



Mr. John C. Cruden
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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.

August 5, 2016

Dear Mr. Cruden,

We thank the Court and the Plaintiffs for the opportunity to provide comments. Natural Resources Defense Council ("NRDC") is an environmental organization with over 1.4 million members and online activists, supported by the expertise of 500 scientists, lawyers, and policy advocates. NRDC has been involved over the past two decades in policies and programs to reduce criteria, toxic, and greenhouse gas pollution from the transportation sector, including light-duty, medium, and heavy-duty trucks.

Remediating the pollution Volkswagen ("VW") caused and broadening its investment in clean, cheat-proof zero-emission vehicles and charging infrastructure is a good start. We support the U.S. Department of Justice in its efforts to ensure VW is brought to justice for any remaining civil and criminal violations. We also thank the California Air Resources Board ("ARB") and U.S. Environmental Protection Agency ("EPA") in their heroic efforts at catching VW's cheating. We ask all agencies to continue their compliance and enforcement efforts to help prevent any future malfeasance by automakers going forward.

NRDC submits the following comments regarding "Appendix C: ZEV Investment Commitment" and "Appendix D: Form of Environmental Mitigation Trust Agreement" of the Consent Decree.

Appendix C: ZEV Investment Commitment

- 1. Targeted investments in ZEV-related infrastructure should be prioritized for states that have "primed" the market through the adoption of Zero Emission Vehicle standards, the implementation of vehicle incentive programs, the establishment of programs to close the charging infrastructure gap, and other market creation programs.**

The Consent Decree requires VW to invest \$2 billion over a period of up to ten years, with \$0.8 billion going to California and \$1.2 billion going to other states. While the infrastructure investments required as part of the Consent Decree should be national in scope, it should be focused on states that have adopted or are in the process of adopting programs to “prime” the market and are forecast to have robust EV markets.

The most important of these market priming programs are the state ZEV programs that require automakers to sell plug-in electric vehicles. As both EPA and ARB recognized in last month’s release of their Draft Technical Assessment Report of Light-Duty GHG Emissions standards, California and the nine other states that have adopted ZEV standards will be driving much of the sales growth across the nation over the next ten years as a direct result of the requirements on automakers in those states.¹

States that are “priming” the market include those that have (1) implemented ZEV programs that require the deployment of electric-drive vehicles, (2) implemented monetary and/or non-monetary incentives to encourage ZEV sales and charging infrastructure deployment, (3) established a robust public charging infrastructure and public utility programs that accelerate the market for ZEVs, and/or (4) developed partnerships between the state and local government with ZEV stakeholders.² For example, in the Midwest, Kansas City, MO has partnered with Kansas City Power & Light to establish a Clean Charge Network to begin priming the market.

By ensuring initial investment commitments are targeted to “primed” markets, EPA and ARB will help avoid charging investments becoming stranded or under-utilized in markets where complementary policies have not been in place or supported. The investments can also be used to leverage existing or future investments being made by state and local government, public-utilities, automakers, and charging service providers.

Volkswagen should also be required to partner with academic universities, research institutes, or national labs to ensure the deployment and siting for ZEV charging infrastructure is optimized, as demonstrated by regional modeling tools. All research findings, as well as any analytical tools created, should be made available to the public and government agencies for planning purposes.

2. Investments made by VW should be coordinated with other investments being made by public utilities; local, state and federal government; and private companies.

Over the next decade, it is expected that the electric utility industry, together with private companies, will make large investments in charging infrastructure. In addition, last month

¹ EPA, ARB, NHTSA (2016), *Draft Technical Assessment Report: Midterm Evaluation of Light-Duty Vehicle Greenhouse Gas Standards and Corporate Average Fuel Economy Standards for Model Years 2022-2025*. <https://www3.epa.gov/otaq/climate/mte.htm#tar>.

² NRDC (2016), *Driving Out Pollution: How Utilities Can Accelerate the Market for Electric Vehicles*, June 2016, <https://www.nrdc.org/sites/default/files/driving-out-pollution-report.pdf>.

the Obama Administration announced that up to \$4.5 billion in loan guarantees would be made available to support electric vehicle charging facilities and the federal government would lead efforts to develop a 2020 vision for a national network of fast chargers for EVs.³ The Consent Decree with VW presents an opportunity to leverage charging investments in a manner that supports cost-sharing among actors – thereby leveraging limited dollars – as well as coordinating the planning, deployment, and operation of charging infrastructure. The multiple investments also present a unique opportunity to potentially connect regional deployment strategies into a coordinated, national network.

Absent a partnership model - such as between VW, utilities, and local/state government - the investments required under the Consent Decree could be spent inefficiently or even compete against other charging investments. We request EPA and ARB work to ensure VW coordinates investments and leverages dollars by prioritizing projects that are seeking a “cost-share” between utility, private, or the state and federal government.

3. We support the agencies’ inclusion of a ceiling on funds utilized for the ‘education and public outreach’ category. We request that the agencies also establish clear goals, metrics, and reporting requirements to help ensure funds in this category are effectively spent.

We support the inclusion of a ceiling, or percentage limit, on education or public outreach efforts in order to ensure on-the-ground investments are prioritized, such as those resulting in infrastructure or public access to ZEVs. While consumer education campaigns are important and have their place, primary responsibility for advertising, marketing, and consumer education should rest with the producers – in this case automakers – that sell zero emission vehicles. We request the agencies take a lead role in determining the goals and metrics that should be monitored for education and outreach efforts, while requiring public reporting on the results of the advertising efforts from a neutral, third-party.

4. We support ZEV investments being utilized to support public ZEV access and infrastructure in underserved, lower-income, and/or communities of color.

ZEV car-sharing programs, ride-and-drives, and rental fleets are excellent ways of expanding the market beyond early adopters that are typically high or middle income. We recommend that both ARB and EPA establish a goal for a portion of investments to be targeted in counties and regions that are underserved, lower-income, and/or communities of color. Many of these communities often disproportionately face the brunt of air pollution or have limited access to technologies that currently have higher-up front cost but may have lower total costs of ownership. Targeting funds for these communities could simultaneously reduce pollution exposure while putting the technologies in the reach of a larger portion of the population.

³ <https://www.whitehouse.gov/the-press-office/2016/07/21/fact-sheet-obama-administration-announces-federal-and-private-sector>

5. Settling Defendants should be asked and allowed to frontload investments to accelerate existing or “shovel-ready” programs, as appropriate.

NRDC interprets the expenditures amounts for the 30 month periods as investment floors, rather than ceilings, and ask EPA and ARB to support frontloading of investments where “shovel-ready” programs may already exist, and where private or public funding may be limited. For example, the California’s ZEV investment plan lists “scrap and replacement” programs with ZEV as one potential option. This program has been working and in place, and has shown an ability to mitigate public health impacts exacerbated by VW, but currently is funding-limited. In addition, EV car sharing programs targeting disadvantaged communities is another area that can yield immediate benefits, including providing broader access to the public, but currently faces similar funding limits.

6. “ZEV Investment” should be defined to expressly include zero emission freight transportation projects in all areas of the country, including but not limited to California.

Under Appendix C, “ZEV Investments” expressly include “zero emission freight transportation projects” *in California*. We strongly support investments in California, but recommend that freight projects in other areas of the country also become eligible for funding as part of the National ZEV Investment Plan. Given that our nation’s freight transportation system extends outside of California, there is no reason to limit eligible investments to that state. Diesel-powered trucks, ships, cargo handling equipment and locomotives contribute to violations of federal clean air standards, and create localized pollution “hot spots” throughout the country. Low-income communities and communities of color bear a disproportionate share of the health harms associated with this pollution. These communities would greatly benefit from zero emission infrastructure investments. Accordingly, while Appendix D (“Mitigation Trust Agreement”) is focused on funding zero emission vehicles for freight, Appendix C should be revised to allow for ZEV enabling investments in freight transportation projects in all areas of the country, including but not limited to investments in overhead catenary systems for port-serving trucks and infrastructure to reduce emissions from ocean going vessels including shorepower and emissions capturing systems (an alternative to shorepower).

7. Anticipated Credible Costs should be audited and reviewed to ensure that they are not excessive, while also ensuring that third-parties are not allowed to win contracts by simply underbidding on prevailing wages.

Much of the initial federal funding of charging infrastructure nationally was through the American Recovery and Reinvestment Act of 2009, which also required prevailing wages for federal projects under the Davis-Bacon and Related Acts. We support EPA and ARB ensuring that expenditures are credible, not excessive, and audited by an independent third party. However, the language also recommends “Settling Defendants shall not obtain services from affiliated companies pursuant to service level agreements if services of equal quality that meet Settling Defendants’ specifications and requirements are available from a

third party at a materially lower cost.” The language raises the possibility that an affiliated company “A” that is providing the prevailing wage could be put at a competitive disadvantage versus an affiliate company “B” that undercuts them on wages. We recommend that EPA and ARB clarify the language to avoid this unintended consequence.

Appendix D: Form of Environmental Mitigation Trust Agreement

1. Beneficiaries should report whether the anticipated air quality and community benefits for a funded project were achieved.

We strongly support provisions within Appendix D that require funding requests to describe an eligible project’s proposed community and air quality benefits, and how the proposed action will mitigate NOx emissions in communities that have historically borne a disproportionate share of these emissions. Such requirements will help ensure that the benefits of the Consent Decree—cleaner air and healthier communities—are targeted to those who need them the most. These requirements, however, should be coupled with an assessment of whether the proposed benefits were achieved. Such assessments could be included within the beneficiary’s reporting requirements, and will enable smarter funding decisions throughout the life of the Environmental Mitigation Trust.

2. The costs of replacement and repowers with all-electric engines should be covered at 100% regardless of whether the engine is government or non-government owned.

Currently, only the costs of replacing and repowering *government-owned* engines with all-electric engines/vehicles are covered in the amount of 100%. Given the superior environmental benefits of zero emission technologies, and the need to propel these technologies into markets across the country, all-electric engines should be fully subsidized regardless of ownership.⁴

Further, in states like California, where this is a significant need to transition to a zero emissions passenger and goods movement system to meet the state’s air quality, health and climate goals, we strongly urge that the consent decree eliminate the incentive for conventional internal combustion engines where electric powertrain options are available including battery-electrics, fuel-cells, or hybrids.

3. Technologies that can achieve the same or greater emissions benefits as shorepower, as well as other control technologies should be eligible for Environmental Mitigation Trust funds.

⁴ While we strongly support incentivizes for ZE engines, we understand that use of such engines will result in a cost-savings for the owner over the life of the engine given that electricity costs are lower than fuel costs. The amount of cost-savings achieved through the use of all-electric engines should be considered (and discounted) when finalizing the amount of incentives provided.

We strongly support shorepower because of the emissions reductions it achieves for ocean going vessels at berth. Given advances in technology, however, shorepower is not the only option for reducing dockside emissions. Recently, the California Air Resources Board approved the use of emissions capturing systems as an alternative to shorepower, and as a means to comply with California's shorepower regulations. Emissions capturing systems should be an eligible Mitigation Action under Appendix D. Further, emissions control technologies, including those being developed for locomotives should also be eligible for funding. Providing multiple options for reducing emissions gives beneficiaries flexibility in securing needed pollution reductions.

4. Overhead Catenary Systems for Heavy Duty Trucks should be eligible for Environmental Mitigation Trust funds.

In Southern California, the South Coast Air Quality Management District is implementing a one-mile overhead catenary system designed to provide power to port-serving trucks. This demonstration project will last one-year. If successful, and with sustained funding, this project could revolutionize the movement of goods to and from the Ports of Los Angeles and Long Beach. The Consent Decree should deem such systems eligible for funding.

5. A list of DERA projects that are eligible for trust funds should be provided to the public for input.

The consent decree allows beneficiaries to use trust funds for Diesel Emission Reduction Act (DERA) projects. This expands the list of projects eligible for Environmental Mitigation Trust funds beyond those enumerated in 1-9 of Appendix D-2 to include projects like truck-stop electrification, among others. We request that the agencies provide a list of DERA projects that could receive trust funds to the public, and allow for additional public input on this list.

Additional Comments applicable to both Appendix C and D

1. The Consent Decree should provide the public an opportunity to provide input on the National and California ZEV Investment Plans, Beneficiary Mitigation Plans, and funding requests before they are approved and granted.

We greatly appreciate the opportunity to comment on the Consent Decree. We also appreciate the provisions within the Consent Decree that make the documents, plans, and reports created in connection with the ZEV investment plans and the Environmental Mitigation Trust expenditures publicly available. In the spirit of promoting additional public engagement, we request that the public be provided a meaningful opportunity to comment on proposed ZEV investment plans, Beneficiary Mitigation Plans, and Beneficiary funding requests before they are approved and granted. Explicitly reserving time for public input will allow for necessary engagement between the public, and States and EPA so that specific infrastructure investments and mitigation projects are intelligently developed. Comments provided by the public should be posted on a public-facing website.

2. The individual and cumulative air quality, community, and health benefits of the projects funded through the ZEV Investment Plans and the Environmental Mitigation Trust should be reported.

The VW Consent Decree provides \$2.7 billion for NO_x mitigation actions and \$2 billion for investments in zero-emission infrastructure and vehicles, both of which will result in reductions in criteria, toxic, and GHG pollutants. These environmental and health benefits should be reported as part of the Consent Decree, and posted on a public facing website. Such reporting will increase discourse over the benefits of ZE infrastructure and vehicles, and influence the quality of investments over the life of the Consent Decree. The Consent Decree already requires, e.g., reporting on the utilization rates of funded ZEV infrastructure, and the proposed air quality and community benefits at the time trust fund request are made. Reporting on the actual environmental and health benefits of the expenditures made pursuant to Appendix C and D complement these existing requirements.

We thank you for the opportunity to provide comments.



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