



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

NOV 18 2016

ASSISTANT ADMINISTRATOR
FOR ENFORCEMENT AND
COMPLIANCE ASSURANCE

The Honorable Fred Upton
Chairman
Committee on Energy and Commerce
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

Thank you for your letter of November 1, 2016, regarding the Zero Emission Vehicle (ZEV) investment requirement in the Volkswagen 2.0 liter Partial Consent Decree (CD). I appreciate the opportunity to address the concerns raised in your letter.

The ZEV investment requirement is intended to remedy adverse impacts from Volkswagen's Clean Air Act violations. The company sold approximately 500,000 vehicles in the United States that it claimed were "green," "lower emitting," and "clean diesel" vehicles. Consumers purchased these vehicles on the premise that they were clean vehicles, but we now know that they were not actually clean. The ZEV provision of the settlement is intended to address the adverse effects of VW's violations on air quality, by supporting technologies that are actually clean. The settlement, approved by the Court, requires Volkswagen to invest in the development and use of clean vehicle technologies. The key provisions for ZEV investments that ensure that all Americans will benefit, described in more detail below, include requirements that VW:

- Solicit and consider input from stakeholders, including states, municipalities and other federal agencies;
- Make all ZEV investments and outreach brand neutral, so all technologies and interested businesses, as well as consumers, will benefit;
- Update the plan every 30 months, so that the plan adapts to changing technologies and market conditions.

The ZEV investment requirement is part of an enforcement case resolution. The settlement is based on the facts of this case, federal and state law governing liability and remedies, and an urgency to deal with the ongoing excess pollution from the vehicles on the road. In June 2016, the EPA and California lodged a settlement that requires Volkswagen to modify or remove from the roads nearly 500,000 cars that do not meet emissions standards, mitigate lifetime excess air pollution from the vehicles, and offset the broader harm to the clean vehicle market through investments in ZEV infrastructure, access, and education. The public was invited to comment on the lodged CD.

On October 25, 2016, the United States District Court for the Northern District of California entered the CD, and thereby ordered Volkswagen, among other things, to make the ZEV investment consistent with the CD. During the public comment period numerous comments were received. The EPA and the U.S.

Department of Justice (DOJ) considered all the comments that were submitted, including comments specifically addressing the ZEV portion of the agreement. The Court also considered those comments before reaching its decision. After consideration of the comments, the Court found that the CD was fundamentally fair, adequate, reasonable, and in conformance with applicable laws. Specifically, with respect to the ZEV element, the Court stated:

The Court finds the ZEV investment requirement substantively fair. Whereas the Environmental Mitigation Trust seeks to reduce the harm caused by the subject vehicles, the ZEV investments promotes actual environmentally-friendly vehicles. A commitment of investments in such technology furthers the purpose of the Clean Air Act by promoting the research and development of programs that address air pollution. *See* 42 U.S.C. § 7401(b)(2).¹

The EPA's Office of Enforcement and Compliance Assurance (OECA) is primarily responsible for ensuring Volkswagen's compliance with the CD, and OECA will work closely with the EPA's Office of Transportation and Air Quality (OTAQ). OECA will also work closely with the Environment and Natural Resources Division of the DOJ as needed to address CD implementation issues. The oversight of enforcement case resolutions is one of OECA's core functions. Other settlements overseen by OECA require mitigation projects, as well as other remedies including major capital projects. EPA enforcement personnel have capably handled these oversight tasks with our allocated budget. The EPA anticipates that will continue to be true as OECA implements this Volkswagen partial CD.

It is Volkswagen's responsibility to make investments consistent with the requirements of the CD. The company will make the decisions on when, how, and where to make the investments, and remains subject to all federal, state, and local laws. Volkswagen may obtain credit toward the overall ZEV investment requirement only where the incurred costs are creditable under the specific terms of the CD.

The EPA will ensure that Volkswagen provides a robust opportunity for stakeholder input into the investment plans before Volkswagen spends any money, and that the company complies with the requirements of the CD. The EPA strongly encourages all interested parties to share their views with Volkswagen through the required stakeholder input process. The outreach provisions of the CD mean that interested parties have a far greater opportunity to provide input than would be the case if the company were making these investments independently for its own business reasons.

The ZEV investment requirement is not a government program and does not augment any government program. It is a remedy obtained from a federal judge by DOJ, on behalf of the EPA, that partially resolves an enforcement case.

The EPA has a limited role with respect to the ZEV investment requirement. In reviewing Volkswagen's submissions under the CD, EPA's role is limited to determining whether the company satisfied the specific requirements of the CD, including the requirement to conduct a robust stakeholder input process. If the EPA determines that Volkswagen has failed to satisfy one or more elements of the ZEV investment requirement, the agency will work with DOJ to address the matter consistent with the CD's

¹ Order Granting the United States' Motion to Enter Proposed Amended Consent Agreement, In re: Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation, MDL No. 15-MD-2672-CRB (JSC) (Oct. 25, 2016, N. D. Cal.).

provisions (which may involve the CD's dispute resolution process and elevating issues to the Court where appropriate).

Volkswagen must develop the National ZEV Investment Plan ("Plan"), and the EPA's role is to review and approve (or disapprove) the Plan as consistent with the specific requirements of Appendix C of the CD. The EPA's limited role will ensure that Volkswagen does what Appendix C requires, including determining, for example, whether the Plan includes the required types of ZEV investments, a projection of Creditable Costs, and explanations and descriptions of activities to provide education and awareness and access on ZEV. The CD specifically requires that Volkswagen's plan be supported, to the extent available, by relevant literature from academia, industry, and government. The CD does not allow the EPA to substitute its preferences for choices made by Volkswagen, but only to determine whether Volkswagen has satisfied the terms of the CD.

The EPA also has a role to review Volkswagen's claimed Creditable Costs. The EPA will first review and approve (or disapprove) Volkswagen's Creditable Cost Guidance and then determine whether Volkswagen will obtain "credit" against its \$1.2 billion commitment for the costs it claims. In exercising its authority, the EPA will consider the conclusions and work product of the Third-Party Reviewer, which will be an independent, certified public accountant tasked to review all claimed costs. Creditable Costs are defined as "costs incurred by Settling Defendants for the planning, installation, operation, and maintenance of a ZEV investment . . . that satisfies the criteria set forth in the National Creditable Cost Guidance." Appendix C-1 requires that Volkswagen's costs be reasonable, necessary, directly connected, and directly allocable in order to be creditable. There are several costs listed in Appendix C-1 that are specifically excluded. For example, entertainment expenses, fines and penalties, general and administrative costs, income taxes, interest and other financial costs, legal costs, pass through costs, disallowed overhead, and trademark costs.

Although there are not established deadlines for the EPA to review and respond to Volkswagen's deliverables under paragraphs 2.2, 2.3, and 2.5, the EPA intends to review and respond to the deliverables as soon as reasonably practicable so that the benefits of the investment may be achieved expeditiously. The EPA's meet and confer process with Volkswagen under paragraphs 2.2 and 2.4, will not include public involvement; the public is generally not involved in such meetings between the parties to a consent decree. However, as explained above, the CD requires, and EPA intends to ensure, that Volkswagen conduct a robust process for public input and accept comment from relevant stakeholders before any decisions are made.

The Committee inquired about EPA's discussions with other federal agencies in reaching this agreement with Volkswagen. Although the EPA cannot provide specific information on the negotiations that led to this settlement, we note that the EPA regularly consults with other federal agencies that have information or expertise on matters that affect EPA's work, and we expect to continue that practice in the implementation of this CD.

The Committee also inquired about grid reliability concerns. The EPA does not anticipate that any such concerns will arise, and notes that each utility is separately governed by a sophisticated structure to address grid reliability. Nothing in the CD relieves any utility of its reliability responsibilities and the EPA fully expects that utilities will be mindful of reliability issues if any arise.

To help ensure Volkswagen's compliance with the ZEV investment requirement, the CD contains a number of features designed to allow stakeholder input into the ZEV investment plan and to ensure appropriate transparency and accountability.

There is a threshold requirement that Volkswagen prepare a National ZEV Investment Plan and a California ZEV Investment Plan. Before the approval of any investment plan, Volkswagen is required to conduct outreach that will specifically solicit input from municipalities, states, federally-recognized Indian tribes, and other federal agencies. In this way, the settlement agreement provides such entities an opportunity to inform the company of viable investment opportunities and other ways in which Volkswagen can maximize this opportunity to support the increased use of zero emission vehicles in the United States. The EPA anticipates that the outreach Volkswagen will do will also allow opportunity for input from stakeholders interested in ZEV infrastructure.

Before the investments begin, Volkswagen must prepare National and California Creditable Cost Guidances in accordance with requirements set forth in the Consent Decree. In short, costs must be reasonable, necessary, and directly connected to ZEV investments. These Creditable Cost Guidances require EPA and California approval. Costs may be credited toward the investment obligation only if they satisfy the applicable Creditable Cost Guidance. These Guidances should help set bright lines to secure compliance with the overall ZEV investment requirement.

In order to ensure transparency, Volkswagen is required to submit annual reports of the investments to the EPA and CARB throughout the 10-year investment period, and post the non-confidential part of the reports on a public website. The annual reports will detail the progress of the ZEV projects and detail Volkswagen's costs for which it seeks credit against the total obligation.

Collectively, these provisions are designed to provide opportunity for stakeholder input, ensure transparency and public accountability for Volkswagen's investment decisions, and ensure that the company meets the requirements of the CD. Volkswagen remains required to comply with all federal, state and local laws as it makes these investments.

Some current participants in the ZEV infrastructure market have expressed concern about the impact of these investments on the market. Competitiveness in the ZEV infrastructure market will help to ensure that investments are thoughtfully made. Volkswagen remains subject to all federal and state laws, including laws regarding competitive behavior. The settlement in no way enables Volkswagen to participate in the ZEV market in a way it, or any other company, could not have done outside any enforcement case, because Volkswagen remains subject to all federal and state laws. If, in the course of making the ZEV investments, Volkswagen unlawfully undermines competition in the market, it will be subject to enforcement under antitrust or other competition laws by appropriate state and federal authorities responsible for overseeing such laws. Specifically, the CD at paragraph 81 states, in relevant part:

Settling Defendants are responsible for achieving and maintaining complete compliance with all applicable federal, State, and local laws, regulations, and permits; and Settling Defendants compliance with this Consent Decree shall be no defense to any action commenced pursuant to any such laws, regulations, or permits, except as set forth herein. The United States and California, do not, by their consent to the entry of this Consent Decree warrant or aver in any manner that Settling Defendants compliance with the

provisions of the Act, or with any other provisions of the United States, State, or local laws, regulations or permits.

While Volkswagen remains subject to all applicable laws, there is nothing in the CD that prevents Volkswagen from obtaining revenue from ZEV-related investments. Unlike the \$2.7 billion that Volkswagen must place into a trust that will be administered by an independent trustee for the purpose of reducing NOx pollution, the ZEV investment requirement will be a business investment made by Volkswagen. Volkswagen may see a benefit from the mandatory ZEV investments, and that would not be inconsistent with the CD. Volkswagen could have decided to make these investments even without this enforcement case, but now it is required to do so.

The CD includes provisions designed to ensure that Volkswagen's investments do not favor any market participants. Under paragraph 2.5.4 of Appendix C, any charging infrastructure proposed by Volkswagen must be able to service all plug-in ZEVs using non-proprietary connectors. Anyone driving a plug-in ZEV with an industry-standard plug must be able to use it, so that the ZEV infrastructure investments advances the greater ZEV market. Also, under paragraph 2.10 of Appendix C-1, costs to establish or defend trademarks or other intellectual property are not creditable. In addition, the CD requires Volkswagen to invest in "brand neutral" public education about ZEVs. In reviewing whether an investment in education and public outreach is "brand neutral," the EPA will consider the relevant education and outreach materials against the requirements of the CD. As stated in paragraph 1.10.2 of Appendix C, to be "brand-neutral," materials cannot feature or favor Volkswagen vehicles, and if they state that they are "sponsored by Volkswagen" that statement cannot be prominently displayed. As noted above, if the EPA determines there has been a violation of the "brand neutral" requirement, it will work with the DOJ to address the matter.

Again, thank you for your letter. If you have any further questions, please contact me or your staff may contact Carolyn Levine in EPA's Office of Congressional and Intergovernmental Relations at levine.carolyn@epa.gov or at (202) 564-1859.

Sincerely,



Cynthia Giles