: Shifting MY2000 heavy-duty trucks using the facility from 100 percent idling to 40 percent idling (i.e., using the facility 60 percent of the time) would lead to the following annual reductions in emissions of NO_x and PM_{2.5}:

Table 18. Sample Calculation of Annual Emission Impacts of an Idle Reduction Project (Model Year 2000 Fleet-Average Heavy-Duty Vehicle with IdleAire Technology, Urban Unrestricted Roads).

| Pollutant | Emission Reduction from Idle Reduction Strategy (IR) | Baseline Idle Emission Rate (grams/hour) | Daily Idling Activity Affected (hours) | Daily Reduction in Emissions from IR (grams) | Annual Reduction in Emissions from IR (grams) |
|-------------------|--|--|--|--|---|
| NO _x | 100% | 109.7 | 14.4 | 1,580 | 576,583 |
| PM _{2.5} | 100% | 6.096 | | 87.8 | 32,041 |

Step Two: Each of the estimated annual emission impacts is multiplied by the project lifetime to identify project-level emission impacts:

Table 19. Sample Calculation of Total Emission Impacts of an Idle Reduction Project (Model Year 2000 Fleet-Average Heavy-Duty Vehicle with Plug-In Technology, Urban Unrestricted Roads).

| Pollutant | Annual Reduction in Emissions from IR (grams) | Project Lifetime (years) | Total Reduction in Emissions from IR (grams) | Total Reduction in Emissions from IR (tons) |
|-------------------|---|--------------------------|--|---|
| NO _x | 576,583 | 15 | 8,648,748 | 9.534 |
| PM _{2.5} | 32,041 | | 480,609 | 0.530 |

Step Three: The project cost is divided by the estimated project-level emission impacts to yield cost-effectiveness estimates:

Table 20. Sample Calculation of Cost-Effectiveness Estimates for an Idle Reduction Project (Model Year 2000 Fleet-Average Heavy-Duty Vehicle with Plug-In Technology, Urban Unrestricted Roads).

| Pollutant | Total Reduction in Emission from IR (tons) | Project Cost | Cost-Effectiveness (dollars per ton) |
|-------------------|--|--------------|--------------------------------------|
| NO _x | 9.534 | \$11,500 | \$1,206 |
| PM _{2.5} | 0.530 | | \$21,707 |

Summary Cost-Effectiveness Estimates: Idle Reduction Strategies

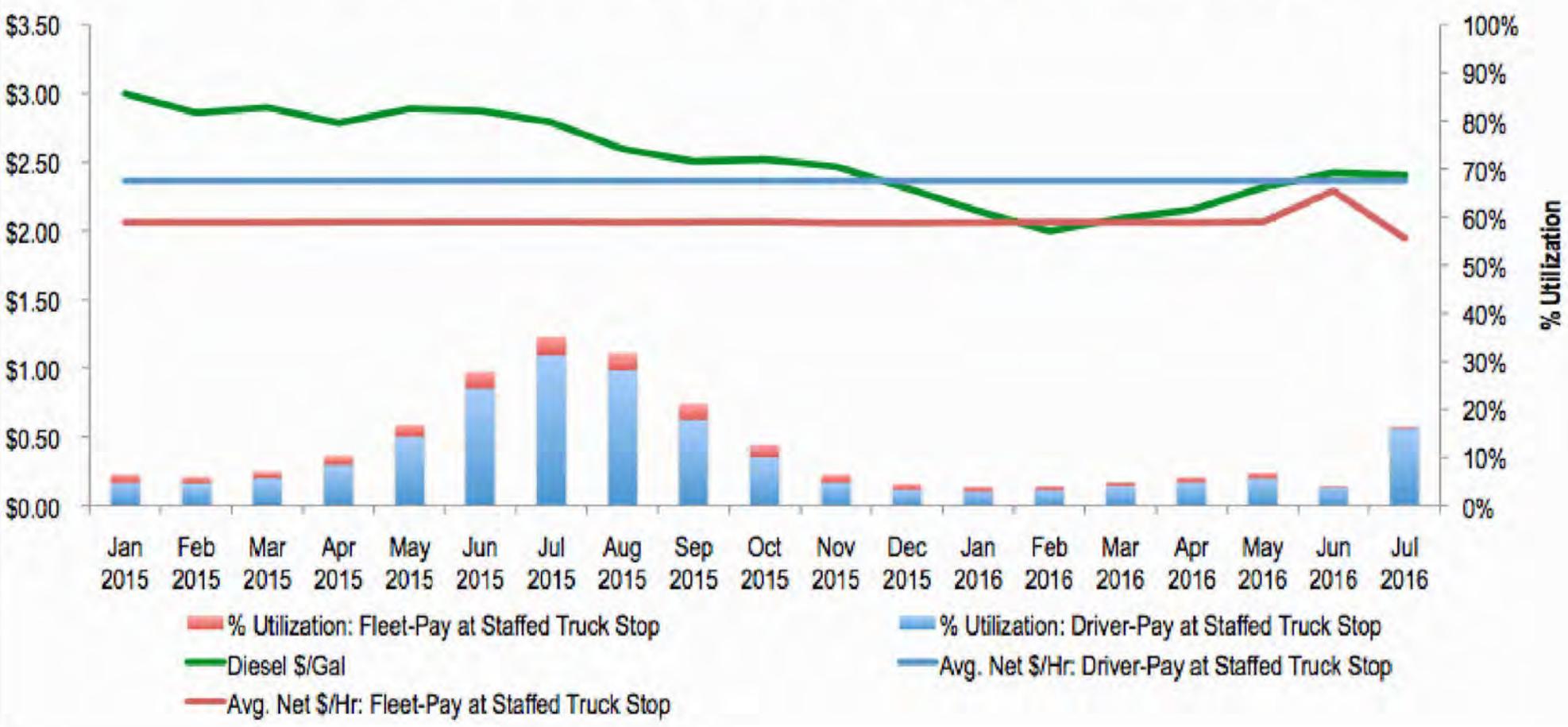
The median cost-effectiveness estimates for the range of scenarios for idle reduction strategies are presented in Table 21 below:

Table 21. Median Cost-Effectiveness Estimates (Dollars per Ton) – Idle Reduction Projects.

| Pollutant | Cost-Effectiveness |
|-------------------|--------------------|
| PM _{2.5} | \$76,342 |
| PM ₁₀ | \$51,139 |
| CO | \$20,724 |
| NO _x | \$2,040 |
| VOCs | \$122,587 |

APPENDIX E

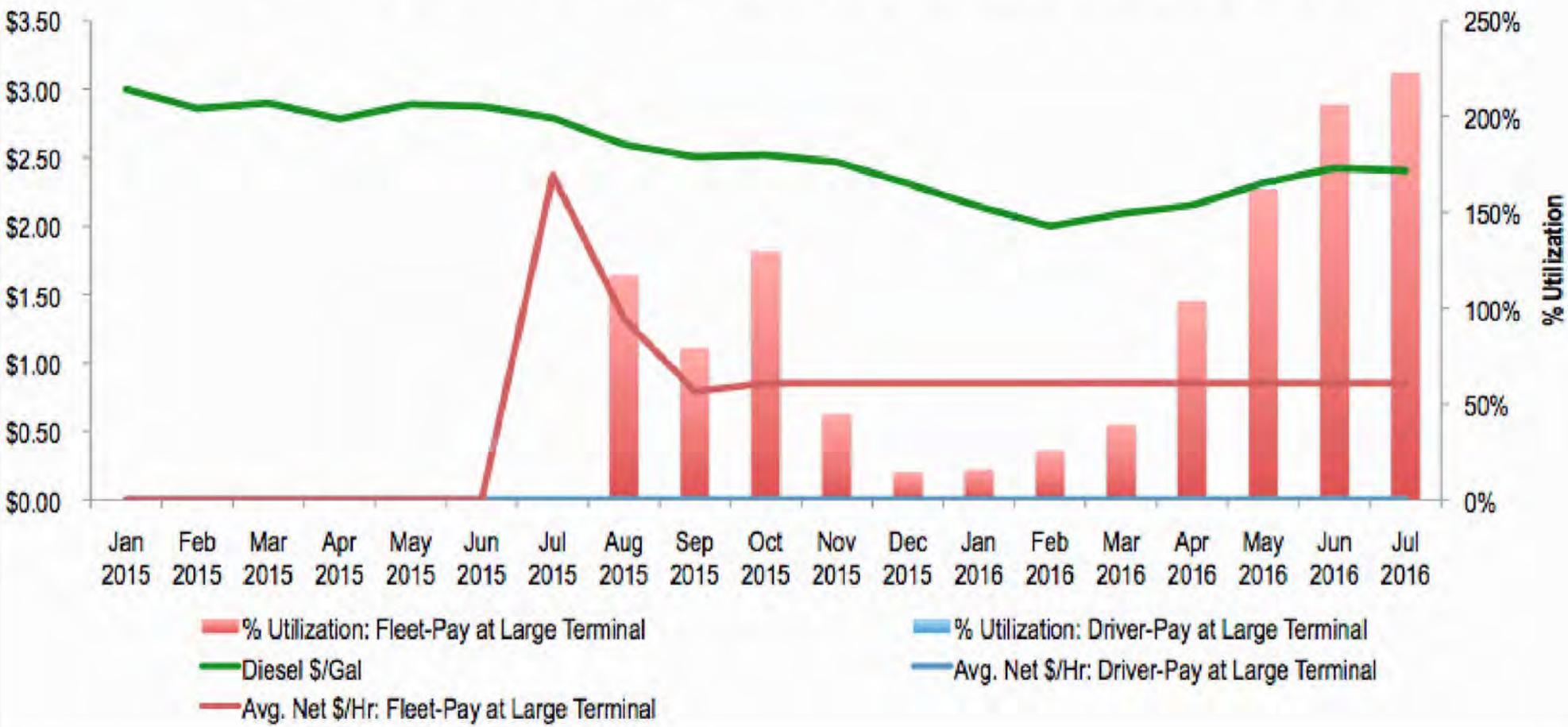
IDLEAIR STAFFED TRUCK STOPS: Utilization (Hours Used as a % of 10 hrs/day for 30 days a month for # of Spaces)



IDLEAIR LARGE TERMINALS: Utilization (Hours Used as a % of 10 hrs/day for 30 days a month for # of Spaces)



IDLEAIR LOW-PRICE TERMINAL: Utilization (Hours Used as a % of 10 hrs/day for 30 days a month for # of Spaces)



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

John C. Cruden
Assistant Attorney General
U.S. DOJ-ENRD
P.O. Box 7611
Washington, D.C. 20044-7611

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 (NOx). 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 NO_x 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 NO_x 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 NO_x emissions, particularly in more rural states. For example, nonroad mobile sources (including vehicles and equipment) are responsible for 21% of Vermont's NO_x 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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August 5, 2016

Transmitted via email to: pubcomment-ees.enrd@usdoj.gov

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In re: Volkswagen “Clean Diesel” Marketing, Sales Practices, and Products Liability
Litigation
Case No: MDL No. 2672 CRB (JSC)
D.J. Ref. No. 90-5-2-1-11386

To Whom It May Concern:

Berkshire Hathaway Energy Company maintains a portfolio of locally managed businesses that share a vision for a secure and sustainable energy future, delivering affordable, safe and reliable service each day to more than 11.6 million electric and gas customers and end-users around the world. These businesses include MidAmerican Energy Company, an Iowa-based utility providing regulated electric and natural gas service; BHE Renewables, LLC, which owns natural gas, wind, geothermal, solar and hydro projects as an independent renewable power producer in New York, Arizona, Texas, California, Illinois and Hawaii and low-carbon natural gas facilities in New York, Arizona, Texas and Illinois; PacifiCorp, which provides regulated electric service in California, Idaho, Oregon, Utah, Washington and Wyoming; and NV Energy Inc., which provides regulated electric and natural gas service in Nevada.

Berkshire Hathaway Energy owns more renewable energy than any other regulated utility. For more than a decade, we have been making significant investments to reduce the impact our operations have on the environment, and, through our businesses, we have invested more than \$16 billion in renewable energy projects and will continue to advance renewable generation, implement advanced technologies, and continue to accelerate electric vehicle adoption in the United States. On July 21, 2016, Berkshire Hathaway Energy signed onto the White House’s Guiding Principles to Promote Electric Vehicles.¹ We believe the partial consent decree under consideration with the Settling Defendants should be consistent with the Administration’s goals under these principles.

¹ See: <https://www.whitehouse.gov/the-press-office/2016/07/21/fact-sheet-obama-administration-announces-federal-and-private-sector>

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Berkshire Hathaway Energy’s three regulated utilities, MidAmerican Energy Company, NV Energy and PacifiCorp, directly serve the electricity needs of their customers’ homes and businesses in 10 states. Their employees live and work in the communities they have the privilege of providing service to and they work closely with civic and business groups and their respective states and agencies who will be involved in the implementation of the programs at the heart of the partial consent decree. Increasingly, our three utilities interact with their customers to support their growing interest in vehicle electrification; to address these interests, our utilities have formed teams directly assigned to proactively advance policies and initiatives that will aid in the transition to a greater deployment of vehicles operating on electricity. Our companies and employees are proud to move forward in support of the U.S. Department of Energy Workplace Charging Challenge and the Edison Electric Institute EV Everywhere Grand Challenge. In that spirit, we offer these comments in support of efficiently deploying the resources supporting vehicle electrification under the partial consent decree.

As both a supporter of the advancement of electric vehicle infrastructure and deployment and a provider of electric services, Berkshire Hathaway Energy provides its perspective on the partial consent decree in the above-referenced matter as a way to express our support of the provisions relating to the Settling Defendants’ increased use of zero emission vehicle technology in the U.S. This includes, but is not limited to, the development, construction, and maintenance of zero emission vehicle-related infrastructure, as well as to ensure that the investments made under the partial consent decree are consistent with and contemplate underlying electricity system requirements that may have a direct or indirect impact on utilities. These comments should not be construed in any way to object to the partial consent decree but, rather, to make suggestions, based on our experiences, regarding implementation of electric vehicle programs to ensure the greatest degree of success and benefit in addition to ensuring that costs associated with the implementation of the consent decree are not shifted to other parties, including electric utilities and their customers.

Definition of ZEV

The partial consent decree may unduly or unintentionally limit the applicability of eligible investments and creditable actions through the use of the term Zero Emission Vehicle (“ZEV”). ZEV is utilized in certain sections, such as in the overview of Appendix C, as zero emission vehicle technology (Appendix C, page 1 – Page 148 of 225 of Document 1605-1). However, as recognized in Appendix C, not all electric vehicles are zero emission vehicles. ZEV is defined in paragraph 1.9 to mean battery electric vehicles and fuel cell vehicles as well as plug-in hybrid electric vehicles meeting a certain threshold in zero emission range and on-road heavy-duty vehicles with an electric powered takeoff (See, Appendix C, page 2 – Page 149 of 225 of Document 1605-1) yet these vehicles require charging infrastructure. The partial consent decree should make it clear that infrastructure associated with all qualifying

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plug-in electric vehicles will be considered to be a Creditable Cost under the partial consent decree.

Infrastructure and Creditable Costs

The Creditable Cost Guidance, Appendix C-1 to the partial consent decree, currently specifies that in order to qualify as Creditable Costs for the National and California ZEV Investment Plan Commitments, costs must be reasonable, necessary, directly connected or directly allocable to the investment plan commitments. Creditable Costs are defined in Appendix C as including “planning, installation, operation, and maintenance of a ZEV.” This definition does not clearly incorporate the costs related to new utility distribution investments and interconnection of the charging stations necessary to support electric vehicle charging station infrastructure. For example, charging stations may require line extensions, transformers, inverters, switch gear, system controls, communications equipment, metering and information technology equipment and associated software to function. These costs should be included in creditable costs to be borne by the Settling Defendants. This support for charging infrastructure is critical and falls within necessary and directly connected expenditures to implement a national charging infrastructure as contemplated under the partial consent decree.

This clarification is particularly important given the fact that the required projection of Creditable Costs in a National ZEV Investment Plan under Paragraph 2.5.3 (Appendix C, page 6 – page 153 of 225) includes, among other things, utilities (See 2.5.3(10)). However, Paragraph 2.2 of Appendix C-1 specifically excludes electricity costs for charging ZEVs as a Creditable Cost unless agreed to in writing by the U.S. Environmental Protection Agency. Berkshire Hathaway Energy encourages the Settling Defendants and the U.S. Environmental Protection Agency to clarify, when refining and finalizing the Creditable Cost Guidance that the utility infrastructure expenditures associated with implementation of the charging stations in general and with implementation of the consent decree qualify as Creditable Costs. To be clear, Berkshire Hathaway Energy understands and agrees that the cost of energy may not be an eligible expenditure under the partial consent decree. However, the installation and operation of the equipment and supporting technology should be a Creditable Cost.

Collaboration

Collaboration with utilities is a key to the successful fulfillment of the commitments set forth in the partial consent decree’s plans and commitments as set forth in Appendix C. Berkshire Hathaway Energy’s operating utilities have technical, planning and siting expertise highly relevant to designing and placement of electric vehicle infrastructure. As the electric grid accommodates ongoing changes to the national generation mix and adapts to increased penetration of renewable and lower carbon generation, coordinated planning to address electric vehicle infrastructure requirements is increasingly important.

Furthermore, the Berkshire Hathaway Energy operating utilities (MidAmerican Energy Company, PacifiCorp and NV Energy) directly serve more than 3.8 million electric customers in 10 states. Those utilities support the electrification of transportation and have committed resources to support our customers’ desire to convert to lower emission and lower cost electric vehicle transportation. Our relationship and daily interactions with those customers

Comments of Berkshire Hathaway Energy

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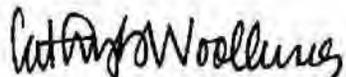
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places us in a unique position to assist in advancing the underlying objectives of the settlement as it relates to advancement of electric vehicles. We encourage the parties to adapt the partial consent decree to accommodate additional collaboration through the Appendix C activities to include organizations such as ours.

The National ZEV Outreach Plan appropriately requires the Settling Defendants to provide states, municipal governments, Tribes and federal agencies an opportunity to offer input on the development of the National ZEV Investment Plan. The National ZEV Investment Plan requires details about costs, location, type, timelines and other aspects of Plan implementation that utilities like Berkshire Hathaway Energy who are investing in electric vehicle infrastructure are uniquely positioned to provide input on. As such, expanding the scope of the contemplated National Outreach Plan and other aspects of the electrification investment commitment to solicit input from entities such as Berkshire Hathaway Energy's operating companies would be appropriate.

Berkshire Hathaway Energy's operating utilities welcome the opportunity to collaborate with the Settling Defendants in developing a National Plan that meets the goals of creating greater accessibility and use of electric vehicles.

Respectfully submitted,



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To: ENRD, PUBCOMMENT-EES (ENRD)
Sent: 8/5/2016 3:52:47 PM
Subject: Blue Bird Comments - VW Settlement
Attachments: Blue Bird Comments _ VW Settlement.pdf

Comments on the VW Settlement Funds and Allocations to School Buses

Comments Submitted by Blue Bird Corporation August 5, 2016

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

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

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

Dear General Cruden:

Blue Bird supports section D2.2 of the VW Settlement to allocate funding for alternative powered school buses. As the leader of alternative fueled vehicles, with our propane and CNG offerings, we have a large number of districts that can attest to the environmental and health benefits of these vehicles vs. their diesel counterparts. There are also a number of studies that confirm that "switching school buses from diesel to improved, clean technology, decreases particulate and gaseous air pollutant and toxic emissions during transit, pick-up and drop-off, and idling. This reduction results in significant reductions in children's exposure to harmful emissions, which in turn have been shown to be associated with improvements in respiratory health, including decreased pulmonary inflammation as measured by exhaled nitric oxide improved lung function and decreased school absenteeism. This was especially observed in asthmatic children who are at a greater risk."¹

Emissions from diesel school buses have more serious impacts for school children because the pollutants tend to become concentrated in the interiors of school buses. When inhaled by younger children whose lungs are still maturing and are particularly susceptible by these pollutants, the effects can be devastating. This effect has been studied and documented for the last 15 years, including by scientists commissioned by CARB (California Air Resource Board).² These studies have led California to start replacing conventional diesel buses with a variety of alternatives fueled school buses, including CNG and propane.

A study on the impact of emission reduction measures in school buses was published last year in the [American Journal of Respiratory and Critical Care Medicine](#). The study called attention to the importance of the problem of air pollution on board school buses. The editorial opens as follows:

For more than a decade, elevated air pollution levels inside school buses have been recognized as an insidious hazard that may affect the health of 25 million U.S. children who commute to school in diesel powered school buses each day. Concentrations of traffic-related air pollutants (TRAP) reported inside school buses are up to several-fold higher than ambient background levels. What are the health effects of these short-term, but relatively intense, exposures to children? This question is amplified by concerns that children are likely to be especially susceptible to the health effects of air pollution. Emissions from diesel engines are a major source of the complex mixtures of fine and ultrafine particulate and gas-phase compounds that make up TRAP. In numerous studies, TRAP has been associated with a growing list of acute and chronic adverse health effects. Of particular importance to children is the established association between short-term exposure to TRAP and exacerbation of asthma, as well as emerging evidence linking long-term exposures to reduced lung growth, incident asthma, obesity, and neurocognitive deficits.³

The study concludes with: "Efforts to clean up diesel engine emissions from school buses are likely to have tremendous societal benefits." ⁴ This points out the fact that the societal impact of harmful emissions are more severe when present in a school bus than in almost any other setting.

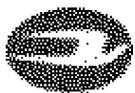
Although a ZEV school bus may be the ultimate solution for the future in the school bus industry, there are current limitations that do not make them practical across several applications school districts require today. One notable limitation with ZEV school buses is mileage range. A majority of school districts require higher mileage range now than is realistic with current ZEV technology. While ZEV development is occurring, it is still in the infancy stage. Our propane and CNG buses are available now, utilize proven technology, address the ZEV limitations, and provide near zero emissions at an affordable price point to school districts nationwide. As a result, Blue Bird requests propane and CNG fueled vehicles be given the same priority funding that is outlined for ZEV school buses.

Blue Bird's current propane offering will be certified to a CARB optional 0.05 NOx level and our type C-CNG offering will be certified to a CARB optional 0.10 NOx level. Both of these certifications are better than the federal 0.20 NOx level and are cleaner than "clean diesel" applications available today. In addition, both of these offerings provide school districts with a method to achieve clean operating school buses without sacrificing their maintenance budgets due to the expensive after-treatment systems that diesel school buses are required to operate. These vehicles also offer improvements in noise quality and cold weather operations, for those districts in northern climates. Finally, Blue Bird's Ford/ROUSH CleanTech propane school bus has the best Total Cost of Ownership (TCO) message of any school bus on the road today, actually saving the districts operating these vehicles substantial savings as compared to their diesel counterparts.

Based on these reasons, Blue Bird strongly recommends a substantial amount of the \$2.7B VW Settlement be allocated to section D2.2 for school bus allocation and be channeled to propane and CNG vehicles. We encourage you to express this in the settlement document itself and direct those who will implement the distribution of these funds to focus their efforts on propane and CNG school buses. This will allow states to replace old buses producing harmful emissions, which our impacting our school age children, with cleaner and affordable alternative fueled school buses which have a cleaner foot print and provide savings to districts operating them.

References:

- ¹ University of Southern California letter authored by Dr. Chairwoman Mary Nichols
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- ³ S. D. Adar et al. **Adopting Clean Fuels and Technologies on School Buses.** American Journal of Respiratory and Critical Care Medicine. Vol. 191, no. 12, June 15, 2015. Pp. 1413-1421.
- ⁴ Op. cit. American Journal of Respiratory and Critical Care Medicine. Pp. 1350-1351.



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Comments on the VW Settlement Funds and Allocations to School Buses

**Comments Submitted by Blue Bird Corporation
August 5, 2016**

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

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

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August 5, 2016

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

Re: In re: *Volkswagen “Clean Diesel” Marketing, Sales Practices, and Products Liability Litigation*, Case No: MDL No. 2672 CRB (JSC), and D.J. Ref. No. 90-5-2-1-11386

Dear Mr. Cruden:

Boyden Gray & Associates appreciates the opportunity to submit these comments regarding the Partial Consent Decree (“Decree”) the Department of Justice (“DOJ”) has lodged in the lawsuit entitled *In re: Volkswagen “Clean Diesel” Marketing, Sales Practices, and Products Liability Litigation*, Case No: MDL No. 2672 CRB (JSC), and D.J. Ref. No. 90-5-2-1-11386. These comments relate to the Decree’s provisions requiring Volkswagen (“VW”) to make \$1.2 billion in investments “to support increased use of technology for Zero Emission Vehicles,” known as ZEVs, in order to resolve DOJ’s claims under sections 203 and 204 of the Clean Air Act (“CAA”) concerning certain 2.0 liter diesel vehicles. Decree at 4 & App’x C ¶ 1.6.*

We believe that the Decree’s ZEV-related investment provisions are unlawful for two reasons.

First, the court lacks jurisdiction to approve the Decree’s ZEV-related investment provisions. The court’s jurisdiction under CAA section 204 is forward-looking only. The court has no power to approve consent decree provisions that—like the Decree’s ZEV-related investment provisions—do not “restrain” future violations of section 203. Even absent section 204, the court’s equitable jurisdiction extends only to remedies that correct or dissipate the bad

* See *infra* n.1 (defining VW and the the 2.0 liter diesel vehicles covered by the Decree).

effects of past unlawful conduct. But the Decree’s ZEV-related investment provisions are entirely unrelated to any of the section 203 violations DOJ alleges in its complaint.

Second, the ZEV-related investment provisions violate the Miscellaneous Receipts Act (“MRA”), 31 U.S.C. § 3302(b), and the anti-augmentation principle of federal appropriations law it codifies. Through the ZEV-related investment provisions, DOJ is attempting to leverage its settlement authority to secure financing, at Treasury’s expense, for projects unrelated to any harm attributable to VW’s conduct. Further, the Decree grants the Environmental Protection Agency (“EPA”) substantial post-settlement control over how, when, and where VW deploys those funds. And it seeks to finance presidential priorities that Congress has not seen fit to fund and has, in fact, rejected. Each of these characteristics of the Decree render it unlawful.

It is not surprising that VW would agree to make \$1.2 billion in ZEV-related investments as a condition of resolving some of DOJ’s claims in this litigation. After all, VW has admitted to having engaged in unlawful conduct, even if it has not conceded the precise legal violations DOJ has alleged. As a result, VW faces liability for civil penalties that could be as high as roughly \$67.5 billion—more than 90% of its current \$73 billion market capitalization.[†] Further, promotion and advancement of ZEVs has been a priority for President Obama since he took office in 2009. It is therefore eminently rational for VW to want to reduce its exposure to civil penalties by directing funds toward ZEV-related investments that promote the Administration’s policy goals.

But it is not lawful for DOJ to condition its settlement of claims against VW on the company making \$1.2 billion in ZEV-related investments. Outside of the settlement context, DOJ would be powerless to secure \$1.2 billion for ZEV-related investments. There is no evidence VW would make such investments voluntarily. And withdrawing funds for those investments from the Treasury absent a congressional appropriation would be a criminal offense. *See* 31 U.S.C. § 1350. Nor could DOJ ever secure a litigated decree—in contrast to a consent decree—enjoining a defendant to make the investments. Unable to secure financing for ZEV-related investments from donations, appropriations, or litigated injunctions, DOJ has sought to leverage its power to impose ruinous civil penalties to secure private financing for their initiatives. In protecting

[†] *See infra* n.4 (discussing a back-of-the-envelope calculation of the scope of VW’s exposure for civil penalties).

Congress' constitutional appropriations power, however, the MRA and the anti-augmentation principles it codifies prevent exactly that stratagem.

In light of the unlawful nature of the Decree's ZEV-related investment provisions, we are hopeful DOJ will work with VW to strike them before asking the court to enter the Decree in the docket.[‡]

Respectfully,

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Enclosure

[‡] In addition to our comments, we agree with the legal and policy arguments reflected in the public comments submitted by the Competitive Enterprise Institute.

Comments of Boyden Gray & Associates PLLC
regarding the Partial Consent Decree in
In re: Volkswagen “Clean Diesel” Marketing, Sales Practices, and Products Liability
Litigation
Case No: MDL No. 2672 CRB (JSC), and D.J. Ref. No. 90-5-2-1-11386.

BACKGROUND

In 2015, the Department of Justice (“DOJ”) filed a complaint alleging that Volkswagen (“VW”) knowingly and willfully installed devices designed to defeat Environmental Protection Agency (“EPA”) emissions testing for NO_x on roughly 580,000 vehicles sold in the United States. Compl. ¶¶ 56-84.¹ As remedies for VW’s conduct, DOJ sought injunctive relief and civil penalties under sections 204 and 205 of the Clean Air Act (“CAA”) (42 U.S.C. §§ 7523, 7524). *Id.* ¶¶ 107, 113, 121, 131.

DOJ contended that VW’s conduct violated subsections (a)(1), (2), (3)(A), and (3)(B) of CAA section 203 (42 U.S.C. § 7522). *Id.* ¶¶ 102-31. Specifically, DOJ alleged that VW’s installation and sale of vehicles containing NO_x “defeat devices” violated:

- section 203(a)(1) because it resulted in the introduction into commerce of new motor vehicles not covered by a statutorily required, EPA-issued Certificate of Conformity, *id.* ¶¶ 102-07;
- section 203(a)(3)(A) because it rendered inoperative other devices on the vehicles installed to comply with EPA emissions regulations, *id.* ¶¶ 114-21;
- section 203(a)(3)(B) because its conduct resulted in the installation or sale of a component designed to defeat compliance with EPA emissions regulations, *id.* ¶¶ 108-13; and

¹ VW collectively describes Volkswagen AG, Volkswagen Group of America, Inc., Volkswagen Group of America Chattanooga Operations, LLC, an Audi AG. *See* Decree at 2. The 2.0 liter diesel vehicles covered by the Decree are VW Jettas, Jetta Sportwagens, Golfs, Passats, Beetles, Beetle Convertibles, and Audi A3’s imported into or sold in the United States from 2009-2015. *Id.* at 8-9.

- section 203(a)(2) because, in concealing its conduct, VW deprived EPA of accurate records that could be used to determine compliance with emissions regulations, *id.* ¶¶ 122-31.

Beginning in September 2015, owners and lessees of the affected VW vehicles filed hundreds of lawsuits against VW in federal courts across the United States. *See* Class Action Settlement Agreement at 1 [hereinafter “CASA”]. The Multi-District Litigation Panel consolidated DOJ’s case with those cases for pretrial proceedings. *See* Dkt. 11, No. 16-295 (N.D. Cal.).

On June 28, 2016, DOJ and the class representatives agreed to resolve several pending claims through settlement. In particular, DOJ agreed to a Partial Consent Decree (“Decree”) to resolve its claims for injunctive relief with respect to roughly 500,000 vehicles known as the 2.0 Liter Subject Vehicles. Decree at 1 & ¶¶ 74-83. The Decree does not address claims for prospective injunctive relief, claims for civil penalties, or any claims regarding the roughly 80,000 so-called 3.0 Liter Subject Vehicles. *Id.* ¶¶ 74-83. On the same day, class representatives also entered into a Class Action Settlement Agreement that fully resolves their claims with respect to the 2.0 Liter Subject Vehicles. CASA at 2 & ¶ 9.14.

In its agreements with DOJ and class representatives, VW agreed to take three broad courses of action.

First, VW agreed to buy back owner-class members’ vehicles and allow lessee-class members to terminate their leases without penalty. Decree at 2-3; CASA at 2-3. Alternatively, VW agreed to pay for class members to modify their vehicles’ emissions systems, contingent upon regulatory approval for an as-yet not-developed modification. Decree at 2-3; CASA at 3. In addition, VW agreed to pay restitution to all class members, including those who no longer own or lease a covered vehicle. CASA at 3. VW has committed to DOJ that these efforts will remove at least 85% of the offending vehicles from commerce. Decree at 3. VW has set aside \$10.033 billion to pay for buybacks, lease terminations, and restitution. CASA ¶ 2.42. The CASA is expressly linked to the Decree, noting that the \$10.033 billion it sets aside for buybacks and lease terminations is the “same funding pool described in” the Decree for those purposes. *Id.*

Second, VW agreed to pay \$2.7 billion to an Environmental Mitigation Trust Fund. The Fund will finance actions to “reduce emissions of NO_x where the” offending vehicles “were, are, or will be operated.” *Id.* at 5. The projects financed by the Trust Fund are “intended to fully mitigate the total, lifetime excess NO_x emissions” from the offending vehicles. *Id.*

Third, VW agreed to “direct” \$1.2 billion to “investments over a 10-year period to support increased use of technology” for ZEVs, including investments related to “ZEV infrastructure, access to ZEVs, and ZEV education.” *Id.* at 4 & App’x C ¶ 1.6. The required ZEV investments “are intended to address the adverse environmental impacts arising from consumers’ purchases of the” offending vehicles, which DOJ contends “were purchased with the mistaken belief that they were lower-emitting vehicles.” *Id.* at 4-5.

The Decree provides three definitions of a ZEV. A ZEV may be an “on-road” (i) passenger car, (ii) light, medium, or heavy duty vehicle, or (iii) light duty truck that “produces zero exhaust emissions” of various pollutants, “including but not limited to, battery electric vehicles (‘BEV’) and fuel cell vehicles (‘FEV’).” *Id.* App’x C ¶¶ 1.9.1. A ZEV may also be an “on-road plug-in hybrid electric vehicle (‘PHEV’) with zero emission range greater than” 35 miles (light duty vehicles) or 10 miles (medium- and heavy-duty vehicles). *Id.* App’x C ¶¶ 1.9.2. Finally, a ZEV may be an “on-road heavy-duty vehicle with an electric powered takeoff.” *Id.* App’x C ¶¶ 1.9.3.

The Decree also defines acceptable ZEV investments. Under the Decree, a ZEV investment must “promot[e] and advanc[e] the use and availability of ZEVs” in certain ways, including (i) building and maintaining ZEV infrastructure (e.g., charging and fueling stations), (ii) sponsoring ZEV public education projects, and (iii) supporting programs that increase the public’s exposure to ZEVs (e.g., car sharing and ride hailing). *Id.* App’x C ¶¶ 1.10.

ANALYSIS

I. The court lacks jurisdiction to approve the Decree’s provisions enjoining VW to make ZEV-related investments.

A court cannot enter into a consent decree that “conflicts with or violates the statute upon which the complaint was based.” *Local No. 93 v. City of Cleveland*, 478 U.S. 501, 526 (1986); *see also Kasper v. Bd. of Election Comm’rs*, 814 F.2d 332, 340 (7th Cir. 1987) (“[J]udges should be on the lookout for attempts to use consent decrees to make end runs around the legislature”). Here, the Decree is founded upon section 204 of the CAA, which grants the court equitable “jurisdiction to restrain” section 203 violations. 42 U.S.C. § 7423(a). This limitation on the court’s equitable authority deprives it of jurisdiction to approve Decree provisions that do not “restrain” future violations. *See Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 488 (1996) (holding statute authorizing actions “to restrain” violations forecloses backward-looking equitable remedies).

The court may not approve the Decree's ZEV-related investment provisions because they do not "restrain" future violations of section 203. VW has been accused of violating section 203 by (i) introducing into commerce vehicles not covered by an EPA-issued Certificate of Conformity, (ii) rendering inoperative devices installed on its vehicles to comply with EPA emissions regulations, (iii) causing defeat-devices to be installed on its vehicles, and (iv) depriving EPA of accurate records used to determine its compliance with emissions regulations. Compl. ¶¶ 102-31. But making \$1.2 billion in ZEV-related investments does not affect the likelihood that VW will engage in any similar conduct in the future. The *Federal Register* notice announcing the Decree admits as much, noting that the Decree does not address claims for "prospective injunctive relief to prevent future violations of the same type that are alleged in the complaints." 81 Fed. Reg. 44051, 44051 (July 6, 2016).

Further, it proves to much to contend that \$1.2 billion in ZEV-related investments "restrain" future section 203 violations by depriving VW of funds it might use to engage in such unlawful conduct in the future. Both the D.C. and Second Circuits have rejected precisely this argument, noting that it would deprive "restrain" of meaning and unlawfully expand the court's equitable jurisdiction to "allow any remedy that inflicts pain." *United States v. Philip Morris USA, Inc.*, 396 F.3d 1190, 1200 (D.C. Cir. 2005) (citing *United States v. Carson*, 52 F.3d 1173, 1182 (2d Cir. 1995)).

In any event, notwithstanding section 204, the Decree's ZEV-related investment provisions are beyond the reach of the court's equitable jurisdiction because they neither correct nor dissipate the evil effects of past unlawful conduct. *See, e.g., United States v. Holtzman*, 762 F.2d 720, 724-25 (9th Cir. 1985). The complaint identifies excess NO_x emissions—and only NO_x emissions—as the source of harm attributable to VW. Compl. ¶¶ 72, 81, 85, 88-89, 94. That pollution could be either past or future excess emissions. The former has already inflicted whatever harm it might cause on human health or the environment. *See EPA, Technical Bulletin: Nitrogen Oxides (NO_x), Why and How They Are Controlled*, at 5 (Nov. 1999) (noting that NO_x dissipates within days). Such harm is impervious to ZEV-related investments. The latter—from 2.0 Liter Subject Vehicles that are not decommissioned or repaired—will occur and generate harm irrespective of whether VW makes any ZEV-related investments.

Indeed, the lack of any relationship between the required ZEV-related investments and VW's conduct is evident on the Decree's face. The Decree asserts that its required ZEV-related investments are "intended to address the adverse environmental impacts arising from consumers' purchases of the 2.0

Liter Subject Vehicles, which the United States . . . contend[s] were purchased with the mistaken belief that they were lower-emitting vehicles.” Decree at 4-5. EPA does not explain how Consumers’ beliefs about their automobiles—mistaken or otherwise—could cause “adverse environmental impacts.” But in any event, the Decree’s very next paragraph states that the funds VW will place in an Environmental Mitigation Trust are “intended to *fully mitigate* the total, lifetime excess NO_x emissions from the 2.0 Liter Subject Vehicles.” *Id.* at 5 (emphasis added). In other words, ZEV-related investments are unrelated to any harm attributable to VW.

II. The Decree’s ZEV-related investment provisions violate the Miscellaneous Receipts Act and the anti-augmentation principle of federal appropriations law it codifies.

A. The Decree’s ZEV-related investment provisions violate the Miscellaneous Receipts Act.

1. The Comptroller General has correctly determined that the Miscellaneous Receipts Act prohibits settlements that divert funds from Treasury to entities or projects that lack a sufficient nexus to allegedly unlawful conduct.

Under the Miscellaneous Receipts Act (“MRA”), “an official or agent of the Government receiving money for the Government from any source shall,” with exceptions not relevant here, “deposit [it] in the Treasury as soon as practicable without deduction for any charge or claim.” 31 U.S.C. § 3302(b). This safeguards the separation of powers by preserving congressional control over the purse. *See* OLC, *Re: Disposition of Funds at Conclusion of Joint FBI/DOD Undercover Operations* at 2–3 (1997). In short, the MRA helps ensure Executive Branch dependence on the Legislative Branch to finance its activities.

The Comptroller General, an agent of Congress, and DOJ’s Office of Legal Counsel, an agent of the President, have put forward competing interpretations of how the MRA applies in the context of settlements. Both agree that the first predicate of an MRA violation is the diversion of funds from Treasury. *See* Decs. of the Comp. Gen., B-247155.2, at 3 (1993); *In re: Stewart Transp. Co.*, 4 Op. OLC 684, 688 (1980). This flows from the MRA’s text. But they disagree on what else is necessary to establish a violation.

The Comptroller General’s position is that agencies abuse their “prosecutorial authority” when they pursue “enforcement scheme[s]” that “go beyond remedying the violation” at issue. Decs. of the Comp. Gen., B-247155.2,

at 2 (1993). Settlements that go beyond remedying violations are unlawful “augment[ations]” of appropriations and represent “circumvention of the congressional appropriations process.” *Id.* According to the Comptroller General, agencies generally may not require payments to third parties as “consideration” for foregoing “further sanction[s] or penalt[ies].” Decs. of the Comp. Gen., B-210210, at 2 (1983). Rather, in all cases, there must be a relationship between the settlement condition and “the correction of the [alleged] violation in question.” Decs. of the Comp. Gen., B-247155.2, at 1 (1993); *see also* Decs. of the Comp. Gen., B-247155, at 3 (1992).

The Comptroller General has repeatedly applied these principles to declare settlements unlawful. In 1983, the Comptroller General informed the Commodities Future Trading Commission that it could not accept a charged party’s promise to make a donation to an educational institution as all or part of the settlement of an enforcement action. Decs. of the Comp. Gen., B-210210 (1983). In 1990, the Comptroller General rejected the Nuclear Regulatory Commission’s efforts to settle enforcement actions by substituting funding for nuclear safety research projects at universities or nonprofit institutions for civil penalties. Decs. of the Comp. Gen., B-238419 (1990). And in 1992 and 1993, the Comptroller General rejected EPA’s efforts to settle pollution cases conditioned upon alleged violators funding public awareness and other projects. Decs. of the Comp. Gen., B-247155 (1992); Decs. of the Comp. Gen., B-247155.2 (1993).

OLC has, unsurprisingly, adopted an interpretation of the MRA that gives the Executive Branch far more freedom over the disposition of settlements funds, at the expense of Congress’ constitutional appropriations power. OLC recognizes that the MRA applies to the government’s constructive receipt of funds—those it “could have accepted.” *In re: Steuart Transp. Co.*, 4 Op. OLC at 688. But rather than measuring constructive receipt by the nexus between settlement conditions and alleged underlying harm, OLC does so by examining the timing of admissions or findings of liability and post-settlement control over settlement funds. According to OLC, the government does not receive funds—constructively or otherwise—when settlements (i) are “executed before an admission or finding of liability” and (ii) foreclose “post-settlement control” by the government “over the disposition or management of the funds or any projects carried out.” *Application Of the Government Corporation Control Act and the Miscellaneous Receipts Act to the Canadian Softwood Lumber Settlement Agreement*, 30 Op. OLC 111, 119 (2006) (quoting Mem., Rebecca Arbogast, OLC, *Miscellaneous Receipts Act and Criminal Settlements* (1996)).

As others have noted, OLC’s interpretation of the MRA is a ready-made guide to its evasion. *See* Ltr. from Richard A. Epstein to Congressmen Bob Goodlatte & Jeb Hensarling at 5 (May 21, 2016) (attached as Exhibit A). The requirement that a settlement occur before an admission or finding of liability simply motivates agencies to structure settlements so that parties agree to provisions that violate the MRA before any admission or finding of liability. And the requirement that the government abstain from “post-settlement control” of funds is both illusory and irrelevant. It is illusory because the government can map out post-settlement use of funds in excruciating detail in the settlement, as it did here. *See infra* p.10. It is also irrelevant because the availability of such funds necessarily arises from the settlement’s failure to fully remedy the alleged harm or to shortchanging the Treasury. In either case, the government has unlawfully leveraged its settlement authority to divert funds from congressionally intended destinations—remediation or Treasury—and toward unappropriated endeavors.

Notably, components of the Executive Branch have sided, at least implicitly, with the Comptroller General rather than OLC. For example, DOJ broadly forbids case resolutions that require “defendant[s] to pay funds to a charitable, educational, community, or other organization or individual that is not a victim of the criminal activity or is not providing services to redress the harm caused by the defendant[s]’ criminal conduct.” Memorandum for Holders of the United States Attorneys’ Manual, at 1 (May 14, 2008). DOJ recognizes that such payments “can create actual or perceived conflicts of interest and/or other ethical issues.” *Id. But see, e.g.,* Decree App’x C ¶ 1.10.2 (requiring VW to engage in “education or public outreach that builds or increases public awareness of ZEVs”). For the same reasons, DOJ permits probation agreements resolving criminal environmental cases to include community service obligations only if the required service is “narrowly tailored to the facts of the case.” *Id.* at 2.

EPA has followed a similar course, requiring a nexus between alleged harm and projects required by settlement agreements. *See* EPA, *2015 Update to the 1998 U.S. EPA Supplemental Environmental Projects Policy*, at 7-8 (Mar. 10, 2015) [hereinafter “SEP Policy”]; Mem., Susan Shinkman, Dir., Office of Civil Enforcement, to Regional Counsels, et al., at 4 (Nov. 14, 2012) [hereinafter “MIR Policy”]. EPA’s SEP Policy governs “project[s] or activit[ies] that [are] not required by law, but that . . . defendant[s] agre[e] to undertake as part of the settlement of . . . enforcement action[s].” SEP Policy at 1. SEPs must have “a sufficient nexus” with the violations alleged—regardless of the timing of any admission or finding of liability. *Id.* at 7. The MIR Policy covers Mitigation as Injunctive Relief—i.e., “injunctive relief” that EPA believes “a court could order” to “remedy, reduce or offset past (and in some cases ongoing) harm

caused by [an] alleged violation.” MIR Policy 2, 3. The MIR Policy requires an even “closer connection between a mitigation action and the harm it redresses than the nexus required by the SEP Policy.” MIR Policy at 4.² EPA grounds its nexus requirement in Comptroller General opinions. SEP Policy at 7 & n.8.³

- 2. The Decree’s ZEV-related investment provisions are unlawful under any interpretation of the Miscellaneous Receipts Act.**
 - a. The Decree’s ZEV-related investment provisions unlawfully divert funds from Treasury.**

The Decree’s ZEV-related investment provisions satisfy the first predicate for an MRA violation—diversion of funds from Treasury. Despite its silence on civil penalties, the Decree self-evidently diverts some portion of civil penalties VW would otherwise pay to Treasury toward ZEV-related investments.

Only forthcoming concessions on civil penalties could explain VW’s agreement to make \$1.2 billion in ZEV-related investments in the Decree. Other possibilities are foreclosed by law, precluded by the Decree’s text, or wholly implausible. VW, for example, is under no legal obligation to make such investments, because DOJ could not secure a court injunction compelling it to do so. *See supra* pp.3-5. Nor has VW received concessions on its mitigation or prevention obligations. Under the Decree, the funds VW will place in an Environmental Mitigation Trust are “intended to *fully mitigate* the total, lifetime excess NO_x emissions from the 2.0 Liter Subject Vehicles.” Decree at 5 (emphasis added). And the \$10.033 billion it has set aside to buyback automobiles or terminate leases is based on an assumed 100% participation rate.

² According to EPA, MIRs might require sources to reduce emissions of a pollutant below legal limits to offset past illegal, excess emissions of that pollutant. MIR Policy at 4. By contrast, SEPs might require sources to operate monitoring stations for that pollutant. *Id.*

³ EPA categorically forbids settlements involving cash payments to third parties because they are “easily . . . construed as . . . diversion[s] from Treasury” in violation of the MRA. Mem., John Peter Suarez, Assistant Adm’r, to Regional Counsels, et al., at 3 (Dec. 15, 2003); *see also* SEP Policy at 17 n.25 (“Cash donations are prohibited because they may create the appearance of a diversion of penalty funds from the U.S. Treasury in violation of the [MRA].”). But EPA does not explain how forbidden cash payments differ from permissible SEPs.

CASA ¶ 2.42 (referencing the Decree). And, of course, there is no “reason to think that” it is making payments to resolve legal claims “out of the goodness of [its] heart.” *Sedlack v. Commissioner*, 203 F.2d 825, 830 (7th Cir. 1953).⁴

That leaves forthcoming concessions with respect to VW’s substantial exposure to civil penalties as the only explanation for its agreement to direct \$1.2 billion to ZEV-related investments.⁵ And those penalties are owed to Treasury.

b. The Decree’s ZEV-related investment provisions unlawfully lack any nexus to harm attributable to VW.

The Decree’s ZEV-related investment provisions also satisfy the second predicate for an MRA violation—an insufficient nexus between the settlement condition and unlawful conduct. Here, the Decree’s ZEV-related investments are wholly unconnected to VW’s conduct. *See supra* pp.4-5.

Indeed, the ZEV-related investment provisions are incompatible with EPA’s SEP Policy and, *a fortiori*, its MIR Policy as well. To comply with the SEP Policy’s nexus requirement, a project must reduce either (i) the likelihood of similar violations, (ii) the adverse health and/or environmental effects of the violation, or (iii) the risk to health and/or the environment created by the violation. *Id.* at 7-8. But ZEV-related investments cannot reduce the likelihood that VW will install defeat devices on its vehicles in the future. Of course, the investments’ financial burden might have some deterrent effect. But deterrence attributable to financial pain is legally insufficient. *See Philip Morris USA, Inc.*, 396 F.3d at 1200. Further, ZEV-related investments do not reduce either the adverse effects of VW’s alleged violations or any risks arising out of them. The harm VW has allegedly caused is either a *fait accompli* or will occur in the future regardless

⁴ *See also* Ex. A at 7 (noting that it is “utterly impossible” to understand why a defendant “without any compulsion,” would prefer to substantially increase its payments beyond statutory maximums “instead of standing on its rights”).

⁵ DOJ’s complaint alleges four separate violations of CAA section 203 with respect to roughly 580,000 vehicles. *See* 42 U.S.C. § 7522(a)(1), (a)(2), (a)(3)(A), (a)(3)(B); Compl. ¶¶ 56-84. The civil penalties for each car could total \$116,250. *See* 42 U.S.C. § 7524(a); 40 C.F.R. § 19.4. The number of violations (580,000) multiplied by the total civil penalties for each violation (\$116,250), yields a back-of-the-envelope exposure for civil penalties of nearly \$67.5 billion.

of the timing, scope, or magnitude of any ZEV-related investments. *See supra* pp.4-5. Either way, ZEV-related investments will not help. *Id.*⁶

c. The Decree’s ZEV-related investment provisions unlawfully give EPA post-settlement control over settlement funds.

The Decree violates the MRA, even under OLC’s untenable reading, by giving EPA substantial post-settlement control over its ZEV-related investments.

In detailed provision after detailed provision, the Decree ensures EPA can effectively control VW’s decisions regarding ZEV-related investments. *See generally* Decree App’x C. The Decree specifies not only how much money VW must invest, but when it must make those investments—“\$300 million . . . every 30 months unless otherwise agreed to in writing by EPA.” *Id.* App’x C ¶ 2.1. The Decree also demands that VW prefer certain ZEV-related investments over others, requiring each National ZEV Investment Plan to include investments in building and maintaining ZEV infrastructure (e.g., charging and fueling stations) and ZEV public education projects, and precluding VW from choosing to direct all of its ZEV-related investments to programs that increase the public’s exposure to ZEVs (e.g., car sharing and ride hailing). *Id.* App’x C ¶¶ 2.5.1, 2.5.5; *see also id.* App’x C ¶ 2.5.6 (limiting ZEV-related investments in public education projects). And the Decree gives EPA substantial input into and veto authority over VW’s National ZEV Investment Plan, according to which VW must make all required investments. *Id.* App’x C ¶¶ 2.1, 2.4, 2.5. This level of input and control gives EPA substantial leverage to, among other things, further direct the type and location of ZEV-related investments. *See e.g., id.* App’x C ¶¶ 2.5.4, 2.5.7 (allowing EPA to review the geographic allocation of ZEV-related investments).

These provisions give EPA more than enough power to ensure that VW’s ZEV-related investments are made according to its preferences regarding timing, type, and location. In short, they ensure substantial—and unlawful—post-settlement control over settlement funds.

⁶ The SEP policy categorically forbids “[g]eneral public educational or public environmental projects” that aim to promote environmentally beneficial conduct. SEP Policy at 17. Thus, EPA’s own policy deems out of bounds the Decree’s requirement that VW engage in “education or public outreach that builds or increases public awareness of ZEVs.” Decree App’x C ¶ 1.10.2.

III. The Decree's ZEV-related investment provisions unlawfully augment appropriations.

The MRA is the primary codification of federal appropriations law's "anti-augmentation" principle, forbids using outside funds to enhance congressional appropriations. See OLC, *Re: Disposition of Funds at Conclusion of Joint FBI/DOD Undercover Operations* at 2-3 (1997); 2 GAO, *Principles of Federal Appropriations Law* at 6-162 to 6-163 (3d ed. 2004). The premise of the anti-augmentation principle is that the Constitution empowers Congress alone to decide not only that a project is worthy of federal financing, but also the extent of the financing that is appropriate. See Decs. of the Comp. Gen., B-300248, at 3 (2004).

The Decree's ZEV-related investment provisions augment appropriations by funding unenacted presidential policy preferences that Congress has implicitly, but clearly rejected.

Electrifying the nation's automobile fleet has been a priority for President Obama since he took office. White House, *Fact Sheet: President Obama's Plan to Make the U.S. the First Country to Put 1 Million Advanced Technology Vehicles on the Road*, Jan. 25, 2011, <https://www.whitehouse.gov/sites/default/files/other/fact-sheet-one-million-advanced-technology-vehicles.pdf>. And in 2011, he requested \$300 million from Congress to "catalyze electric vehicle deployment." *Id.* In 2016, the President also asked Congress to impose a \$10 per barrel tax on oil to finance ZEV-related investments through his "21st Century Transpiration Initiative." White House, *Fact Sheet: President Obama's 21st Century Clean Transportation System*, Feb. 4, 2016, <https://www.whitehouse.gov/the-press-office/2016/02/04/fact-sheet-president-obamas-21st-century-clean-transportation-system>.

Congress, however, has never supported the President's ZEV-related plans and has, instead, gone in a different direction. In the 2015 FAST Act, Congress directed the Secretary of Transportation to establish "electric vehicle charging and hydrogen, propane, and natural gas fueling corridors" throughout the nation. [FAST Act § 151]. Rather than make direct investments in infrastructure, the FAST Act directs the Secretary of Transportation to "identify the near- and long-term need for, and location of" fueling and charging infrastructure "at strategic locations along major national highways." *Id.*

The Decree's ZEV-related investment provisions represent an impermissible evasion of Congress' decision to reject the President's preferred ZEV-related infrastructure plan and to map out a different course for federal

involvement in alternative fuels infrastructure development. Having failed to secure \$300 million from Congress for ZEV-related investments, the Decree seeks to secure four times that amount from VW. And having failed to convince Congress it should invest directly in ZEV infrastructure, the Decree does exactly that. At every turn the Decree's ZEV-related investment provisions augment congressional appropriations.

DOJ cannot shelter the Decree's ZEV-related investment provisions within EPA's SEP Policy. Under that policy, augmentation occurs when a SEP satisfies a statutory obligation, contravenes a statutory expenditure prohibition, or supplements a specific appropriation. *See* SEP Policy at 9. But the SEP Policy is flawed. It acknowledges that SEPs that result in third parties supplementing EPA's *existing* funding capabilities are unlawful augmentations, even absent specific prohibitions on additional expenditures. It follows, then, that SEPs that result in third parties supplementing EPA's *non-existent* funding capabilities are also unlawful augmentations. There is no basis for requiring a specific prohibition on expenditures in the latter, but not the former, case. The Decree's ZEV-related investment provisions thus unlawfully augment appropriations.

CONCLUSION

The MRA safeguards the 16 words of the Constitution's Appropriations Clause: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. art. I, § 9, cl. 7. The Decree tramples upon Congress' constitutional authority and violates the MRA. The MRA forecloses DOJ from leveraging its settlement authority to deprive Treasury of civil penalties in order to pursue a \$1.2 billion campaign to promote and advance the use and availability of ZEVs—a project that lacks any nexus to the conduct underlying the Decree. The MRA also deprives EPA of any authority to augment its appropriations by directing public resources toward presidential priorities that Congress has flatly rejected. If the President wants to promote electricity—rather than gasoline, natural gas, propane, or biofuels—as the future fuel of the nation's vehicle fleet, he must secure congressional appropriations to do so. His agents violate the MRA when, as here, they exploit their enforcement authority to secure private financing for that venture.

EXHIBIT

A

BOYDEN GRAY & ASSOCIATES PLLC
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VW-2LCMT0000100

Richard A. Epstein

May 21, 2016

The Honorable Bob Goodlatte
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20510

The Honorable Jeb Hensarling
Chairman
Committee on Financial Services
U.S. House of Representatives
Washington, DC 20510

Re: Mortgage Lending Settlements of the Department of Justice With Banks

Dear Chairman Goodlatte and Chairman Hensarling:

On February 11, 2015, I sent you a letter that examined the settlements the United States Department of Justice (DOJ) had entered into with JP Morgan Chase, Citigroup and Bank of America with respect to their handling of disputes over residential mortgage-backed securities (RMBSs). Since that time the DOJ has entered into two other settlements with Morgan Stanley and Goldman Sachs. These settlements allowed the banks to reduce the amount of the payments into the Treasury by instead making contributions of millions of dollars to designated community groups for supposed third-party charitable purposes. In exchange for the contributions the banks received a reduction in their liabilities for various assorted legal violations. The question is whether these settlements subverted the exclusive power that Congress has over the appropriation process. Let me repeat once again that I am writing this letter solely on my own behalf. I have no client interest in this matter. As I noted in my earlier letter, I have done extensive work on many of these issues, and remain (for identification purposes only) the Laurence A. Tisch Professor of Law, New York University School of Law, the Peter and Kirsten Bedford Senior Fellow, Hoover Institution, and the James Parker Hall Distinguished Professor of law emeritus and senior lecturer at the University of Chicago.

In my February letter, I concluded that this redirection of Treasury-bound funds to other private organizations was an illegal and unconstitutional appropriation of federal funds to private groups. The argument made by the DOJ and other proponents of these settlements—namely, that these settlements were made in good faith with banks that were represented by counsel—was wholly

beside the point. It was completely in the interest of the banks to reduce their financial liability by whatever means were available to them. Their acceptance of the offer in no way gives the DOJ the authority to make that offer, when the DOJ knows full well that the banks are under a duty to their own shareholders to take the best offer available to them.

The purpose of this letter is to extend my earlier analysis by reviewing the Miscellaneous Receipts Act (MRA), 31 U.S.C. § 3302, which governs the disposition of funds paid into the United States Treasury. Since the time of my earlier analysis, David K. Min, Assistant Professor, has offered his own testimony supporting the position of the DOJ on this fundamental issue.¹ In his testimony he comments extensively on the testimony of Paul Larkin² as well as on other sources. Examining this body of work only reinforces the conclusion I reached in my February 11, 2015 letter. The DOJ settlement practices are illegal and pose a serious threat to the sound administration of justice.

By way of setting the stage for this analysis, it is useful to refer briefly to the important recent decision of Judge Rosemary Collyer, in *United States House of Representatives v. Burwell (HR v. Burwell)*, which held unconstitutional the payments made by Treasury under Section 1402 of the Affordable Care to insurance companies that waived deductibles and co-pays and provided other benefits to potential insureds to induce them to enroll in ACA-approved health care plans. Judge Collyer held that the Affordable Care Act did authorize a program for such reimbursements, but did not fund them, so it was unconstitutional for Treasury to make those payments to any health care insurer in the absence of some explicit appropriation by Congress for that purpose. In her view, the interpretive question was clearly a matter of law, so the government did not receive any deference in its interpretation of Congress' appropriation power. I take that same position here. The language of the MRA forbids the diversion of funds by any executive branch officials from the Treasury to any private organization.

The MRA provides, in relevant part, as follows:

¹ Written Testimony of David K. Min, Assistant Professor of Law, University of California Irvine School of Law, Before the Subcommittee on Oversight and Investigations of the United States House of Representatives Committee on Financial Services, *Settling the Question: Did Bank Settlement Agreements Subvert Congressional Appropriation Powers?*, Thursday, May 19, 2016 9:15 am, 2128 Rayburn House Office Building, available at <http://financialservices.house.gov/uploadedfiles/hhrg-114-ba09-wstate-dmin-20160519.pdf>

² Written Testimony of Paul J. Larkin, PhD, Senior Research Fellow, The Heritage Foundation, Before the Subcommittee on Oversight and Investigations of the United States House of Representatives Committee on Financial Services, *Settling the Question: Did Bank Settlement Agreements Subvert Congressional Appropriation Powers?*, presented on February 12, 2015, available at <http://www.heritage.org/research/testimony/2015/consumers-shortchanged-oversight-of-the-justice-departments-mortgage-lending-settlements>,

(a) Except as provided by another law, an official or agent of the United States Government having custody or possession of public money shall keep the money safe without—

- (1)** lending the money;
- (2)** using the money;
- (3)** depositing the money in a bank; and
- (4)** exchanging the money for other amounts.

(b) Except as provided in section 3718(b) of this title, an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim.

The clear intention of this provision is to make sure that money owed to the Treasury is promptly put into the general fund in order to prevent its diversion for purposes Congress has not authorized. The immediate deposit of these funds into the Treasury achieves that result by preventing any money from being used, lent, deposited, or exchanged by some inferior government official in transactions that have not been authorized by law. The American system of constitutional law contains key principles of separation of powers and checks and balances. Under these principles, any expenditure must be authorized by Congress, which *alone* can set the overall parameters under which the money is spent. It is for Congress to say how much money should be spent and on what purposes.

As Judge Collyer's recent decision in *HR v. Burwell* stresses, the Constitution invests *all* legislative power in the Congress of the United States. U.S. Const. art. I, § 1. Among the powers included in that delegation to Congress is the power to appropriate funds for specific government purposes. "No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." *Id.* at § 9, cl. 7. In most cases the revenues received by the United States are from taxation, and these provisions ensure that the taxes cannot be diverted to enterprises that have not been authorized by the Congress. It would be a massive circumvention of the constitutional scheme if any official in the executive branch, from the President on down, could evade this structural limitation on government power by the simple expedient of diverting the money to some other payee *before* it had been deposited.

By way of comparison, the situation here is no different from what would arise if an individual taxpayer, who was owed payment for services, could either reduce or avoid his income tax liability by diverting moneys owed him to some other person or entity with either lower or no tax liability. *Lucas v. Earl*, 281 U.S. 111 (1930), held that income was taxed to the party who earned it, and could not be diverted to another person by any prearranged contract directing that payment be

made to his wife instead. Justice Holmes sets out the futility of those anticipatory arrangements as follows:

[T]his case is not to be decided by attenuated subtleties. It turns on the import and reasonable construction of the taxing act. There is no doubt that the statute could tax salaries to those who earned them, and provide that the tax could not be escaped by anticipatory arrangements and contracts, however skillfully devised, to prevent the salary when paid from vesting even for a second in the man who earned it. That seems to us the import of the statute before us, and we think that no distinction can be taken according to the motives leading to the arrangement by which the fruits are attributed to a different tree from that on which they grew. 281 U.S. at 114-115.

It is just that logic that applies to the existing situation. No official in the executive branch should be allowed to defeat the MRA by diverting Treasury funds through, as Holmes observed, any “anticipatory arrangement, however skillfully devised[.]” Yet this is precisely what the DOJ has done under these bank settlements. DOJ’s pattern of evasion is stunningly simple, but should nonetheless be wholly forbidden. The DOJ enters into negotiations with a bank it suspects of improper behavior in connection with issuing or otherwise handling RMBS. It then tells the bank prior to settlement that it will reduce the total amount of money it will demand so long as the bank agrees in advance to provide funds to some executive branch-approved organization that will provide charitable services to individuals who are in personal distress with their own financial situation.

The arrangements here are suspect for two clear reasons. First, the defalcations that DOJ challenges are not in the primary lending market, but, as Professor Min notes, “over the alleged misconduct in the creation, marketing, and sale of residential mortgage-backed securities.” Min, Testimony at 1. In simple terms, the banks were charged with misconduct in the securitization of residential home mortgages. They were not charged with any misconduct in connection with the origination of any of these loans. There is therefore no more reason to divert the money to these organizations and their beneficiaries than there is to any other individuals who were in no way hurt by the asserted wrongs of the bank. Second, the DOJ often suggests that the money be paid to organizations that Congress has refused to fund or has already provided funding by explicit appropriations. As Chairmen Hensarling and Goodlatte noted in their November 25, 2014, letter to then U.S. Attorney General Eric H. Holder Jr., Citigroup was required to make a minimum of \$10 million payment to HUD-approved “housing counseling agencies,” which include La Raza and NeighborWorks. It is worth adding that HUD is part of the Obama administration, so that close coordination between two parts of the executive branch is to be presumed. It is not the case that these settlements would allow the banks to make their contributions to the American Cancer Society.

Looking at the settlement as a whole therefore, it seems clear that these provisions are intended to divert money from Treasury to causes that Congress already funded, may not have approved, or may have directly opposed. In order to justify this questionable result, Professor Min insists in his testimony (at page 1) that these settlements are proper so long as two conditions are satisfied:

First, the settlement must be executed prior to an admission or finding of liability. Second, the federal government must not retain post-settlement control over the funds. If these two criteria are met, the federal government's control over the settlement funds is deemed to be so attenuated that it cannot be said to have "received" the money, and thus any concerns about bypassing the appropriations process are, at least from a legal perspective, inapplicable.

Min's analysis, however, is fatally flawed because it renders wholly useless all the protections that the MRA affords to the public treasury. The first point dealing with the pre-liability timing of the settlement offers no protection against any form of collusive behavior. It simply provides a roadmap whereby the DOJ and the target bank first agree on a settlement and then conveniently announce that there is at that time no determination of liability. Both parties to the deal have every incentive to agree to that result, which can be done each and every time the parties wish to settle.

The second requirement is both ambiguous and irrelevant. It is ambiguous because the condition that the government "must not retain post-settlement control over the funds" does not give the settling bank full and complete discretion on where to pay the money in question. So long as the banks are required to pick organizations from some approved HUD list, the government has retained all the control it needs to steer the money into its intended hands, even though the parties for whose benefit the moneys are ultimately paid are not in any sense victims of the wrongful conduct for which the banks were sued. The point is also irrelevant, for even if the banks had *carte blanche* on how to spend the funds, there is no explanation for why they, and not the Congress, should determine who receives the money.

In the end, therefore, these two supposed conditions impose *zero* constraint on what the DOJ can do to direct the expenditure of money even without any appropriation by Congress. It is just wrong for Professor Min to assert that the control of DOJ over these funds is so "attenuated" that the entire process should not be treated as "receipt" of the funds in question. Exactly the opposite is true. The control that DOJ has in the design of the settlement and the distribution of the funds is in fact complete, such that the practice in this case manifestly violates the MRA even if it meets the two conditions that Min sets out.

Professor Min seeks to evade these arguments by correctly noting that "DOJ of course enjoys broad authority in deciding when and how to settle governmental

claims.” Min, Testimony at 3. The point is surely true, for when the government faces the risk of defeat and the cost of litigation, it is always entitled to settle a claim in ways it thinks will result in the highest net benefit to the United States. This authority is, as Professor Min notes, “broad.” But it is by no means absolute. In ordinary litigation the DOJ always has to act in good faith in its effort to provide maximum benefit to the United States. It follows therefore that the United States cannot enter into collusive settlements that allow private parties to do far better than the government’s own evaluation concludes they should be able to. The DOJ may well conclude that an uncertain claim for \$1,000,000 has between a 40 and 60 percent chance of success. If it then decides to settle the claim for \$100,000, or ten percent of face value, it is as though it has made an illicit appropriation of somewhere between \$300,000 and \$500,000 to the party with whom it has settled. It is in order to guard against this risk that ample authority exists to review settlements.

Professor Todd David Peterson explored this risk in his article, *Protecting the Appropriations Power: Why Congress Should Care About Settlements at the Department of Justice*, 2009 BYU LAW REV. 327 (2009), available at <http://digitalcommons.law.byu.edu/cgi/viewcontent.cgi?article=2483&context=lawreview>. His article addresses how “the executive branch has sought ways to circumvent congressional control over the federal purse and achieve its own ends outside of the will of Congress.” *Id.* at 330. It is worth quoting his conclusions in full:

First, when the Department is enforcing a federal statute, it may propose a settlement that requires the defendant to perform certain actions that benefit the Department or other federal agency. These actions may not violate the Miscellaneous Receipts Act because there are technically not “receipts,” but it circumvents Congress’s appropriations power by augmenting the agency’s budget.

Second, when the Department defends cases brought against the federal government, it may wish to compensate plaintiffs for political reasons or because the administration favors the plaintiff’s cause, even though the plaintiff’s legal claim is weak. This type of action is aided by the existence of the Judgment Fund, a permanent unlimited appropriation that may be used for paying judgments and settlements against the United States without charging the budget of any executive branch agency. Settlements that take advantage of this governmental deep pocket to evade Congress’s appropriations power amount to unauthorized grants to the plaintiffs.

Id. at 331.

Professor Min cites the Peterson article, Testimony at 4, but only for the bland observation that Congress sought to address this problem of improper

settlement. But he nowhere notes that the above passages show that the legislation was intended to respond to the very issues raised in this case. Indeed, in these circumstances the evidence of circumvention is apparent on the face of the settlement. The cases that Professor Peterson refers to are ones in which the beneficiary of DOJ largesse is the party with whom it is in dispute. In those cases, it is necessary to peel back the onion to discover whether the settlement was for a fair valuation. But that problem does not arise here because every dime that is explicitly directed to a third party charity counts as a diversion of funds. The settlement can therefore be condemned on its face, without going through the evaluations that are needed when there are no transfers to third parties.

Professor Min seeks to evade this conclusion by insisting that the use of third party payments allows the government to increase the pressure on the banking defendants. He thus gives the example where the government is supposedly constrained by a statutory cap from demanding more than \$100 million. Min, Testimony at 7. Nonetheless, it is “for various reasons” able to secure a settlement whereby it reduces the statutory damages to \$90 million so long as the bank offers \$90 million to charity. His argument is surreal. It is easy enough to understand why the DOJ might like to obtain a settlement above the maximum recoverable amount. But it is utterly impossible to figure out why any bank, without any compulsion, would prefer to increase its total financial payments by \$80 million by taking this deal instead of standing on its rights. If the bank wants to make charitable deductions for increasing good will, the last thing it wants to do is announce to the world that its contribution was to cope with serious allegations of civil or criminal wrongdoing.

Indeed, it is easier to find a better explanation for what the government has done—namely, it has taken advantage of the very elastic definition of what counts as a civil wrong. Professor Min notes that 12 U.S.C. 1833a(b)(1) caps penalties for FIRREA violations at \$1 million per violation. He then writes:

Thus, it is not clear that DOJ could have procured much more in civil penalties than it received from the RMBS settlements, even if it had litigated these cases and won, due to FIRREA’s statutory cap on civil penalties. The charitable payment provisions appear to have allowed DOJ to procure much more than it would have been able to get if it had been limited to civil penalties.

Min, Testimony at 7.

This analysis is, however, completely in error, because Professor Min does not explain why any one would pay an amount in excess of that \$1 million figure. Part of the answer lies in subsection (b)(2), which Professor Min does not quote, which provides: “In the case of a continuing violation, the amount of the civil penalty may exceed the amount described in paragraph (1) but may not exceed the lesser of \$1,000,000 per day or \$5,000,000.” The leverage, however, is not as limited as it

sounds, because these figures apply to multiple violations of the law in independent transactions. The RMBS involve many different deals, incorporating many different mortgages from different sources, so it is easy to multiply by the number of offenses to which the \$1 million and \$5 million limits apply. It follows that these large settlements are obtained because of enormous government leverage, not from some benighted sense of public duty. It is therefore no surprise that the astute bank will look for any avenue to avoid these crushing penalties, which is why the evasion of the MRA in these cases are so clear.

Nor is there anything in the literature that alters the conclusion. Professor Min cites an article by Professor Colin Diver, *The Assessment and Mitigation of Civil Money Penalties by Federal Administrative Agencies*, 79 COLUM. L. REV. 1435, 1455-56 (1979), for this unexceptionable proposition: "By definition, a civil money penalty does not serve a 'specific' compensatory function of making whole an identifiable individual specifically injured by the offending conduct. Money penalties can, however, be used to serve a 'general' compensatory function—that is, to compensate 'society' at large for harm that it has suffered at the hands of a violator."

When examined carefully, however, Diver's proposition cuts in exactly the opposite direction for which it was quoted. The penalties to which Diver refers are paid directly into the Treasury, where they compensate for a diffuse set of social losses. Professor Diver at no point mentions the diversion of public funds to specific organizations that will thereafter use them to assist discrete groups that were not injured by the conduct for which the settlement in question was reached. These payments would, under his argument, count as private and not social. Nothing in Diver's article offers the slightest defense for the settlement diversions by the DOJ in these bank cases.

Finally, Professor Min cites *Sierra Club, Inc. v. Electronic Controls Design, Inc.*, 909 F.2d 1350 (9th Cir. 1990)[*ECD*], for the proposition that "settlement agreements in which the defendants does [sic] not admit liability are not prohibited from including terms requiring them to make payments to private third parties." Min, Testimony at 4. But the assertion in question reveals a complete misunderstanding of the case. The Sierra Club brought a citizen's action under the Clean Water Act against ECD for the wrongful discharge of pollutants into the Molalla River in Oregon. The case was settled by consent decree before trial. That settlement contained a term that provided that ECD would "pay \$45,000 to various identified private environmental organizations for their efforts to maintain and protect water quality in Oregon." The Department of Justice then intervened and claimed that any civil penalty under the CWA had to be paid by law to the United States Treasury and not to a private party. The Court then held:

We agree with the district court that if the payments required under the proposed consent decree are civil penalties within the meaning of the Clean Water Act, they may be paid only to the U.S. treasury. We

disagree, however, that the payments are civil penalties. No violation of the Act was found or determined by the proposed settlement judgment. When a defendant agrees before trial to make payments to environmental organizations without admitting liability, the agreement is simply part of an out-of-court settlement which the parties are free to make.

It should be evident that the DOJ provision in *ECD* is the antithesis of the position here, where the DOJ has diverted money that should go into the Treasury into the hands of private parties who had no connection whatsoever with the suit, and who were not injured in any way by the underlying conduct of the banks, unlike the payments to the Sierra Club in the private settlement by *ECD*. Neither the Sierra Club nor the *ECD* were bound by the MRA as branches of the federal government. The settlement terms, moreover, did not make transfers to unrelated third parties, but instead were obviously intended to reimburse it in part for the costs of bringing suit and to provide a benefit to both the Sierra Club and the public at large. The case certainly does not support, let alone stand for, the proposition that the DOJ may conduct settlement negotiations that divert money that should be paid into the Treasury to private parties that have done nothing whatsoever to correct any underlying harm in the case.

In sum, there are no credible arguments either in the case law or in the presentation of Professor Min that lend any support to the proposition that the DOJ may divert money from the Treasury to private parties by offering private banks a financial break if they pay money directly to third parties. The practice is wholly illegal. It is also wholly undesirable as well. The DOJ's job is to enforce the law, not to direct resources to its favored clients or causes. Allowing these diversions of funds will have the undesirable effect of encouraging all kinds of interest groups to step forward to ask the DOJ to direct the proceeds of settlement in their direction. Indeed, there is no reason to believe that they will stop with asking the government to divert funds. It is all too likely that, through back channels, a wide range of interest groups of all persuasions will lobby DOJ to bring key law suits against their preferred defendants so that they can then claim their piece of the action when the case is settled. These are dangerous practices and dangerous precedents. The defense of these practices offered by DOJ and Professor Min should be decisively rejected. Practices of this sort should end right now.

Sincerely yours,



Richard A. Epstein



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July 26, 2016

Assistant Attorney General
Environment and Natural Resources Division
U.S. Department of Justice

In re: Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation, Case No: MDL No. 2672 CRB (JSC), and D.J. Ref. No. 90-5-2-1-11386.

Dear Assistant Attorney General:

Please consider adding Truck Stop Electrification as an Eligible Mitigation Technology in Appendix D-2 of the VW settlement.

As a trucking company, we find our drivers often have to idle their truck engines overnight while complying with DOT Hours of Service requirements and maintaining a safe and comfortable environment while resting.

We consider expanding the availability of truck stop electrification, or providing vouchers to pay for the service, essential in addressing the needs of our drivers and in decreasing the need to idle our trucks.

Sincerely,

Tanya Fox, CCLP, CDS
Safety & Compliance Manager
Brian Kurtz Trucking Ltd.
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Number of drivers in our fleet: 85



BKT 12/2015



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July 26, 2016

John C. Cruden
Assistant Attorney General
U.S. DOJ--ENRD
P.O. Box 7611
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In re: Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation, Case No: MDL No. 2672 CRB (JSC), and D.J. Ref. No. 90-5-2- 1-11386

Dear Assistant Attorney General Cruden,

Please find enclosed our **comments on Appendix C "The ZEV Investment Commitment"** to the Partial Consent Decree, Case No: MDL No. 2672 CRB (JSC).

Appendix C sets forth the requirements for Settling Defendants to direct \$2 billion of investments over a period of up to 10 years into actions that will support increased use of zero emission vehicle ("ZEV") technology in the United States, including, but not limited to, the development, construction, and maintenance of zero emission vehicle-related infrastructure. Eligible ZEV investment are defined in paragraph 1.10. As presently conceived, most of the investment of money by the Settling Defendants under ZEV Investment Commitment would, in all likelihood, be spent in category 1.10.1:

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

Brilliant Light Power Inc. (BrLP) believes that **the proposed ZEV infrastructure will become obsolete before the end of the proposed implementation period**, most likely in the early 2020s. The reasons are as follows:

- BrLP has developed a revolutionary new energy technology, called "SunCell[®]", that will be able to generate electricity from hydrogen plasma, with water as the only consumable. Series production of SunCells will start in 2017.
- SunCells will be cheap compared to existing electric power generation technologies and internal combustion engines.
- SunCells will be in a size range (100-500 kW) that match road transport needs nearly perfectly.

- BrLP intends to introduce SunCells for stationary uses first (in 2017), then uses and trucks since high capacity and capacity utilization in stationary, freight and mass transit power generation tends to be much higher than for cars that are, on average, used only 5% of the time (and 1% of maximum power). BrLP intends to develop automotive versions of SunCells by the early 2020s.
- However, given that the Partial Consent Decree, Appendix C “The ZEV Investment Commitment” proposes to create an expensive electric vehicle charging infrastructure that would be made obsolete by automotive SunCells as early as 2020, BrLP proposes to amend Appendix C as follows: replace paragraph 1.10.1 with:

“Brand-neutral research and development of ZEV technology within the United States. The results of such proprietary research and development efforts or activities will be made available to automobile manufacturers in the United States on a non-discriminatory basis under confidentiality agreements. Such efforts or activities may contain a statement that they are “sponsored by Volkswagen,” but that statement shall not be prominently displayed, and the efforts, materials or activities shall not feature, favor, or advertise Settling Defendants’ services or vehicles.”

Alternatively, the proposed new paragraph 1.10.1 could be inserted as paragraph 1.10.2 with appropriate changes in the order of the following paragraphs, or added as new paragraph 1.10.5.

BrLP’s SunCell® technology has recently been validated by five independent scientists, including professors of physics and engineering and a leading expert in nuclear and conventional explosives. The validation reports are available from BrLP under confidentiality agreement. More information is available on the BrLP website: www.brilliantlightpower.com and, in particular, demonstration videos and presentations at: <http://brilliantlightpower.com/demonstration-days/>.

Please also note that the **combined environmental and health benefits of electric vehicles and associated battery-charging infrastructure are not significant compared to conventional gasoline and diesel vehicles.** A recent, peer-reviewed study of “Life cycle air quality impacts of conventional and alternative light-duty transportation in the United States” (Tessum, PNAS, 2014 <http://www.pnas.org/content/111/52/18490.full.pdf>) shows that electric vehicles charged by next-decade grid-average electric power have higher health costs than conventional vehicles—with a mortality rate about twice that of modern internal combustion engines, and twice the health costs per gallon gasoline equivalent (\$1 vs. \$0.5 for gasoline, diesel, CNG or hybrids, see Tessum, Figure 2). The combined climate and health externality costs of grid-average electric vehicles are also higher than for gasoline, diesel, CNG and hybrids (Tessum, Figure 3).

Electric vehicles will have a climate and health cost advantage over conventional vehicles only once coal-fired power generation has been phased-out. Only **with clean electric power generation** technologies (solar, wind, water, SunCells) would a battery-charging infrastructure provide **positive** climate and health benefits. However, with SunCells soon available as a cost-effective automotive technology, a ZEV battery-charging infrastructure would become economically obsolete by the early 2020s.

Sincerely yours,



Dr. Randell L. Mills

Chairman and CEO
Brilliant Light Power, Inc.



BYD America
1800 S Figueroa St.
Los Angeles, CA 90015

August 5, 2016

Assistant Attorney General
U.S. DOJ—ENRD
P.O. Box 7611
Washington, D.C. 20044-7611

Re: *In re: Volkswagen “Clean Diesel” Marketing, Sales Practices, and Products Liability Litigation*, Case No: MDL No. 2672 CRB (JSC)

Dear Assistant Attorney General:

BYD America (“BYD”) appreciates the opportunity to comment on the Proposed Partial Consent Decree for the lawsuit entitled *In re: Volkswagen “Clean Diesel” Marketing, Sales Practices, and Products Liability Litigation*.

I. Introduction

BYD is a global manufacturer of zero-emission light-duty and heavy-duty battery electric vehicles. With its North American offices headquartered in Los Angeles, CA and multiple manufacturing facilities in Lancaster, CA, BYD seeks to support policy agendas that squarely address climate change and its associated dangers.

The proposed settlement is an important opportunity to make significant progress in the growth of electric vehicles across the nation, and especially in California. Although the settlement includes a substantial amount of funding for EVs, the resources are still finite. *It is critical that funding decisions be made with the mindset of achieving maximum emissions reductions per dollar spent.* With that in mind, BYD offers the following comments on the ZEV Investment Commitment and the Environmental Mitigation Trust Agreement.

II. ZEV Investment Commitment (“Appendix C”)

Focus on Heavy-Duty Vehicles in California

BYD supports the overarching zero emission vehicle (ZEV) strategy laid out in Appendix C. The funds will go a long way toward increasing ZEV infrastructure, education and access. The California ZEV Investment Plan (California Plan) is especially important, as its definitions allow funding for scrapping and replacement with ZEV vehicles and for the “Green City” initiative, which may include zero emission transit or freight transport projects. Any California Plan monies earmarked for vehicle purchases should be used to



acquire heavy-duty zero-emission vehicles. Clarification language to this effect should be added to Appendix C, as vehicle purchases are only addressed in Section I, Definitions, and do not receive any further explanation in Appendix C.

These types of projects should be a fundamental aspect of the California Plan. Large-scale deployments of heavy-duty zero-emission vehicles will result in significant economic, environmental and health benefits in California's most disadvantaged communities, which bear the brunt of greenhouse gas and criteria air pollutant emissions from conventionally fueled heavy-duty vehicles. For example, one study found that meeting federal ozone and particulate matter standards in the South Coast air basin, where many vulnerable communities are located, would result in health benefits valued at over \$21 billion dollars.¹ Given California's national prominence in the clean transportation space, it is critical that these projects receive priority and be implemented in order to provide a blueprint that can be emulated by other regions throughout the country.

Flexibility for Heavy-Duty Infrastructure

With respect to the California Plan, some extra flexibility should be afforded to charging infrastructure for heavy-duty ZEVs, at least in the short-term. As currently drafted, the California Plan (Section 3) requires any proposed charging infrastructure to have the ability to service all plug-in ZEVs with non-proprietary connectors. While this requirement makes sense in the light-duty ZEV context, it makes less sense for heavy-duty ZEVs. Charging standards for heavy-duty ZEVs are still evolving and each original equipment manufacturer (OEM) utilizes a proprietary charging solution for its vehicles. These solutions vary significantly on several levels, from the shape of the connector to the output power coming out of the cable. For example, one OEM's charger will take in power from the grid and charge at 100kW, while another OEM will take in the same power and charge at only 50kW. Further, some OEMs offer high power overhead catenary charging systems, while others prefer simple depot plug in solutions.

These fundamental technical differences make it extraordinarily difficult to accommodate multiple charger types on one heavy-duty charging station. The addition of a different connector type to a charging station would not allow vehicles from different heavy-duty ZEV OEMs to be able to charge from that station. Given these technical realities, *the California ZEV Investment Plan should allow for the installation of proprietary chargers, at least for the first 30-month portion of the Plan.* As the industry at large moves toward a plug-in charging standard, future 30-month segments will be able to integrate it. There are currently several active SAE committees that are developing standards for heavy duty charging, but these efforts will take time and we cannot afford to go slow when it comes to air quality and climate change.

¹ Victor Brajer, Jane V. Hall, and Frederick W. Lurmann. Valuing Health Effects: The Case of Ozone and Fine Particles in Southern California. *Contemporary Economic Policy*, 29 (4), 524-535.



III. Environmental Mitigation Trust Agreement (“Appendix D”)

Targeted Regional Funding

A crucial facet of maximizing emissions reductions involves directing funding toward regions that are most heavily impacted by greenhouse gas and criteria air pollutant emissions. A geographically scattershot funding approach will only serve to dilute the impact of the settlement fund and fail to make a significant impact on air quality. BYD commends Section 5.2.10 of the Environmental Mitigation Trust Agreement, which acknowledges the need to target funds toward “communities that have historically borne a disproportionate share of the adverse impacts of such emissions.” Projects should focus on regions found on the U.S. EPA’s nonattainment criteria air pollutant list.² Focused projects will also encourage larger deployments of heavy duty vehicles allowing for economies of scale, as well as concentrated improvements to air quality and significant operational cost savings.

Prioritize the Cleanest Technologies

Given the need to mitigate air quality damage caused by hidden emissions, it is important to focus funding on heavy-duty vehicles and, within that context, the cleanest technologies available. BYD applauds the eligible mitigation actions outlined in Appendix D-2, which specifically target the heavy-duty and freight sectors.

With respect to the expenditure structure, however, bolder steps must be taken to mitigate the damage that has already been inflicted on the environment. *Therefore, in cases where a zero emission solution is available, no funding should be directed toward any technology type that results in tailpipe emissions.* The Mitigation Trust is an once-in-a-lifetime opportunity to fundamentally change, at the national level, the way people and goods are moved in this country by making transformative gains in transportation electrification. Battery electric drayage trucks, transit buses and medium freight and delivery trucks are already commercially available and ready to meet the needs of their respective industries. Providing funding for diesel, CNG, hybrid and alternative-fuel solutions that will continue to emit more greenhouse gases and criteria air pollutants is counterproductive when completely zero-emission solutions are commercially available. The opportunity to deploy as many of these completely zero-emission heavy-duty vehicles should be aggressively seized. The Appendix D-2 language outlining eligibility for forklift projects should be used as the template for project eligibility in cases where zero-emission solutions are available.

Additionally, spending 15% of Trust Funds on light-duty zero emission vehicle supply equipment does not reflect the most efficient use of funds to achieve emissions reductions. This funding should be significantly decreased or eliminated, especially as

² <https://www3.epa.gov/airquality/greenbook/ancl.html>



both the National and California ZEV Investment Plans specifically target direct funding toward light-duty ZEV infrastructure. Instead, these funds should be directed toward the purchase of more zero-emission heavy-duty vehicles in order to achieve maximum air quality gains.

Expanded Forklift Weight Range

The lowest range of eligible weights for forklifts should be set at 3600 pounds lift capacity. This expanded weight range will increase the Mitigation Trust's impact on emissions reduction.

Getting Money Out the Door

Time is of the essence with respect to mitigating the environmental damage caused by the emissions-testing deception. As such, BYD recommends that funding be disbursed utilizing voucher systems. Several states, including California, have already established successful voucher programs aimed at funding heavy-duty zero-emission vehicles. The existing programmatic infrastructure can be used to disburse Trust Funds. States that do not have such programs can replicate this model in order to streamline their disbursements.

IV. Conclusion

These investments will prove transformative for numerous communities around the nation. It is critical that the funding be invested with an eye toward maximum impact on emissions and that it also be disbursed without delay. BYD appreciates the opportunity to make these comments and the thoughtful consideration of the U.S. Department of Justice.

Sincerely,

A handwritten signature in black ink, appearing to read "Zachary S. Kahn", is positioned above the typed name.

Zachary S. Kahn
Director of Government Relations
BYD America

State Capitol
Sacramento, CA 95814

California Legislature

August 4, 2016

Mr. John Cruden
Assistant Attorney General
United States Department of Justice
Environment and Natural Resources Division
P.O. Box 7611
Washington, D.C. 20044-7611

Re: Comments of Members of the California Legislature on Proposed Partial Consent Decree Under the Clean Air Act - Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation, Case No: MDL No. 2672 CRB (JSC)

Dear Mr. Cruden:

As California lawmakers, we are proud of our efforts to lead the world in fighting climate change. Last year, SB 350 (De León) was signed into law enacting the "Clean Energy and Pollution Reduction Act of 2015." This legislation establishes targets to increase retail sales of renewable electricity to 50 percent by 2030 and double the energy efficiency savings in electricity and natural gas end uses by 2030.

California is a leader in zero-emissions vehicle (ZEV) technology. And our vehicle rebate program has helped thousands of Californians make the switch from greenhouse gas-emitting cars. California regulatory agencies are working to ensure that all Californians have access to ZEV vehicles and the infrastructure to support it.

Electric vehicles and EV charging are at a tipping point. It is important that new investments in this area complement all other existing commitments and programs.

This settlement agreement presents a once in a lifetime opportunity to make a substantial investment in this technology.

With \$800 million designated to support EV Adoption in California and \$1.2 billion in a national fund, we are concerned that, as currently drafted, Appendix C leaves open serious questions about how the \$2 billion will be administered and what the impact will be on low income communities, as well as innovation and the continued operation of a competitive marketplace for EV charging equipment and services.

We want to ensure that the spirit and letter of SB 350 is at the centerpiece of this effort.

The funds should be administered independently and transparently, distributed in a way that encourages the continued development of a robust and competitive charging marketplace, allows drivers significant choice, and provides for meaningful administrative oversight.

The funds should not benefit one particular company or market sector, but should support competition within the entire industry. It is important to get this right, since the decisions we make today will define the marketplace for decades.

Therefore, to ensure that this rare capital infusion is used to its full benefit, we ask that CARB and the EPA continue to lead in this regard by ensuring that the following principles are enshrined in the decree:

ZEV for All Drivers – We want all Americans to participate in this program. Fund allocation must accelerate ZEV infrastructure in disadvantaged communities and communities of color, often the most affected by pollution from the energy sector.

Stimulate innovation – Utilize an independent body to oversee the administration of funds to ensure that multiple vendors with cutting-edge technology are able to enter the market. This independent body can ensure that the fund allocation does not favor one company over another.

Preserve Choice – Drivers should be able to charge their vehicles wherever they would like and whenever they can. Site owners should be able to choose charging technology and adjust pricing to fit the specific needs of their business.

Promote Transparency – The fund allocation process must be understandable, ensuring that all stakeholders have insight into the process and means by which to comment.

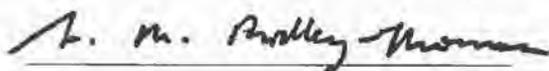
This is a rare opportunity for an infusion of capital into ZEV infrastructure, but safeguards are needed to ensure competition and innovation.

Thank you for considering our requests.

Sincerely,









Bob Borte

August 5, 2016

Assistant Attorney General
Environment and Natural Resources Division
U.S. DOJ--ENRD, P.O. Box 7611
Washington, D.C. 20044-7611

RE: Volkswagen ``Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation,
Case No: MDL No. 2672 CRB (JSC), and D.J. Ref. No. 90-5-2- 1-11386.

Dear Sir or Madam:

The comment below is submitted on behalf of California Greenworks, an environmental nonprofit corporation based in South Los Angeles. California Greenworks focuses on enriching urban green space for underserved communities, and has been fighting for environmental justice ever since its establishment in 2002.

California Greenworks supports the Consent Decree filed by the U.S. Environmental Protection Agency (EPA) and California Air Resources Board (CARB); however, California Greenworks suggests strategies to be developed to ensure that the mitigation funds are used to benefit communities most vulnerable to NOx-caused environmental issues.

The first line of defense against pollution in cities is urban green space, which removes nitrogen in water bodies, filter air, cool temperature, and retain ground water. However, it is widely recognized that environmental resources are not equitably distributed within cities. Accessibility to environmental resources such as green space is highly hierarchical, and for various reasons favors high-income white communities. As a result, high-income white communities enjoy more environmental benefit brought by green space and receive less impact from environmental hazards. Executive Order 12898 was introduced in 1994 to address this issue; it requires that Federal actions, including mitigation measures, to be reviewed and screened for their effects on minority communities and low-income communities.

Under the merit of E.O. 12898, various efforts to systematically quantify and assess environmental injustice are launched, including the creation of EJ indexes by EPA, which takes demographic information into account when assessing the impact of an environmental factor. EJ indexes reveal that within a geographically continuous region there are undeniable differences in the amount of impact communities sustain from environmental hazards. For example, despite being geographically close to each other, Beverly Hills scores significantly lower than South Los Angeles in all EJ indexes, indicating considerable differences in environmental hazards-caused impact on populations (Appendices A and B).

In this particular case concerning excess NOx emission, California Greenworks believes EPA and CARB must ensure that mitigation fund is not only allocated to areas where NOx emission is high ("where the 2.0 Liter Subject Vehicles were, are or will be operated", as stated in the Consent Decree), but also to projects primarily focus on NOx reduction in urban low-income and minority communities, for the following reasons:

1. NOx and its byproducts can travel long distance by wind; therefore, mitigation efforts should not be confined to locations where excess NOx emission happened, nor should the amount of efforts be proportional to the amount of excess NOx emission at that location;
2. As shown above, the impact of environmental factors on communities is stratified according to income and ethno-racial characteristics; urban low-income and minority communities sustain more severe impact due to their lack of environmental resources. Therefore, mitigation efforts should be community-based and concentrate on urban low-income minority communities;
3. More specifically, NOx is proven to be related to, among other effects, the formation of ground-level ozone (smog) and the deterioration of water bodies; both effects become more pronounced as area of green space decreases. Locating at the bottom of the green space hierarchy in cities, low-income and minority communities are most vulnerable to the consequences of excess NOx emission.

In closing, California Greenworks appreciates and welcomes EPA and CARB's settlement with Volkswagen, but at the same time urges EPA and CARB to implement rules which supervise the allocation and usage of mitigation funds, in the hope that communities most adversely affected by excess emission of NOx receive adequate funding for damage mitigation and green space restoration.

Please feel free to contact me by email at [REDACTED] or by phone at [REDACTED] should you have any questions about our comment.

Sincerely,
Haley Feng
Ecology Research Analyst (Intern) for California Greenworks

Appendices Attached

Save as PDF

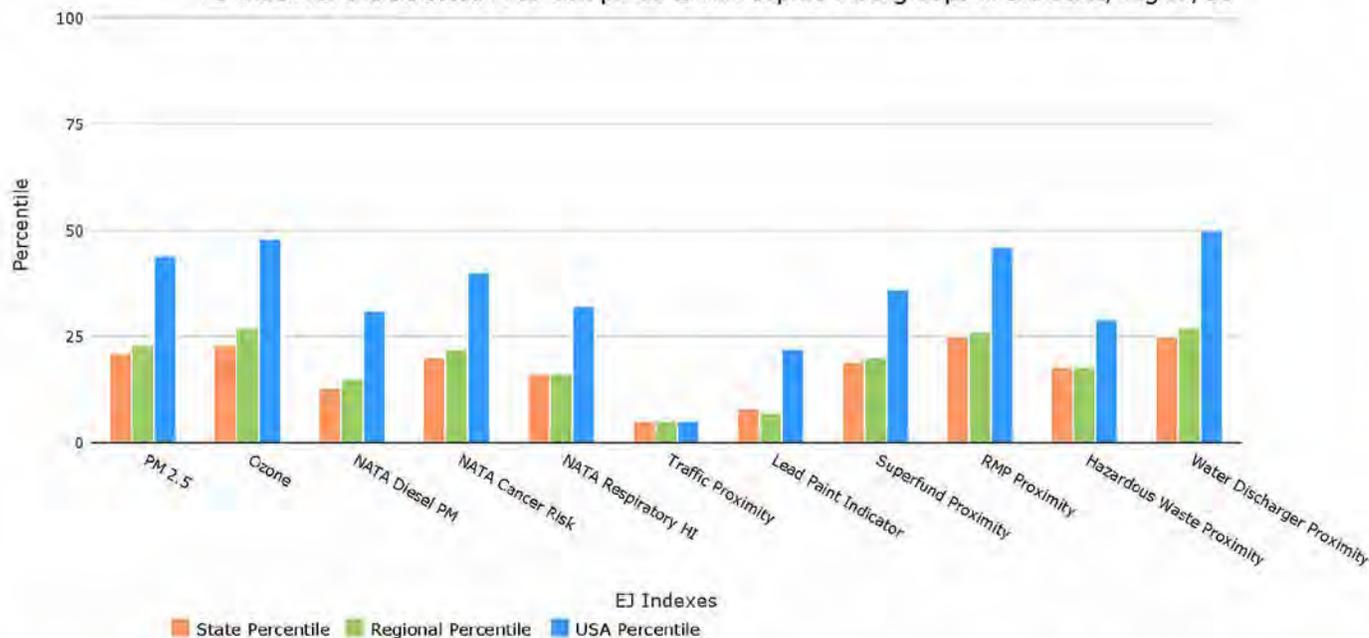


EJSCREEN Report (Version 2016)
3 mile Ring Centered at 34.073619,-118.400358
CALIFORNIA, EPA Region 9
Approximate Population: 255,315
Input Area (sq. miles): 28.27



| Selected Variables | Percentile in State | Percentile in EPA Region | Percentile in USA |
|---|---------------------|--------------------------|-------------------|
| EJ Indexes | | | |
| EJ Index for Particulate Matter (PM 2.5) | 21 | 23 | 44 |
| EJ Index for Ozone | 23 | 27 | 48 |
| EJ Index for NATA* Diesel PM | 13 | 15 | 31 |
| EJ Index for NATA* Air Toxics Cancer Risk | 20 | 22 | 40 |
| EJ Index for NATA* Respiratory Hazard Index | 16 | 16 | 32 |
| EJ Index for Traffic Proximity and Volume | 5 | 5 | 5 |
| EJ Index for Lead Paint Indicator | 8 | 7 | 22 |
| EJ Index for Superfund Proximity | 19 | 20 | 36 |
| EJ Index for RMP Proximity | 25 | 26 | 46 |
| EJ Index for Hazardous Waste Proximity | 18 | 18 | 29 |
| EJ Index for Water Discharger Proximity | 25 | 27 | 50 |

EJ Index for the Selected Area Compared to All People's Blockgroups in the State/Region/US



This report shows the values for environmental and demographic indicators and EJSCREEN indexes. It shows environmental and demographic raw data (e.g., the estimated concentration of ozone in the air), and also shows what percentile each raw data value represents. These percentiles provide perspective on how the selected block group or buffer area compares to the entire state, EPA region, or nation. For example, if a given location is at the 95th percentile nationwide, this means that only 5 percent of the US population has a higher block group value than the average person in the location being analyzed. The years for which the data are available, and the methods used, vary across these indicators. Important caveats and uncertainties apply to this screening-level information, so it is essential to understand the limitations on appropriate interpretations and applications of these indicators. Please see EJSCREEN documentation for discussion of these issues before using reports.

appropriate interpretations and applications of these indicators. Please see EJSCREEN documentation for discussion of these issues before using reports. This screening tool does not provide data on every environmental impact and demographic factor that may be relevant to a particular location. EJSCREEN outputs should be supplemented with additional information and local knowledge before taking any action to address potential EJ concerns.

Save as PDF



EJSCREEN Report (Version 2016)

3 mile Ring Centered at 33.927517,-118.278126

CALIFORNIA, EPA Region 9

Approximate Population: 347,440

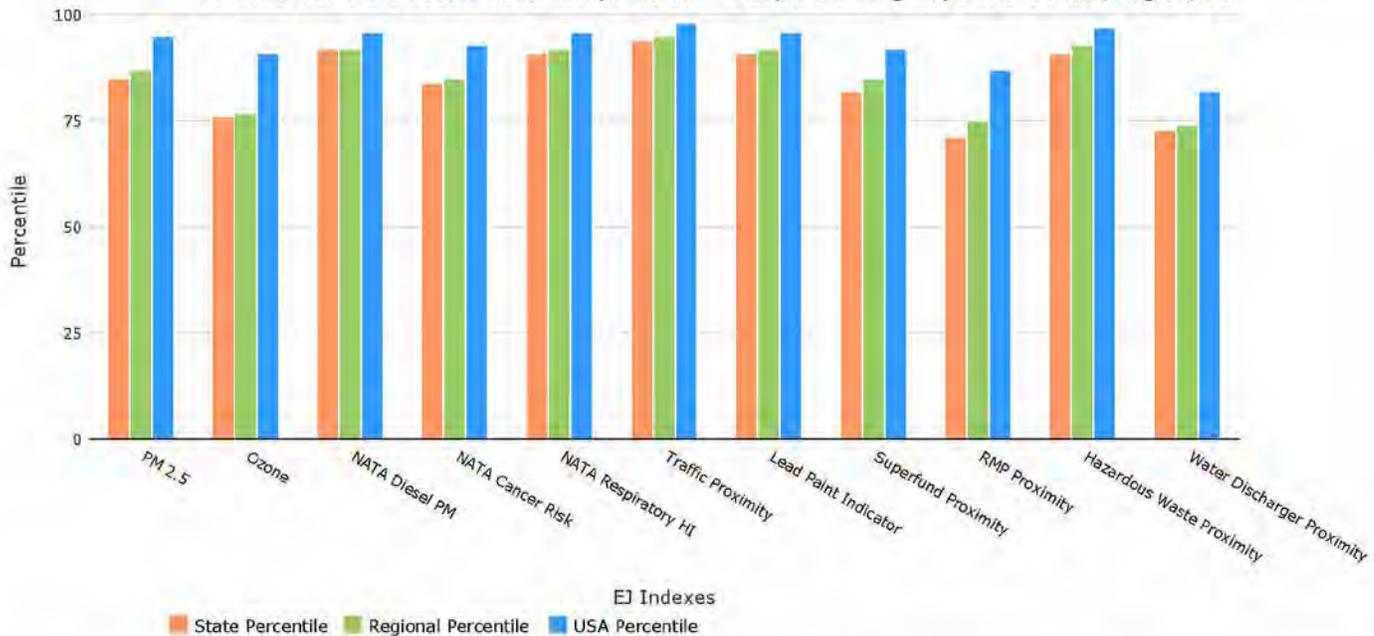
Input Area (sq. miles): 28.27

(The study area contains 1 blockgroup(s) with zero population.)

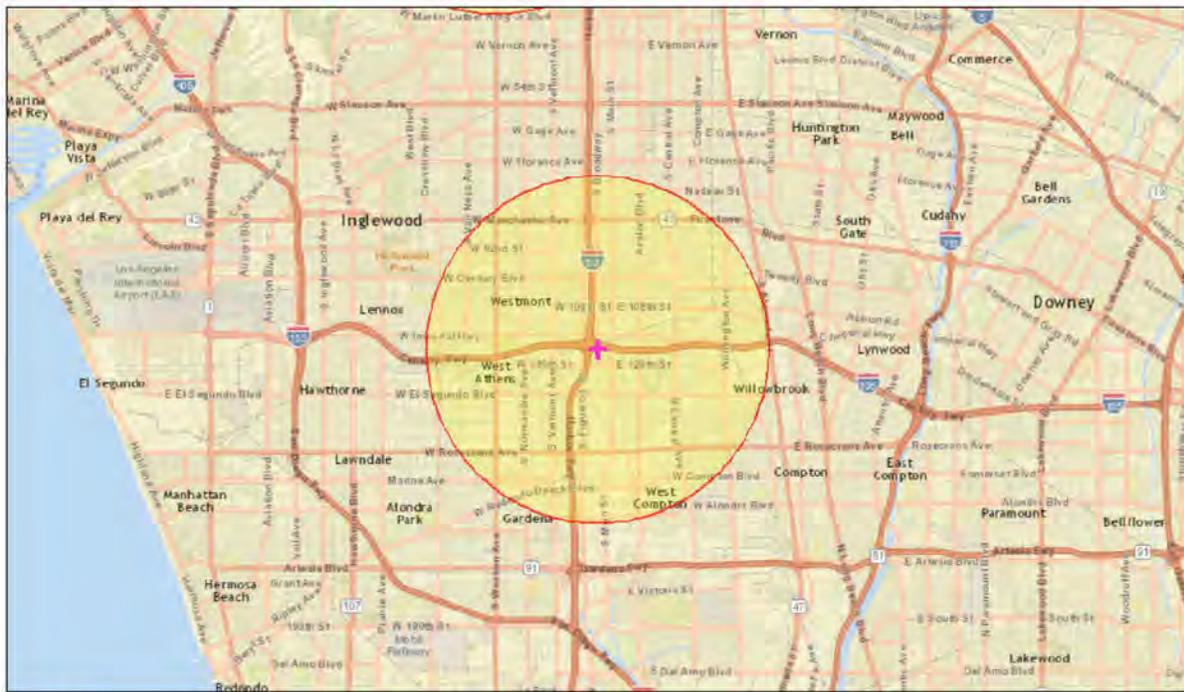


| Selected Variables | Percentile in State | Percentile in EPA Region | Percentile in USA |
|---|---------------------|--------------------------|-------------------|
| EJ Indexes | | | |
| EJ Index for Particulate Matter (PM 2.5) | 85 | 87 | 95 |
| EJ Index for Ozone | 76 | 77 | 91 |
| EJ Index for NATA* Diesel PM | 92 | 92 | 96 |
| EJ Index for NATA* Air Toxics Cancer Risk | 84 | 85 | 93 |
| EJ Index for NATA* Respiratory Hazard Index | 91 | 92 | 96 |
| EJ Index for Traffic Proximity and Volume | 94 | 95 | 98 |
| EJ Index for Lead Paint Indicator | 91 | 92 | 96 |
| EJ Index for Superfund Proximity | 82 | 85 | 92 |
| EJ Index for RMP Proximity | 71 | 75 | 87 |
| EJ Index for Hazardous Waste Proximity | 91 | 93 | 97 |
| EJ Index for Water Discharger Proximity | 73 | 74 | 82 |

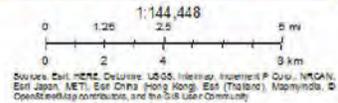
EJ Index for the Selected Area Compared to All People's Blockgroups in the State/Region/US



This report shows the values for environmental and demographic indicators and EJSCREEN indexes. It shows environmental and demographic raw data (e.g., the estimated concentration of ozone in the air), and also shows what percentile each raw data value represents. These percentiles provide perspective on how the selected block group or buffer area compares to the entire state, EPA region, or nation. For example, if a given location is at the 95th percentile nationwide, this means that only 5 percent of the US population has a higher block group value than the average person in the location being analyzed. The years for which the data are available, and the methods used, vary across these indicators. Important caveats and uncertainties apply to this screening-level information, so it is essential to understand the limitations on appropriate interpretations and applications of these indicators. Please see EJSCREEN documentation for discussion of these issues before using reports.



August 3, 2016
 Buffer Area
 Digitized Point



Sites reporting to EPA

| | |
|--|---|
| Superfund NPL | 0 |
| Hazardous Waste Treatment, Storage, and Disposal Facilities (TSDF) | 0 |
| National Pollutant Discharge Elimination System (NPDES) | 0 |

| Selected Variables | Value | State Average | Percentile in State | EPA Region Average | Percentile in EPA Region | USA Average | Percentile in USA |
|---|-------|---------------|---------------------|--------------------|--------------------------|-------------|-------------------|
| Environmental Indicators | | | | | | | |
| Particulate Matter (PM 2.5 in $\mu\text{g}/\text{m}^3$) | 12.4 | 9.83 | 85 | 9.37 | 88 | 9.32 | 98 |
| Ozone (ppb) | 44 | 49.8 | 32 | 51 | 25 | 47.4 | 26 |
| NATA* Diesel PM ($\mu\text{g}/\text{m}^3$) | 1.92 | 0.973 | 92 | 0.978 | 90-95th | 0.937 | 90-95th |
| NATA* Air Toxics Cancer Risk (risk per MM) | 53 | 44 | 83 | 43 | 80-90th | 40 | 80-90th |
| NATA* Respiratory Hazard Index | 3.6 | 2.1 | 93 | 2 | 90-95th | 1.8 | 95-100th |
| Traffic Proximity and Volume (daily traffic count/distance to road) | 3200 | 1200 | 89 | 1100 | 90 | 590 | 96 |
| Lead Paint Indicator (% pre-1960s housing) | 0.64 | 0.3 | 83 | 0.24 | 86 | 0.3 | 83 |
| Superfund Proximity (site count/km distance) | 0.14 | 0.17 | 71 | 0.15 | 75 | 0.13 | 77 |
| RMP Proximity (facility count/km distance) | 0.31 | 0.64 | 55 | 0.57 | 60 | 0.43 | 67 |
| Hazardous Waste Proximity (facility count/km distance) | 0.24 | 0.12 | 89 | 0.11 | 91 | 0.072 | 95 |
| Water Discharger Proximity (count/km) | 0.1 | 0.2 | 41 | 0.2 | 42 | 0.31 | 32 |
| Demographic Indicators | | | | | | | |
| Demographic Index | 80% | 49% | 90 | 47% | 91 | 36% | 94 |
| Minority Population | 98% | 61% | 94 | 58% | 95 | 37% | 96 |
| Low Income Population | 62% | 36% | 83 | 36% | 83 | 35% | 87 |
| Linguistically Isolated Population | 14% | 10% | 71 | 9% | 74 | 5% | 88 |
| Population with Less Than High School Education | 37% | 19% | 82 | 17% | 84 | 14% | 93 |
| Population under Age 5 | 9% | 7% | 72 | 7% | 72 | 6% | 75 |
| Population over Age 64 | 9% | 12% | 39 | 13% | 39 | 14% | 29 |

*The National-Scale Air Toxics Assessment (NATA) is EPA's ongoing, comprehensive evaluation of air toxics in the United States. EPA developed the NATA to prioritize air toxics, emission sources, and locations of interest for further study. It is important to remember that NATA provides broad estimates of health risks over geographic areas of the country, not definitive risks to specific individuals or locations. More information on the NATA analysis can be found at: <https://www.epa.gov/national-air-toxics-assessment>.

For additional information, see: www.epa.gov/environmentaljustice

EJSCREEN is a screening tool for pre-decisional use only. It can help identify areas that may warrant additional consideration, analysis, or outreach. It does not provide a basis for decision-making, but it may help identify potential areas of EJ concern. Users should keep in mind that screening tools are subject to substantial uncertainty in their demographic and environmental data, particularly when looking at small geographic areas. Important caveats and uncertainties apply to this screening-level information, so it is essential to understand the limitations on

appropriate interpretations and applications of these indicators. Please see EJSCREEN documentation for discussion of these issues before using reports. This screening tool does not provide data on every environmental impact and demographic factor that may be relevant to a particular location. EJSCREEN outputs should be supplemented with additional information and local knowledge before taking any action to address potential EJ concerns.
