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OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

Frequently Asked Questions (FAQ) For Beneficiaries to the Volkswagen Mitigation Trust Agreement

Air Enforcement Division
Second Edition, November 2016, Supersedes Prior Editions

The United States District Court, Northern District of California approved a partial 2.0 liter Volkswagen settlement on October 25, 2016, and entered a partial Consent Decree. The Partial Consent Decree requires the defendant, Volkswagen, to establish and fund a \$2.7 billion environmental mitigation trust. The trust will be administered by an independent trustee. The provisions about the mitigation trust are largely found in paragraphs 14–19 of the partial Consent Decree and Appendix D to the partial Consent Decree. The purpose of the mitigation trust is to fund eligible mitigation actions that replace diesel emission sources with cleaner technology to reduce excess emissions of oxides of nitrogen (NO_x) caused by the violating 2.0 liter cars. *See* EPA, [Securing Mitigation as Injunctive Relief in Certain Civil Enforcement Cases \(2012\)](#). This mitigation work is in addition to the emission reductions achieved by requiring Volkswagen to buy back or modify the violating 2.0 liter cars.

The partial settlement is structured to provide the impacted states, territories, and Indian tribes with the ability to select and implement appropriate mitigation actions funded by Volkswagen. Appendix D-1 to the partial Consent Decree provides an initial allocation of the funds, under which no state receives less than \$7.5 million and Indian tribes receive a separate allocation of more than \$49 million. Appendix D-2 provides a broad array of mitigation actions that beneficiaries can implement. Beneficiaries must elect to become beneficiaries within 60 days of when the final trust agreement is filed with the Court (Trust Effective Date). Beneficiaries have 10 years from the Trust Effective Date to request their allocation and implement mitigation actions and tribal beneficiaries have six years from the Trust Effective Date to request their allocations.

This document is a series of frequently asked questions for beneficiaries to the mitigation trust. The EPA will update this document as necessary.

New- Indicates the question and answer did not appear on the previous FAQ.

Revised- Indicates the question or answer has been revised from how it appeared on the previous FAQ.

1. FAQs: Timing

Revised: FAQ 1.1: When is the trust likely to become effective?

A: The trust will likely become effective sometime during the first half of 2017. Several steps must occur before the trust becomes effective. The first step occurred when the Court approved the settlement, on October 25. The second step will occur when a trustee is appointed by the Court, which could happen within 60–90 days after the Court approved the settlement – between the end of December and the end of January 2017. Third, the trust agreement must be finalized, in a form substantially similar to the one included in the settlement, executed by Volkswagen and the trustee, and filed with the Court.

Revised: FAQ 1.2: Who can qualify as a beneficiary?

A: Potential beneficiaries are all 50 states, the District of Columbia, Puerto Rico, and federally recognized tribes, as described in Appendix D-1.

FAQ 1.3: How do potential beneficiaries become beneficiaries?

A: To become a beneficiary, each potential beneficiary must file a certification form (Appendix D-3) with the Court within 60 days of the Trust Effective Date. The certification form includes, among other things, a waiver of certain claims that may require deliberation and approval by various offices within each potential beneficiary's government. Because the Trust Effective Date will not occur until several months after the settlement is approved, potential beneficiaries will have significantly longer than 60 days to execute their certification forms if they begin the process now. Potential beneficiaries should monitor the case docket as the Trust Effective Date is the date the final trust agreement is filed with the Court.

Revised: FAQ 1.4: What is the first step for beneficiaries in deciding which eligible mitigation actions to take?

A: All beneficiaries (except for tribes) must create a mitigation plan that summarizes how the beneficiary intends to use its allotted funds. The plan must address a number of factors, including for example, the expected emission benefits, and how the beneficiary will seek and consider public comment as described in Paragraph 4.1 of Appendix D.

FAQ 1.5: What are the documentation requirements for funding specific projects and why are they necessary?

A: Each funding request must have sufficient detail to enable the trustee to determine whether the funds will be spent on eligible mitigation actions, to ensure the money is spent transparently, and that the projected costs are eligible.

FAQ 1.6: What if a project changes such that it costs less, or more, than the beneficiary asks for and receives from the trust?

A: Beneficiaries may adjust their goals and specific spending plans at their discretion and, if they do so, will need to provide the trustee with updates to their Beneficiary Mitigation Plan.

FAQ 1.7: When can beneficiaries actually expect to have access to funds for eligible mitigation actions?

A: The trustee has 120 days from the Trust Effective Date (which, as described above, we anticipate to be sometime in 2017) to file a list of designated beneficiaries. Once designated, each beneficiary may submit funding requests to the trustee for eligible mitigation actions, subject to certain limits during the first three years until the trust is fully funded. The trustee must act upon such funding requests within 60 days of receipt, either by approval, disapproval, requesting changes, or requesting further information. Therefore, beneficiaries should expect to have access to trust funds beginning approximately six months following the Trust Effective Date.

Revised: FAQ 1.8: Is there guidance on what information a state must submit about its projects?

A: The elements of the Beneficiary Mitigation Plan are listed in paragraph 4.1 and the elements of the required funding requests are listed in paragraph 5.2 of Appendix D. The Mitigation Trust Agreement is designed to be straightforward, with a list of projects that focus on vehicle or vessel equipment or engine replacements that are relatively uncomplicated to implement. A beneficiary may also choose the DERA option, under which it may receive limited and appropriate guidance from an EPA Regional office typical of what is routinely provided to DERA grantees.

Revised: FAQ 1.9: May a beneficiary appeal the trustee's denial of a request for funds?

A: Within 60 days after receiving a beneficiary's funding request, the trustee will be required to transmit to the requesting beneficiary and post on the trust's public website a written determination either approving the request, denying the request, requesting modifications to the request, or requesting further information. Each written determination approving or denying an Eligible Mitigation Action funding request will include an explanation of the reasons underlying the determination, including whether the proposed Eligible Mitigation Action meets the requirements of the Mitigation Trust Agreement. In the unlikely event that a beneficiary ultimately disagrees with the trustee's decision on its request, it may petition the Court to review the decision.

FAQ 1.10: To what extent must a beneficiary take public comment on its mitigation plan?

A: Beneficiaries have discretion in how they seek and consider public input on their Beneficiary Mitigation Plans; however the plans must explain the process for public input.

Revised: FAQ 1.11: How long do beneficiaries have to access and spend allocated trust funds?

A: Beneficiaries have 10 years to spend allocated trust funds. After that, unused trust funds will be redistributed as supplemental funding among beneficiaries that have used at least 80% of their allocated trust funds. Such beneficiaries will be given five additional years to use the supplemental funding.

Revised: FAQ 1.12: Are there any limits to how much of its total allocation a beneficiary can draw at any given time?

A: No beneficiary may request payout of more than one-third of its allocation during the first year after VW makes the initial deposit of \$900 million to the trust, or two-thirds of its allocation during the first two years after VW makes the initial deposit.

New: FAQ 1.13: How will the trustee of the mitigation trust be selected?

A: The Court will select and appoint the trustee of the mitigation trust from among a list of final candidates. The list of final candidates is created pursuant to a process established in paragraph 15 of the Partial Settlement. First, California, the States, and the Indian tribes may each submit a list of initial trustee candidates to the United States. Then, California, the States, the Indian tribes and the United States confer to select between three and five final candidates from the list of initial candidates. This list of final candidates is then submitted to the Court.

2. FAQs: Eligible Mitigation Actions (General Issues)

Revised: FAQ 2.1: What is the range of eligible mitigation actions?

A: Eligible mitigation actions are focused on reducing NO_x emissions from mobile sources of pollution. Reducing emissions from mobile sources, such as vehicles, and vessels, has historically proven to be a cost-effective and simple way to reduce NO_x pollution. Appendix D-2 to the Consent Decree details the 10 eligible mitigation actions and eligible expenditures. Actions eligible under the Diesel Emission Reduction Act (DERA) option (eligible mitigation action #10) include truck stop electrification (electrified parking spaces to eliminate long duration idling), fuel efficiency and idle reduction equipment (single-wide tires, fuel-operated heaters, auxiliary power units, etc.), construction and agricultural equipment, smaller marine vessels, and diesel generators, among others. The list of DERA –eligible project types with their required cost-shares can be found at: <https://www.epa.gov/sites/production/files/2016-08/documents/fy16-dera-project-eligibility-cost-share-overview.pdf>

FAQ 2.2: Why is the eligible mitigation actions list so specific on eligible model years for vehicles that can be taken out of service or replaced?

A: Eligible mitigation actions involving highway vehicles are restricted to model years that predate the EPA's current, more stringent emissions standards. It is important to focus on replacing the older, dirtier vehicles and engines—which might otherwise remain in service for

many more years—to ensure substantial air quality gains will be achieved expeditiously in places where people live and work.

Revised: FAQ 2.3: What are the ways in which a beneficiary can use its allocated trust funds to replace dirty heavy-duty diesel vehicles with electric vehicles?

A: There are many opportunities for beneficiaries to use trust funds to purchase new all-electric vehicles listed in Appendix D-2 to the partial Consent Decree. For example, a beneficiary could receive 100% of the cost of a new electric, government-owned school, transit, or shuttle bus to replace an existing diesel, government-owned school, transit, or shuttle bus. In addition, Attachment 2 allows a beneficiary to use trust funds to pay for up to 75% of the cost of a new all-electric replacement vehicle for nongovernment-owned fleets, and 100% of the cost of new all-electric school bus replacements in private fleets contracted with public school districts. The charging infrastructure associated with these electric vehicles can also be purchased with trust funds.

FAQ 2.4: Why is scrappage required?

A. The partial settlement funds the replacement of older, high-polluting heavy-duty vehicles, engines, and/or equipment. To ensure that such replacements achieve the intended emission reductions, the replaced equipment must be scrapped. Beneficiaries are encouraged to recycle scrapped vehicles, engines, and equipment to reduce unnecessary waste.

3. FAQs: Eligible Mitigation Actions: DERA option

Revised: FAQ 3.1: How will eligible mitigation action #10 (the DERA option) work for eligible beneficiaries?

A: The DERA program is a Congressionally-authorized program that enables the EPA to offer funding assistance for actions reducing diesel emissions. Thirty percent of annual DERA funds are allocated to the DERA Clean Diesel State Grant Program. Under the DERA Clean Diesel State Grant Program, each state and territory is offered a base amount of EPA DERA funding. States and territories that match the base amount dollar for dollar receive an additional amount of EPA DERA funding to add to the grant (50% of the base amount). This non-federal voluntary match can be state or territorial funds, private funds, or settlement funds such as those from the beneficiary's allocation under the mitigation trust. Under the DERA option, beneficiaries may draw funds from the trust for their non-federal match on a 1:1 basis or greater than 1:1 basis. Below are two examples. In both examples, the entire amount (\$500,000 and \$1.3 million) is now included in the EPA DERA grant and subject to the EPA and federal grant rules and practices. The list of DERA- eligible project types with their required cost-shares can be found at: <https://www.epa.gov/sites/production/files/2016-08/documents/fy16-dera-project-eligibility-cost-share-overview.pdf>

Example A: If a state's DERA allocation in FY2017 is \$200,000 under the DERA Clean Diesel State Grant Program, the state may use \$200,000 in trust funds as the 1:1 match. Then, the state will receive its bonus DERA funds equal to 50% of the base amount (\$100,000), making \$500,000 the total amount the state receives—\$300,000 from DERA and \$200,000 from the trust.

Example B: If a state's DERA allocation in FY2017 is \$200,000 under the DERA Clean Diesel State Grant Program, the state may use a larger amount—\$1 million in this example—in trust funds to overmatch the 1:1 ratio. The state receives its bonus DERA amount of \$100,000 and thus the total amount for the DERA Clean Diesel State Grant Program for FY2017 would be \$1.3 million—\$300,000 from DERA and \$1 million from the trust.

Revised: FAQ 3.2: How will eligible mitigation action #10 (the DERA option) work for tribal beneficiaries?

A: Tribal trust beneficiaries may utilize trust funds for the DERA Clean Diesel Tribal Grant Program. Because DERA enables the 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 actions eligible under DERA, such as repowering fishing vessels, repowering or replacing generators, and electrifying parking spaces, in addition to those from the eligible mitigation actions list (Appendix D-2). Under the DERA Clean Diesel Tribal Grant Program, tribes submit applications for DERA grant funding in response to an annual Request for Proposals. Tribes will be able to request trust funds annually to use as a voluntary match for DERA tribal grants.

FAQ 3.3: Are a beneficiary's administrative expenses covered under eligible mitigation action #10 (the DERA Option) or under the "eligible mitigation action expenditures" listed in Appendix D-2?

A: A beneficiary that chooses any of the actions from 1 through 9 can spend up to 15% of its total mitigation plan budget on administrative expenses as set for in Appendix D-2. As described in current DERA program guidance, DERA Clean Diesel State Administrative expenses can also account for up to 15% of the total amount of funding (DERA funds plus matching funds, such as trust funds) for DERA Clean Diesel State Grants.

FAQ 3.4: What are the options for beneficiaries that might want to conduct an eligible mitigation action that does not exactly fit the required criteria for the action?

A: Beneficiaries may use option #10, the DERA option. The DERA program has a process for handling waivers of existing guidelines. Examples of waivers that the EPA has approved with reasonable justification include the following: waivers of model year restrictions, useful life restrictions, and cost-share restrictions.

Revised: FAQ 3.5: What if Congress does not fund DERA in the future?

A: Under option #10 in Appendix D-2 of the partial Consent Decree, the DERA option, beneficiaries may use trust funds for their non-federal match or overmatch pursuant to DERA. If Congress does not appropriate funds for DERA in the future, then option #10, the DERA option, would not be available. Trust funds would still be available for projects under options 1-9 of Appendix D-2.

4. FAQs: Miscellaneous

FAQ 4.1: What is the connection between beneficiary status and state motor vehicle registration of the 2.0 liter vehicles at issue in the case?

A: Beneficiaries must file a certification form with the Court that includes certain agreements regarding vehicle registration. The relevant certification form language is at Certification #9 of Appendix D-3.

New: FAQ 4.2: Is there any requirement for Beneficiaries to report the anticipated NOx reductions of their mitigation actions?

A: Yes, paragraph 4.1 explains that Beneficiaries are required to provide a description of the expected emission benefits of their Beneficiary Mitigation Plan. Paragraph 5.2.3 further requires Beneficiaries to estimate the amount of NOx their Mitigation Actions will reduce when submitting funding requests.