



U.S. Department of Justice

Office of Tribal Justice

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In July of 2016, the Department of Justice and the Environmental Protection Agency invited federally-recognized tribal governments to consult on the process for distribution of the Tribal Allocation Subaccount of the Environmental Mitigation Trust established under the settlement of *In re: Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation*. The government-to-government consultation was initiated to consult on determining a method for allocating annual funding in the Tribal Allocation Subaccount for Eligible Mitigation Actions for projects on Indian land and providing technical assistance to tribes. Telephonic consultations were held on August 8, 10, and 15 in 2016. In addition to the telephonic consultation, written comments were accepted until the end of the 60-day consultation period (August 27, 2016) established in the consent decree. The results of this consultation are as follows:

Response to Tribal Consultation

1. Request for a Separate Tribal Trustee or a Tribal Advisory Council to Consult with the Trustee on Administration and Distribution of the Tribal Allocation Subaccount of the Environmental Mitigation Trust. Many of the Tribes or tribal-affiliated organizations requested a designated tribal trustee who is separate from the at-large trustee, or alternatively that the Trustee should be directed to appoint and support a Tribal Advisory Council to assist the Trustee in evaluating tribal funding requests.

Response: During negotiations with the trustee, the parties decided to establish two trusts: (1) an Environmental Mitigation Trust for State Beneficiaries ("State Mitigation Trust"); and (2) an Environmental Mitigation Trust for Indian Tribe Beneficiaries ("Indian Tribe Mitigation Trust"). Pursuant to the terms of the Indian Tribe Trust Agreement (the "Trust Agreement"), the trustee will set aside \$30,000 of the administrative cost subaccount to support the formation of a Tribal Advisory Council to advise the Trustee in evaluating tribal funding requests. Based on specific comments received during the consultation, the United States recognizes that the tribes have expressed a preference for the Institute for Tribal Environmental Professionals ("ITEP") to be the catalyst in forming this advisory council. In the Trust Agreement, the trustee agreed to select ITEP to serve this function. If a Tribal Advisory Council is formed, it should include representatives from all regions, including Alaska, and from small and large Tribes to ensure a balanced approach.

2. Allowable Mitigation Projects. The Consent Decree requires VW to establish and fund an Environmental Mitigation Trust and a Tribal Allocation Subaccount to be used by Tribal

Beneficiaries to implement NOx reduction projects to mitigate the excess tons of NOx emitted by the violating Volkswagen 2.0 Liter and 3.0 Liter vehicles (“Subject Vehicles”). The United States received a number of comments asking that the list of eligible mitigation projects be expanded.

Response: Appendix D of the Consent Decree allows Beneficiaries to use Trust funds to implement NOx reduction projects that fall within nine enumerated categories of Eligible Mitigation Actions, as well as to use Trust funds for their nonfederal match or voluntary match under EPA’s Diesel Emission Reduction Act (“DERA”) program for projects that are not included in the nine specifically enumerated categories (known as “Option 10”). *See* Consent Decree Appendix D-2. Since the DERA program was established in 2005, EPA has gained considerable experience in implementing NOx mitigation projects and has extensive knowledge about which types of projects are most cost-effective at reducing NOx from diesel emissions. Based on its experience, EPA concluded that the nine enumerated categories include actions that have a proven track record, are cost-effective, are relatively straightforward, and can be approved by the Trustee and implemented by state and tribal Beneficiaries in an efficient and expeditious manner. By limiting the Trust to a defined set of proven and cost-effective projects, the Trust allows Beneficiaries flexibility to implement a range of projects within their jurisdiction, while still ensuring that the Trust is most effective at accomplishing its goal of fully mitigating the excess NOx attributable to the Subject Vehicles. In addition, to the extent that a Beneficiary wishes to fund a specific NOx mitigation project that does not fall within one of the enumerated categories, it may still apply, under Option 10, to use Trust funds to pay for its non-federal voluntary match pursuant to a DERA grant. However, Trust funds shall not be used to meet the non-federal mandatory cost share requirements, as defined in applicable DERA program guidance, of any DERA grant.

3. Compatibility with DERA Program. Some Tribes and Tribal organizations commented that the “DERA Option” included in Appendix D-2 is problematic because DERA receives its funding from Congress, and Beneficiaries cannot rely on DERA receiving appropriated funds every year. They also raised a concern that the certification and reporting requirements under the Trust are different from or inconsistent with DERA.

Response: The DERA Option for any given year is dependent upon an appropriation for the Diesel Emissions Reduction Act for that year. If there is no appropriation, Beneficiaries may not choose the DERA Option. In that case, Beneficiaries should choose projects from Eligible Mitigation Actions 1-9.

Tribes wishing to participate in the DERA Option will submit a Notice of Intent to Participate to the Trustee to reserve Trust funds. Then they will submit their DERA proposal to EPA. If their proposal is selected for funding, the Trust funds they reserved will be available as their non-federal voluntary match. Tribes do not need to submit anything under the DERA state program.

A Beneficiary that chooses the DERA Option must submit DERA Quarterly Programmatic Reports and a Final DERA Programmatic Report to EPA as required under

the DERA grant terms and conditions. A Beneficiary may submit its DERA reports to the Trustee to fulfill its reporting requirements for any portion of its Trust funds under the DERA option.

The DERA Option provides Beneficiaries with additional project options if Eligible Mitigation Actions 1-9 do not align with their fleets or needs. The DERA Option for the Tribes limits project eligibility to those projects that are listed as eligible in the DERA Tribal Request for Proposals (“RFP”). Projects listed in Eligible Mitigation Actions 1-9 and the DERA program are eligible for Trust funds because they are proven methods to reduce NOx. Tribes should review the DERA RFP for project eligibility.

4. Administrative Costs Associated with the Tribal Allocation Subaccount. Tribes and Tribal organizations requested that no more than 2.5% of the Tribal Allocation Subaccount be used for Trustee administrative costs.

Response: Subparagraph 2.1.3.2 of the Trust Agreement establishes a Tribal Administration Cost Subaccount, which is separate from the Tribal Allocation Subaccount. The Trust’s expenses relating to administering the Tribal Allocation Subaccount are taken from the Tribal Administration Cost Subaccount; the Trust’s administrative costs are not taken from the Tribal Allocation Subaccount, which is used instead to fund Eligible Mitigation Actions, Eligible Mitigation Action Expenditures, and technical assistance, as described in subparagraph 2.1.1 of the Trust Agreement. Pursuant to Paragraph 5.2 of the Trust Agreement, Beneficiaries that submit a funding request to the Trustee are required to include a project management plan for the proposed Eligible Mitigation Action, including a detailed budget and implementation and expenditure timeline. As explained in Appendix D-2 under “Eligible Mitigation Action Administrative Expenditures”, Beneficiaries may use Trust Funds for actual administrative expenditures associated with implementing such Eligible Mitigation Action, but not to exceed 15% of the total cost of such Eligible Mitigation Action. These administrative expenditures include the costs of professional services and contracts for consulting services. The allocation for these purposes reflects the importance of attention to administration, record-keeping and transparency by the Beneficiaries, and should allow for adequate personnel in that regard.

5. Distribution of the Tribal Allocation Subaccount. Some Tribes and Tribal organizations objected to what they described as a “first come, first serve” basis of distributing the Tribal Allocation Subaccount. Others commented that Paragraph 5.0.5.2.3 of Appendix D, which is triggered by the amount of funding requests exceeding the amount of funds available in a given year, was an unnecessary administrative provision that penalizes those committed to instituting Eligible Mitigation Actions. They argue that this could lead to some tribes working together to circumvent or interfere with another Tribe’s access to the allocation and argue that the Trustee should be able to determine how to allocate the funds if a particular year is oversubscribed. Tribes and Tribal Organizations also requested an expansion in the number of funding years for the Tribal Allocation Subaccount, but one Tribe requested a reduction in the number of years. One Tribe also requested there be no or low minimum project dollar amounts. Finally, Tribes and Tribal Organizations requested that the United States eliminate the reversion

of the Tribal Allocation Subaccount funds back into the general fund at the end of the six-year funding cycle.

Response: The formula set forth in Paragraph 5.0.5.2.1 allows for the equal distribution of the funds across multi-year funding cycles. This general approach balances the feedback received from Tribes to ensure (a) funding for Tribes and Tribal projects that are prepared to begin immediately, and (b) the availability of funds in later years for Tribes who may need additional time in preparing and submitting their projects and funding requests. In that sense, it is not truly a “first come, first serve” process for the first six years of funding. In EPA’s experience administering the Tribal DERA program, the amount of funds available in each year should be sufficient to fund a majority of the requests in a given year. In response to comments, the United States agrees that the six-year funding window for the Tribal Allocation Subaccount should be expanded to ten years for it to be commensurate with the amount of time the States have to request funding for eligible mitigation projects in Appendix D. Accordingly, the Indian Tribe Mitigation Trust now provides for a ten-year funding period. Subparagraph 5.0.5.2.1 sets forth an initial six-year funding cycle. If any funds remain in the Tribal Allocation Subaccount after this six-year period, Indian Tribe Beneficiaries may apply for additional funding in year seven. However, after the first seven years of the funding cycles, any remaining funds will be available for the remaining years on a “first come, first serve” basis. The expansion of the funding cycle years should also result in no Tribal Allocation Subaccount funds reverting to the trust.

In a July 8, 2017, letter sent in response to the National Tribal Air Association’s questions regarding the VW Settlement, the United States explained the process that results if a particular year is oversubscribed. Here is that response:

If a Tribe applies for funding for an eligible mitigation action (“EMA”) and the particular year that the Tribe has applied for is oversubscribed, then the Trustee will allocate the available funds for that year by prorating it based on the census population data for each Tribe. For example, if the total amount available for a particular year is \$1,000,000 and five Tribes with a combined population of 1,000,000 apply for EMA funding in excess of the \$1,000,000, the Trustee will distribute the \$1,000,000 as follows:

Tribe	Population
Tribe A	400,000 (40%)
Tribe B	200,000 (20%)
Tribe C	50,000 (5%)
Tribe D	75,000 (7.5%)
Tribe E	275,000 (27.5%)
Total	1,000,000

Tribe	Allocation
Tribe A	\$400,000 (40%)
Tribe B	\$200,000 (20%)
Tribe C	\$50,000 (5%)
Tribe D	\$75,000 (7.5%)
Tribe E	\$275,000 (27.5%)
Total	\$1,000,000

In the event that a Tribal submission does not meet the administrative or technical requirements for funding or if the Trustee needs additional information from the particular Tribe, the Trustee will notify the Tribe. If the Trustee needs additional information, the Tribe will need to provide that information for the project to be eligible for funding. If the Tribal funding request is for a project that is not an EMA, the Tribe will have the opportunity to apply for projects that meet EMA requirements in subsequent years.

6. Technical Assistance. Paragraph 2.1.1 of the Trust Agreement provides that up to 5% of the Tribal Allocation Subaccount may be used for technical assistance to enable tribes to prepare funding requests for Eligible Mitigation Actions. The Tribes and Tribal Organizations had several comments on the technical assistance funding that will be provided to the Tribes. Some advocated for a smaller amount for technical assistance, while others argued that the percentage for technical assistance should be flexible or increased. Tribes and Tribal Organizations also requested that the indirect costs (administrative overhead) associated with administering the technical assistance be capped, for example at 25% of overall technical assistance funding, so that a greater amount of direct funding is used to support technical assistance for Tribes. One Tribe also requested that the legal costs for preparation of documents related to becoming a beneficiary be covered. The Tribes also identified ITEP as a technical assistance provider, as it is equipped to provide assistance, training, and outreach to the Tribes, with the possible exception of Alaska and some rural areas that may need special local expertise. Tribes also requested that some templates for required documents be produced by whatever organization provides the technical assistance. The National Tribal Air Association (NTAA) expressed the concern that perhaps there should be a sliding scale for the distribution of the technical assistance funding as it would be unfortunate if most of the technical assistance money is used immediately and there were not additional funds for a Tribe that applied in a later year.

Response: The 5% set aside for technical assistance funding in Paragraph 2.1.1 of the Trust Agreement is based on EPA’s work with Tribes that have applied to the DERA program. When Tribes apply to the DERA program, EPA provides the technical assistance. Based on EPA’s years of experience of administering the Tribal DERA program and providing technical assistance, the 5% cap provides sufficient funding for technical assistance for all Tribes interested in becoming beneficiaries.

In response to comments, the United States recognizes that the tribes have expressed a preference for ITEP as a technical assistance provider. In the Trust Agreement, the trustee agreed to select ITEP to serve as the technical assistance provider. The United States encourages the technical assistance provider to assist Tribes in preparing the

certification of beneficiary status and funding requests under the Trust Agreement, which would reduce the need for legal assistance to prepare documents. The United States understands that there may need to be additional technical assistance providers for Alaska and rural areas with unique needs and encourages the technical assistance provider to work with regional organization(s) as possible to provide that assistance. In response to the NTAA's concern about the technical assistance funding running out before the final cycle of funding, it is certainly a possibility that the technical assistance funds could be used up before the last funding cycle, but it is also a possibility that there will be technical assistance funds remaining that do not get used. Providing technical assistance funding on a sliding scale will not ensure that all of the technical assistance funding gets used or that the Tribes requesting technical assistance early in the process receive adequate assistance.

In response to the comment about administrative overhead costs, the Trust Agreement caps the indirect costs (administrative overhead) associated with administering the technical assistance at 30.9% of overall technical assistance. In each budget submitted for funding, ITEP is required to certify that its indirect costs comply with that limit.

7. EV Charging Infrastructure. Similar to public comments received on the Partial Consent Decree, the Tribes argued that the 15% cap on allocating funds toward electric vehicle ("EV") charging infrastructure projects should be removed (i.e., Beneficiaries should be allowed to spend a greater share of their allocation on EV charging).

Response: Light duty EV charging infrastructure promotes greater use of zero emission vehicles which, in turn, leads to a general reduction in NOx emissions from mobile sources. By allowing Trust funds to be used for EV charging infrastructure in addition to the other categories of projects, Appendix D allows Beneficiaries to choose from a wide range of projects that address both heavy duty and light duty vehicles. On the other hand, EV charging infrastructure projects are aimed at reducing emissions from lower-emitting sources. By limiting the amount of funds that can be spent on EV charging infrastructure, Appendix D ensures that sufficient funds are available to pay for projects that better address higher-emitting sources such as those targeted in Eligible Mitigation Actions 1-8.

In addition, Appendix C requires Volkswagen to invest \$2 billion to advance ZEV and ZEV infrastructure. As part of that process, Volkswagen is required to provide notice and opportunities for stakeholders to provide suggestions, observations, and offers of assistance or support for potential ZEV investments that it may make under its National ZEV Investment Plans (*see* National Outreach Plan description in Paragraph 2.3 of Appendix C). Volkswagen must provide reasonable notice of these opportunities on VW.com and VWCourtSettlement.com, and in fact did so for the first of four 30-month investment cycles. Tribes interested in learning more about this process for stakeholder comment pertaining to future investment cycles should visit these websites. Appendix C also includes significant investment in light duty charging infrastructure, although those investments may not be located in every state, tribe, or territory. Appendix C investments may also not be the same type of investment that interest a state, tribe, or territory. Thus,

Beneficiaries may use 15% of an Appendix D allocation to fund charging infrastructure projects.

8. Coordination Between Tribes and States on Projects. One Tribe suggested that the impact of the Partial Consent Decree could be maximized if the Tribes and states coordinated on projects.

Response: Nothing in the Partial Consent Decree prevents the Tribes and states from coordinating on projects to maximize the benefits. All beneficiaries (except for Tribes) must create a Beneficiary 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 comments as described in Paragraph 4.1 of Appendix D. 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. In addition to liaising with the states directly, through the public input process Tribes can provide input to the states on ideas for maximizing the benefits of the Mitigation Trust.

9. Objections to the Methodology Used for the Trust Mitigation Account Allocations. One Tribe commented that using the number of registered Subject Vehicles leads to a distorted view of the impact of the NO_x emission on Indian country. As the Tribe pointed out, many reservations are near major tourist attractions and receive significant highway traffic. Highway traffic reports might be a better indicator of exposure to NO_x emissions from the Subject Vehicles.

Response: The Mitigation Trust Fund is intended to fund NO_x reduction projects where the Subject Vehicles were, are or will be operated. While highway traffic reports might provide an indicator of high traffic areas generally, they would not necessarily provide any data on the number of Subject Vehicles that are contributing to that traffic.

10. Objections to the “Finalization of Trust Agreement” Provision in the Consent Decree. Tribes and Tribal organizations objected to Paragraph 16 of the Consent Decree (described in several Tribal comments as “Section 17”) as it does not include Tribes in the process for finalizing the Trust Agreement after Trustee selection.

Response: Comments on the terms of the Consent Decree were handled through a separate process and the United States has already responded to timely public comments received. Paragraph 16 of the Consent Decree is limited to the United States, California, the entities (other than Indian Tribes) in Appendix D-1, and the Settling Defendants. After the Court appointed a Trustee, those parties worked with the Trustee to finalize the two Trust Agreements and to modify terms of the agreements as necessary for administration of the Trusts. Through the consultation process pursuant to Paragraph 2.1.1. of Appendix D of the Decree, however, the United States has responded to comments of the interested federally-recognized Indian tribes and negotiated with the trustee, the States, and the Settling Defendants to modify Appendix D in the process of finalizing the Indian Tribe Trust Agreement to address some of these concerns.

11. Special Considerations. One Tribe argued that special consideration should be made for its unique location between two air sheds and close to the United States-Mexico border. In addition, some Tribes and Tribal Organizations argued that the Alaska Native villages should receive special consideration regarding technical assistance due to their remoteness and unique challenges facing the villages. One Tribe also requested funding for information and training sessions for tribal citizens regarding the Partial Consent Decree.

Response: It is important to note that the Trust Agreement is structured such that the Trustee does not exercise discretion in choosing which funding requests to approve as long as the proposed Eligible Mitigation Action meets the requirements set forth in Appendix D-2 of the Decree and furthers the purpose of the Trust.

The organization that administers the technical assistance funding for the Tribes should take into consideration the unique circumstances of the Alaska Native villages and consider providing a sub-grant to an organization willing to provide the additional technical assistance to the villages.

Funds from the Tribal Allocation Subaccount are not for educational purposes, but to mitigate the NOx emissions resulting from the Subject Vehicles.