

August 2, 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 National Association of Clean Air Agencies (NACAA) 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), and D.J. Ref. No. 90-5-2-1-11386. NACAA is a national, non-partisan, non-profit association of air pollution control agencies in 41 states, the District of Columbia, four territories and 116 metropolitan areas. The air quality professionals in our member agencies have vast experience dedicated to improving air quality in the United States. These comments are based upon that experience. The views expressed in these comments do not necessarily represent the positions of every state and local air pollution control agency in the country.

Volkswagen AG, Volkswagen Group of America, Inc., Volkswagen Group of America Chattanooga Operations, LLC, and Audi AG (collectively, VW) allegedly violated federal and state laws and regulations by purposely, and over a sustained period of time, employing prohibited defeat devices that resulted in excess emissions of nitrogen oxide (NO<sub>x</sub>). It is estimated that, across the country, 500,000 model year 2009 to 2015 motor vehicles containing 2.0 liter diesel engines were affected by the scandal.

The excess NO<sub>x</sub> emissions that have resulted from VW’s alleged violations contribute to ozone (smog), particle pollution, haze, toxic air pollution, global warming, acid rain and the eutrophication of water bodies. NO<sub>x</sub> emissions

are linked with a large number of adverse impacts on the respiratory system, as well as with the many ill effects associated with all of the pollution problems to which they contribute, including premature death.

The members of NACAA are responsible under the Clean Air Act for preventing and controlling air pollution, including developing plans for meeting the National Ambient Air Quality Standards for NO<sub>2</sub> (the indicator for the larger group of NO<sub>x</sub>), as well as for ozone and particulate matter, both of which can be created as a result of NO<sub>x</sub> emissions. As such, we are very troubled by VW's alleged violations because they directly interfere with our agencies' efforts to protect the public's health and welfare.

Accordingly, we applaud the United States Department of Justice (DOJ) for taking these alleged violations very seriously, recognizing the associated environmental and public health damage and, through the proposed partial CD – particularly the Environmental Mitigation Trust Agreement – establishing a program that requires VW to, among other things, address and mitigate the environmental harm its alleged actions have caused. Additionally, we are pleased DOJ has incorporated into the proposed CD many of the elements that NACAA called for in its *Recommendations for the Distribution of Funds for Environmental Mitigation and Supplemental Environmental Projects Related to Alleged Volkswagen Violations*, which the members of NACAA adopted on May 17, 2016. (Available at <http://www.4cleanair.org/sites/default/files/Documents/NACAA-VW-SEP-Recommendations-5-17-16.pdf>).

Based on the fact that state and local air pollution control agencies will share in the responsibility of mitigating the environmental damage and public health harm caused by the violating VW vehicles and focusing on the extensive experience these agencies have in implementing a host of sophisticated and comprehensive air quality programs, the NACAA recommendations called for significant resources resulting from the legal settlement of the VW case to be provided to state and local air pollution control agencies. Funds directed in this way would support activities to ensure that past, present and future excess emissions from VW's alleged violations are mitigated. NACAA is gratified that DOJ has recognized the unique responsibilities and expertise of these agencies and included a significant role for them in the proposed CD, as NACAA recommended.

Given the great importance of this proposed CD and the potential it has for mitigating the substantial environmental harm caused by VW's alleged actions, we offer the following comments and recommendations to improve specific elements of the proposed program. These comments are intended to further refine and strengthen the CD to ensure that it fully meets its intended goals. In light of the many intricacies associated with implementing a program of this magnitude, and to ensure that there is a clear and workable process in place for doing so, we also strongly recommend that prior to entering a final CD, DOJ convene an open, interactive discussion with state and local air pollution control agencies concerning practical administrative and process issues related to the implementation of the Mitigation Trust Fund program. If undertaken immediately and expeditiously, such a discussion should not delay commencement of the program.

## **Partial Consent Decree**

NACAA believes it is important for the CD to ensure that VW provides resources sufficient to not only offset, but also achieve reductions to surpass, all excess emissions that have already occurred and that will occur in the future as a result of the alleged violations. Accordingly, NACAA is very supportive of the intention of the Environmental Mitigation Trust fund “to fully mitigate the total, lifetime excess NO<sub>x</sub> emissions from the 2.0 Liter Subject Vehicles” (page 5, #7). Additionally, we endorse the concept of requiring VW to place additional funds in the mitigation trust if VW does not meet its goal of recalling or removing from commerce a required percentage of affected vehicles (page 4-5, #3). This provision provides an incentive for VW to successfully implement the recall program and ensures that additional mitigation resources will be available if the recall provisions do not meet expectations.

## **Appendix D – Form of Environmental Mitigation Trust Agreement**

### **Mitigation Trust Beneficiaries (page 10)**

In the section entitled “IV. Mitigation Trust Beneficiaries,” the proposed CD outlines a process for governmental entities identified in Appendix D-1 to elect to become Beneficiaries of the Trust. Those identified as eligible to become Beneficiaries include the 50 states, Puerto Rico, the District of Columbia and Tribes. NACAA is concerned that the proposed CD does not provide for local air pollution control agencies to receive funds under the Environmental Mitigation Trust Fund and recommends that such a mechanism be added.

Most local agencies are highly sophisticated and effective governmental entities with many years of experience (several, in fact, are larger than state agencies; they and others have been in existence as long as or longer than some state agencies). Some of these local air pollution control agencies would undoubtedly play a key role in planning NO<sub>x</sub>-reduction strategies under the Mitigation Trust Program and would be best positioned within their jurisdictions to effectively execute them. Under the proposed CD, there are local agencies, including some in significant, highly populated areas, that may not have the ability to obtain Mitigation Trust Funds if their only option is to request funds from the state. There are a variety of reasons that this could be problematic, including, for example, if a state is not proactive in applying for funds or cannot undertake a mitigation action while the local agency is well situated to take on valuable NO<sub>x</sub>-reduction programs.

The Clean Air Act states that “air pollution prevention...and air pollution control at its source is the primary responsibility of States and *local* governments” (Section 101[a][3]) (emphasis added). Additionally, when discussing air pollution control agencies, the Act includes states as well as city, county or other local government authorities that are charged with the responsibility for enforcing ordinances or laws related to air pollution (Section 302). Finally, under Section 105 of the Clean Air Act, local air pollution control agencies are eligible to receive federal grants directly, along with the states. NACAA believes it is appropriate, therefore, for the Environmental Mitigation Trust Fund to recognize the important role of local air pollution control agencies and include provisions allowing qualified local agencies to become Beneficiaries and apply directly for a portion of the funds. In order to reduce the administrative

burden on the Trustee, NACAA recommends that a state and the local air agencies within that state work together to the greatest extent possible to collaborate on projects and seek funding.

#### Beneficiary Mitigation Plan (page 11)

The proposed CD provides Beneficiaries with 30 days after being deemed a Beneficiary to submit a Beneficiary Mitigation Plan that summarizes how they plan to use the mitigation funds allotted to them. The plans are expected to include such things as the Beneficiaries' overall goals, the categories of actions that will be appropriate, the percentages of funds to be used for each action, how the benefits on certain overburdened areas will be considered and the expected ranges of emission benefits from the plans. The stated purpose of these plans is to provide the public with information about the Beneficiaries' visions for the use of the funds.

NACAA is concerned that 30 days is too short a time for many agencies to complete and submit such plans. Agencies could be required to follow state- or local-mandated processes for developing and seeking internal approval of their plans, which would necessitate additional time. We recommend additional time be provided.

#### Registration of 2.0 Liter Subject Vehicles (page 13-14)

Sections (a) and (b) list specific conditions under which a Certifying Entity may not deny registration to any Subject Vehicle. However, Section (d) indicates that the Certifying Entity *may* deny registration under certain conditions. These sections are confusing and it is unclear if they conflict with one another. The CD would benefit from additional explanation and clarification with respect to the conditions under which registration may or may not be denied.

Additionally, Section (c), as currently written, is subject to misinterpretation and should be clarified. Our reading is that the Settling Defendant will identify and provide information to the Certifying Entities about which vehicles have or have not received the Approved Emissions Modification. However, the current wording may leave the impression that the Certifying Entities are responsible for determining (i.e., identifying) and reporting which vehicles have undergone modification.

#### Accountability Provisions (pages 17-19)

In the sections on Funding Requests (page 17) and Beneficiary Reporting Obligations (page 18-19), the proposed CD calls for provisions that ensure accountability on the part of the Beneficiaries. NACAA believes it is appropriate for the recipients of the resources to be held accountable to ensure that the funds are used for their intended goals and to provide assurance to the public that the funds are achieving meaningful results.

With respect to the Beneficiary Reporting Obligations, however, we are concerned that the language in the proposal is rather vague. We recommend that a more detailed explanation be provided on what is envisioned with respect to recording and reporting mitigation actions. Among other things, it is important for Beneficiaries to understand in advance what is expected

and in what level of detail in order to accurately estimate future staffing needs and costs for these tasks.

### Joint Application (page 18)

NACAA is pleased that the proposed CD includes an option for multiple Beneficiaries to submit a joint request for funds. Air pollution does not respect political boundaries and often multi-jurisdictional approaches are most effective and efficient in ameliorating local and regional air pollution problems. We applaud this provision, which allows for additional flexibility and creativity in designing mitigation efforts.

### **Appendix D-2 – Eligible Mitigation Actions and Mitigation Action Expenditures**

NACAA appreciates the inclusion in Appendix D-2 of the proposed CD of a list of Eligible Mitigation Actions from which Beneficiaries may choose (pp. 1-9), all of which have the potential to yield significant NO<sub>x</sub> emissions reductions and benefit public health and the environment in many areas of the country. We are also very pleased that the proposed CD recognizes the need to allow Beneficiaries to use a portion of their allotted Trust Funds for actual administrative expenditures associated with implementation of any Eligible Mitigation Actions. We believe, however, that both of these provisions would benefit from additional flexibility and/or clarification and offer the following comments in this regard.

With respect to Eligible Mitigation Actions, NACAA agrees with the inclusion of each of the nine distinct categories listed but believes this list is too narrow. Accordingly, we recommend that it be expanded to allow funds, with no cap, to be used for projects to address specific additional sources or projects to ensure that states are able to direct their allocation toward the NO<sub>x</sub> reduction programs best suited to their circumstances. We urge that the enumerated Eligible Mitigation Actions also include nonroad equipment and vehicles, such as those used for construction, agriculture, mining and other heavy industrial applications—which can remain in service for many years and produce far more NO<sub>x</sub> than onroad trucks per hour of operation—as well as truck-stop electrification, cargo-handling equipment and yard trucks. As with the already-listed actions, projects for these additional actions should continue to support as many alternative fuel options as possible. We further recommend that vehicle retrofits be included as Eligible Mitigation Actions, consistent with their inclusion under the Diesel Emission Reduction Act program.

NACAA also recommends that the list of Eligible Mitigation Actions be further augmented with an additional, more open-ended category that would provide flexibility and creativity to fund unlisted Mitigation Actions based on the Trustee's approval of a request by the Beneficiary that makes the case for an unlisted action that effectively reduces NO<sub>x</sub> emissions. Since the program established under the proposed CD could extend for 15 years, such a category would ensure that there is a mechanism for keeping mitigation options current. It would also allow Beneficiaries to request approval for unlisted actions that would achieve significant NO<sub>x</sub> reductions in a cost-effective way in their particular jurisdictions (with the understanding that cost effectiveness varies from area to area) and/or address the particular circumstances of an area.

The Eligible Mitigation Actions listed in the proposed CD also include the “Diesel Emission Reduction Act (DERA) Option,” (p. 9) under which Beneficiaries may direct Trust Funds to their DERA non-federal match or overmatch, including for projects not specifically listed as Eligible Mitigation Actions but eligible under DERA. While NACAA appreciates the effort to make a connection to the highly successful DERA program, we have a concern with this option. Given that DERA is a program subject to Congressional authorization and appropriation, there is no guarantee it will endure throughout the lifetime of the CD program. Therefore, key DERA-eligible projects must also be specifically enumerated in the CD as Eligible Mitigation Actions (which we have recommended and elaborated on above).

For each of the nine distinct categories of Eligible Mitigation Actions, the proposed CD identifies, in terms of percent of cost, how much may be drawn from Trust Funds for projects involving non-government-owned vehicles or equipment, generally ranging from 25 percent to 75 percent of the cost (for government-owned vehicles and equipment, 100 percent of costs may be covered). We request clarification of how these proposed levels of cost coverage were determined and recommend that a mechanism be included for allowing a higher percentage to be covered. We also recommend that for Eligible Mitigation Actions 1 (large trucks), 2 (buses) and 6 (medium trucks) in particular, funding for repowering and replacing non-government-owned vehicles explicitly be allowed at a higher percentage if ultra-low-NO<sub>x</sub> engines or vehicles are used. Specifically, we recommend that in each of these three categories, the term “All-Electric” be replaced with “Advanced Technology” and that the following definition of “Advanced Technology” be added: “Advanced Technology shall mean All-Electric vehicles and engines, vehicles and engines meeting a 0.02-grams-NO<sub>x</sub>-per-brake-horsepower-hour standard or such other technology as determined by the Trustee.”

NACAA commends the inclusion of Light Duty Zero Emission Vehicle Supply Equipment (p. 8) among the Eligible Mitigation Actions. However, we are concerned that capping at 15 percent the amount of Trust Funds that a Beneficiary can spend on this item is too restrictive and urge that this cap be lifted.

Understanding mobile source emissions and their impacts on air quality is critical to guiding effective NO<sub>x</sub> emission mitigation actions. Accordingly, NACAA recommends that Beneficiaries be allowed to use a portion of their allotted Trust Funds to conduct air quality analyses that will inform their selection of mitigation actions. Such analyses should include, among others, emission inventories, air quality modeling (including improving the quality of input data) and monitoring trend analyses.

In addition, we recommend that the parameters of several of the Eligible Mitigation Actions included in the proposed CD be clarified or expanded:

- 1) Expand the definition of “Class 8 Local Freight Trucks” (p. 11) to include not only tractor trucks, as stated, but also straight trucks. Given the examples provided in the definition of this term (waste haulers, concrete trucks, dump trucks) it appears the intention is to include both, which NACAA supports. The following definition would accomplish this: “Class 8 Local Freight, and Port Drayage Trucks (Eligible Large

- Trucks)’ shall mean trucks 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).”
- 2) Make long-haul trucks, in addition to local trucks, eligible for funding for mitigation actions.
  - 3) Expand the model year (MY) ranges for all eligible truck categories. In 10 years, when Beneficiaries will be required to show they have spent 80 percent of their respective allocation, MY 2006 trucks will be more than 20 years old and likely already replaced.
  - 4) Identify vehicles by the MY of the engine rather than the MY of the vehicle, since the two do not necessarily correspond to one another. Identifying a replacement by the MY of the vehicle could allow for a newer vehicle equipped with an older, dirtier engine.
  - 5) Extend provisions allowing companies that contract with a government entity to take advantage of the 100-percent government cost sharing. Under the School and Transit Bus project category (pp. 3-4), school bus companies that contract with a government entity are considered government entities for the purpose of taking advantage of the 100-percent government cost sharing. We recommend that this provision be extended to the Class 4-7 and Class 8 local freight truck categories, which would allow replacement or repowering of vehicles (e.g., waste haulers) that belong to a company that contracts with a municipality to be funded at 100 percent. Similarly, repowering or replacement of emergency vehicles (e.g., ambulances, fire trucks) for which a municipality contracts with a private company should also be eligible for funding at 100 percent.
  - 6) Define Tugs/Ferries such that the term includes river barge towboats or tugs and large diesel-powered river cruise boats.
  - 7) Expand eligibility under “Ocean Going Vessels (OGV) Shorepower” to also apply to vessels that operate within the Great Lakes system.
  - 8) Expand the definition of “Zero Emission Vehicle” (p. 12) by adding at the end of the current definition “or other vehicles that demonstrate comparable emissions benefits.”

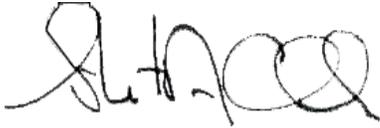
As stated above, NACAA strongly supports the inclusion of provisions to allow Beneficiaries to use up to 10 percent of their Trust Funds for actual administrative expenses related to the implementation of Eligible Mitigation Actions (p. 10). It is unclear whether indirect costs (based on a federally approved indirect rate) are eligible expenditures; if they currently are not, we recommend that they be made eligible in the final CD. In addition, we recommend that a mechanism be included to allow a higher overall administrative rate than 10 percent if the Beneficiary can demonstrate that a project has unusually high administrative needs. Finally, we believe additional guidance is necessary to explain and clarify eligible administrative expenses.

## **Conclusion**

Once again, we commend DOJ for reaching this proposed settlement to address the environmental impacts of VW’s egregious alleged violations. We thank you for this opportunity to comment on the *Notice of Lodging of Proposed Partial Consent Decree Under the Clean Air*

*Act*, related to Volkswagen “Clean Diesel” Marketing, Sales Practices, and Product Liability Litigation, Case No: MDL No. 2672 CRB (JSC), and D.J. Ref. No. 90-5-2-1-11386 and we strongly urge that DOJ provide full consideration to NACAA’s recommendations. We look forward to discussing the details of the program with you further as you develop the final CD. If you have any questions or require additional information, please do not hesitate to contact Mary Sullivan Douglas or Nancy Kruger of NACAA at [mdouglas@4cleanair.org](mailto:mdouglas@4cleanair.org) or [nkruger@4cleanair.org](mailto:nkruger@4cleanair.org), respectively, or (202) 624-7864.

Sincerely,



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