



U.S. Department of Justice

Office of Tribal Justice

Room 2318, RFK Main Justice Building
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August 10, 2016

Dear Tribal Leader:

As initially announced on July 8, 2016, the Department of Justice and the Environmental Protection Agency invite you to a consultation on the process for distribution of the Tribal Allocation Subaccount of the Environmental Mitigation Trust to be established under a partial settlement of *In re Volkswagen "Clean Diesel" Marketing, Sales Practices and Products Liability Litigation*. Under the partial settlement of EPA's Clean Air Act claims in *In re Volkswagen "Clean Diesel" Marketing, Sales Practices and Products Liability Litigation*, Case No. 15-md-2672 CRB (JSC) (N.D. Cal.), the Settling Defendants are required to establish an Environmental Mitigation Trust (Trust) to fund specific actions to mitigate excess emissions of nitrogen oxides (NOx) from the cars subject to the lawsuit by reducing NOx emissions from other sources (Eligible Mitigation Actions).

The Trust will be administered by a Trustee, and the Eligible Mitigation Actions will be implemented by the Trust Beneficiaries. The Trust provides an allocation for federally-recognized tribes that become Trust Beneficiaries (Tribal Allocation Subaccount), as well as an allocation to cover the Trustee's administrative costs associated with the Tribal Allocation Subaccount. Further information regarding the general terms of the consent decree are available at <https://www.epa.gov/enforcement/volkswagen-clean-air-act-partial-settlement>. Only the listed projects in Appendix D-2 of the consent decree are Eligible Mitigation Actions. Specific portions relevant to Tribes can be found at pages 13 through 16 of the consent decree and in Appendices C and D to the consent decree.

The Department of Justice and the Environmental Protection Agency invite you to consult on a method for allocating annual funding in the Tribal Allocation Subaccount for Eligible Mitigation Actions, for providing technical assistance to tribes, and for recommending candidates to serve as the Trustee. A framing paper detailing the issues is included below.

The schedule for the telephonic consultations is as follows:

Monday, August 8, 2016: Consultation Session 3:00 – 4:00 p.m. Eastern

Link to register for the call and receive the call-in information: <http://dpreister.com/10088759>

Wednesday, August 10, 2016: Consultation Session 3:00 – 4:00 p.m. Eastern

Link to register for the call and receive the call-in information: <http://dpreister.com/10088775>

Monday, August 15, 2016: Consultation Session 3:00 – 4:00 p.m. Eastern

Link to register for the call and receive the call-in information: <http://dpreister.com/10088779>

Please note that you will be asked to provide your name and Tribal affiliation when you register. In addition, we will accept written comments until the close of business on Wednesday, August 27, 2016, the end of the 60 day consultation period established in the consent decree. Please submit any written comments via email to OTJ@usdoj.gov or (if necessary) via regular mail to:

Office of Tribal Justice
Department of Justice
950 Pennsylvania Avenue NW, Room 2318
Washington, DC 20530

If you have questions or have trouble using the links to register, please contact the Office of Tribal Justice at OTJ@usdoj.gov. We hope you will be able to participate in this important government-to-government consultation and look forward to working with you on this important issue.

Sincerely,



Tracy Toulou
Director
Office of Tribal Justice
U.S. Department of Justice

The Method for Distributing the Tribal Allocation Subaccount of The Environmental Mitigation Trust to Be Established Under the Partial Settlement of *In re Volkswagen “Clean Diesel” Marketing, Sales Practices and Products Liability Litigation*

Background on the Litigation

On June 28, 2016, the United States lodged in federal district court a partial settlement with automakers Volkswagen AG, Audi AG, Volkswagen Group of America, Inc., and Volkswagen Group of America Chattanooga Operations, LLC (collectively “Volkswagen”). The settlement — which is described in a Partial Consent Decree available to the public at <https://www.epa.gov/enforcement/partial-consent-decree-volkswagen> — partly resolves allegations that Volkswagen violated the Clean Air Act by selling approximately 500,000 model-year 2009 to 2015 motor vehicles containing 2.0-liter diesel engines equipped with “defeat devices” (“Partial Consent Decree”). The allegations were set forth in a complaint that the United States filed on January 4, 2016, on behalf of the U.S. Environmental Protection Agency (“EPA”), alleging that these vehicles were equipped with defeat devices in the form of computer software designed to cheat on federal emissions tests. The settlement is a partial settlement because it addresses only what Volkswagen must do to address the 2.0 liter cars on the road and the pollution from these vehicles, and does not address other aspects of the United States’ complaint, including claims relating to 3.0-liter vehicles and civil penalties.

The major pollutants at issue in this case are oxides of nitrogen (“NO_x”), a serious health concern. NO_x pollution contributes to the formation of harmful smog and soot, exposure to which is linked to a number of respiratory- and cardiovascular-related health effects as well as premature death. Children, older adults, people who are active outdoors (including outdoor workers), and people with heart or lung disease are particularly at risk for health effects related to smog or soot exposure. Nitrogen dioxide formed by NO_x emissions can aggravate respiratory diseases, particularly asthma, and may also contribute to asthma development in children.

Under the Partial Consent Decree, Volkswagen will pay \$2.7 billion to establish and fund an Environmental Mitigation Trust. The Trust will serve to remediate the excess NO_x emissions from the 2.0-liter vehicles by enabling governmental Beneficiaries to implement projects to reduce NO_x emissions from other sources (“Eligible Mitigation Actions”). Potential beneficiaries must elect to become Beneficiaries under the Partial Consent Decree and the Trust Agreement. All 50 States, Puerto Rico, the District of Columbia, and federally recognized Indian tribes may elect to become Beneficiaries, and in making such an election, must meet specific requirements under the Trust. The Trust will be administered by a Trustee, who has not yet been selected.

State and territorial Beneficiaries will receive a specific allocation of funds from the total \$2.7 billion that can be used for any of the listed Eligible Mitigation Actions. There is also a separate allocation for tribal Beneficiaries totaling \$50 million to be shared by federally recognized tribes (“Tribal Allocation Subaccount”). All Beneficiaries must abide by requirements of the Trust Agreement.

Eligible Mitigation Actions include projects to reduce NO_x from heavy-duty diesel sources near population centers, such as delivery or freight trucks; school, shuttle, and transit buses; forklifts; airport ground-support equipment; tugs and ferries; locomotive switchers; shorepower for ocean going vessels; and light-duty zero-emission-vehicle supply equipment (“ZEV infrastructure”). See Appendix D-2 to the Partial Consent Decree for Eligible Mitigation Actions and Eligible Mitigation Action Expenditures. Beneficiaries have the flexibility to choose which projects on the list of Eligible Mitigation Actions are the best options for their communities. Tribal Beneficiaries may also use Trust funds for Diesel Emissions Reduction Act (“DERA”) program tribal grants (number 10 on the Eligible Mitigation Actions list). Because DERA enables EPA to offer separate funding assistance to tribes to reduce diesel emissions, this option will enable tribes to utilize Trust funds to implement clean diesel projects not on the Eligible Mitigation Actions list but eligible under DERA, such as repowering fishing vessels, repowering or replacing generators, and electrifying parking spaces. Additional information about the DERA program tribal grants can be found at <https://www.epa.gov/cleandiesel/clean-diesel-tribal-grants>.

As noted above, the Trust includes a Tribal Allocation Subaccount for federally recognized tribes that become Trust Beneficiaries and a portion of that subaccount will cover the Trustee’s administrative costs associated with that account.

The Tribal Allocation Subaccount

The Partial Consent Decree describes a default process for distributing the funds in the Tribal Allocation Subaccount. The Department of Justice and the EPA are now consulting with federally recognized tribes: (i) to determine whether the default process outlined in the Partial Consent Decree will work well for tribes, or whether an alternative method for distributing the funds in the Tribal Allocation Subaccount should be established; (ii) whether and how to direct up to 5% of the Tribal Allocation Subaccount toward technical assistance to help tribes prepare funding requests for Eligible Mitigation Actions; (iii) whether and how tribes wish to nominate candidates to serve as Trustee of the Environmental Mitigation Trust; and (iv) whether tribes are interested in ZEV infrastructure actions and, if so, how to implement the limitation that no Beneficiary may spend more than 15% of its allocation on ZEV actions. This framing paper is being circulated to facilitate the consultation and frame the discussion with tribal leaders.

Subparagraph 2.1.1 of Appendix D to the Partial Consent Decree allows for a 60-day tribal-consultation period, after which the United States may file a motion with the court requesting approval of the allocation method, if any, resulting from the consultation process. If no such motion is filed, the Trustee will be authorized to accept funding requests from tribal Beneficiaries in accordance with the default process set forth in Appendix D to the Partial Consent Decree. If the total cost of these requests exceeds the amount of available funds, the Trustee will allocate funds among the requesting tribes pursuant to subparagraph 5.0.5.2.3 of Appendix D. Under the default procedure, the Trustee would not exercise any discretion in selecting which Eligible Mitigation Actions to fund.

Again, the DERA program enables EPA to offer separate funding assistance to tribes to reduce diesel emissions. Under the DERA tribal grant program, tribes submit grant applications in

response to an annual Request for Proposals. But because DERA program funding for tribes is competitive in nature, eligibility for DERA funding could be impacted if the process for distributing the Tribal Allocation Subaccount provided some tribes a competitive advantage in applying for DERA funds.

Regardless of whether tribal Beneficiaries submit funding requests directly to the Trustee, or proceed through a separate entity that is selected or established to determine which potential Eligible Mitigation Actions from tribes should be submitted to the Trustee, the Trustee is not authorized or funded to provide technical assistance. Technical assistance is available from EPA with respect to mitigation actions taken under the DERA program. In addition, the Partial Consent Decree permits up to 5% of the Tribal Allocation Subaccount to be used for technical assistance to help tribes prepare funding requests for Eligible Mitigation Actions.

Finally, Paragraph 15 of the Partial Consent Decree includes a procedure for selecting the Trustee. Not later than 30 days after the Court approves the Partial Consent Decree, tribes may submit to the United States one consolidated list of three, four, or five candidates to be considered for selection as the Trustee.

ISSUES AND QUESTIONS FOR CONSULTATION

The Process for Tribes to Submit Eligible Projects to the Trustee:

1. Under the default approach all 567 federally recognized tribes may become Beneficiaries and submit their funding requests directly and independently to the Trustee in accordance with the allocation provision at subparagraph 5.0.5 of Appendix D to the Partial Consent Decree. Is this approach workable?
2. Alternatively, would it be preferable to use an existing entity, or to establish a new separate entity, to determine which potential Eligible Mitigation Actions from all tribes that become Beneficiaries should be submitted to the Trustee? Are there entities that may be capable and willing to perform this function? If a new entity is preferable, what would the structure of that entity be to ensure fairness?

Technical Assistance to Tribal Governments:

1. Practically speaking, will tribes that become Beneficiaries be able to use up to 5% of the Tribal Allocation Subaccount for technical assistance to help tribes prepare funding requests for Eligible Mitigation Actions? If so, how and when should the 5% be allocated among tribal Beneficiaries?
2. Also, should we consider amending the Trust Agreement to allow for the 5% to be used to fund an independent, non-profit organization to provide this assistance? If technical assistance is provided through a separate organization, should assistance be provided to tribes on a first-come, first-served basis, or on some other basis? What organization could provide this assistance?

Nomination of Trustee:

1. Should tribes jointly submit a consolidated list of Trustee candidates in accordance with the Partial Consent Decree?
2. If so, who should coordinate and submit that consolidated list of Trustee candidates?

ZEV Infrastructure:

1. Are tribes interested in funding ZEV infrastructure?
2. If so, how should the limitation that no Beneficiary spend more than 15% of its allocation on ZEV infrastructure be implemented? Because tribes are not required to submit Beneficiary Mitigation Plans under subparagraph 4.1, and because tribes may become Beneficiaries during any annual tribal funding cycle under subparagraph 5.0.5.1, the default approach would require each tribal Beneficiary to limit ZEV infrastructure to 15% of any annual funding request submitted under subparagraph 5.0.5.2. Is there an alternative approach that would be preferable?