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Attorney for the Commonwealth of Kentucky

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

**IN RE: VOLKSWAGEN “CLEAN
DIESEL” MARKETING, SALES
PRACTICES, AND PRODUCTS
LIABILITY LITIGATION**

Relates to: *United States v.
Volkswagen AG, et al.*, No. 16-cv-295 (N.D.
Cal.)

MDL No. 2672 CRB (JSC)

**NOTICE OF FILING OF
AMENDED CERTIFICATION FOR
BENEFICIARY
STATUS UNDER THE
ENVIRONMENTAL MITIGATION
TRUST AGREEMENT FOR THE
COMMONWEALTH OF KENTUCKY**

Judge: Hon. Charles R. Breyer


NOTICE

Pursuant to Section 4.0 of the Environmental Mitigation Trust Agreement for State Beneficiaries in *In re: Volkswagen “Clean Diesel” Marketing, Sales Practices, And Products Liability Litigation*, MDL No. 2672 CRB (JSC), Dkt. No. 51-1 at 19, the Commonwealth of Kentucky, through its undersigned attorney, hereby files the attached Amended Certification for Beneficiary Status under the Environmental Mitigation Trust Agreement (Appendix D-3).

COMMONWEALTH OF KENTUCKY'S
NOTICE OF FILING OF AMENDED
CERTIFICATION FOR
BENEFICIARY STATUS MDL No.
2672 CRB (JSC)

Respectfully submitted,
For the Commonwealth of Kentucky

Lisa Jones
Staff Attorney
KY Bar No. 90374

By: 
Lisa Jones
Staff Attorney
KY Bar No. 90374

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

APPENDIX D-3

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

1. Identity of Lead Agency

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

BENEFICIARY’S LEAD AGENCY CONTACT INFORMATION:

Contact:	John R. Bender, Executive Advisor, Kentucky Dept. for Energy Development and Independence
Address:	300 Sower Blvd., 3rd Floor, Frankfort, KY 40601
Phone:	(502) 782-6888
Fax:	(502) 564-7484
Email:	Rick.Bender@ky.gov

2. Submission to Jurisdiction

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

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

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

4. Certification of Legal Authority

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

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

5. Certification of Legal Compliance and Disposition of Unused Funds

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

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

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

7. Publicly Available Information

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

8. Notice of Availability of Mitigation Action Funds

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

9. Registration of Subject Vehicles

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

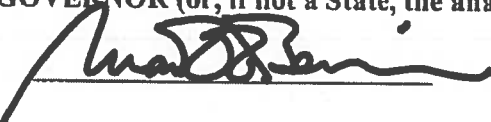
- (a) Shall not deny registration to any Subject Vehicle based solely on:
 - i. The presence of a defeat device or AECD covered by the resolution of claims in the Partial Consent Decree or in the Second Partial Consent Decree; or
 - ii. Emissions resulting from such a defeat device or AECD; or
 - iii.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

- iv. The availability of an Approved Emissions Modification, an Emissions Compliant Recall or the Buyback, Lease Termination, and Owner/Lessee Payment Program.
- (c) May identify Subject Vehicles as having been modified, or not modified, in accordance with the Approved Emissions Modification or the Emissions Compliant Recall on the basis of VIN-specific information provided to the Beneficiary by the Defendants.
- (d) Notwithstanding the foregoing, the Beneficiary may deny registration to any Subject Vehicle on the basis that the Subject Vehicle fails to meet EPA's or the Beneficiary's failure criteria for the onboard diagnostic ("OBD") inspection; or on other grounds authorized or required under applicable federal regulations (including an approved State Implementation Plan) or under Section 209 or 177 of the Clean Air Act and not explicitly excluded in subparagraphs 9(a)-(b).

10. Reliance on Certification

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

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

Signature: 

Name: Matthew G. Bevin

Title: Governor, Commonwealth of Kentucky

Date: November 6, 2017

Location: Frankfort, Kentucky

[FOR OTHER REQUIRED SIGNATORIES]:

Signature: _____

Name: _____

Title: _____

Date: _____

Location: _____

[FOR OTHER REQUIRED SIGNATORIES]:

Signature: _____

Name: _____

Title: _____

Date: _____

Location: _____

ATTACHMENT TO APPENDIX D-3
COMMONWEALTH OF KENTUCKY
CERTIFICATION FOR BENEFICIARY STATUS
ENVIRONMENTAL MITIGATION TRUST AGREEMENT

Pursuant to Paragraph 7 of Appendix D-3, Certification of Beneficiary Status under the Environmental Mitigation Trust Agreement (“Beneficiary Certification”), the Commonwealth of Kentucky (“Beneficiary”) submits the following information:

(i) The procedures by which the records submitted by the Beneficiary in accordance with Paragraph 7 of the Beneficiary Certification may be accessed by the public, which shall be designed to support access and limit burden for the general public.

As “Lead Agency,” the Energy and Environment Cabinet (“EEC”) developed its own Volkswagen Mitigation Website (“EEC’s Website”) to provide information to the public on activities surrounding the various parts of the Volkswagen Settlement in general and specifically about the Environmental Mitigation Trust and Beneficiary activities. Records submitted by the Commonwealth of Kentucky, as Beneficiary, in accordance with Paragraph 7 of the Beneficiary Certification will be available to the public through the Termination Date by access to the EEC’s Website and will link to the National Trustee website when it becomes available. In addition to web access, the public may request documents pursuant to Kentucky’s Open Records Act, KRS 61.870 *et. seq.*, which provides the means for the public to inspect and copy governmental records.

(ii) The procedures by which public input will be solicited and considered for the Beneficiary Mitigation Plan required under Paragraph 4.1 of the Trust Agreement.

The EEC’s Website provides a centralized site where the public submit comments, by completing an electronic form, on Kentucky’s Environmental Mitigation Plan (“Mitigation Plan”) before it is drafted and will provide a new electronic form once the draft is complete. The public will be given at least thirty (30) days to comment on the draft Mitigation Plan along with the ability to participate at a public meeting. Comments received will be considered before submission to the Trustee.

(iii) A description of whether and the extent to which the certification stated in Paragraph 7 of the Beneficiary Certification is subject to the Beneficiary’s applicable laws governing the publication of confidential business information and personally identifiable information.

The certification stated in Paragraph 7 of the Beneficiary Certification is subject to the Commonwealth of Kentucky’s applicable laws governing the publication of confidential business and personally identifiable information. Disclosure of certain private, confidential, and trade secret information is exempted from public disclosure pursuant to KRS 61.878. Additionally, 400 KAR 1:060 sets forth definitions and procedures for designation of records filed with EEC with information treated as trade secrets and confidential business information.