

# The Volkswagen Settlement: An Opportunity for Tribes to Mitigate Nitrous Oxide Emissions in Indian Country

by Gina Allery

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On June 28, 2016, the United States lodged a partial settlement with automakers Volkswagen AG, Audi AG, Volkswagen Group of America Inc., and Volkswagen Group of Chattanooga Operations LLC (collectively “Volkswagen”).<sup>1</sup> The partial settlement resolved allegations that Volkswagen violated the Clean Air Act by selling 2009 to 2015 model-year motor vehicles containing 2.0-liter diesel engines equipped with “defeat devices” that enabled “cars to ‘emit up to 40 times more pollution’ than allowed under U.S. emission standards.”<sup>2</sup> After public comment, the federal district court in the Northern District of California officially approved the amended partial consent decree on Oct. 25, 2016. The amended partial consent decree establishes a \$2.7 billion mitigation trust account to be used to reduce nitrous oxide emissions from diesel engines.<sup>3</sup> In a historic recognition of federally recognized tribal governments, the mitigation trust account includes a Tribal Allocation Subaccount with approximately \$50 million for federally recognized tribal governments to use for eligible mitigation projects. This marks the first time federally recognized tribal governments have been specifically included in a major nationwide class action settlement.

The major pollutants at issue in the Volkswagen case are oxides of nitrogen (NOx), which are a serious health concern. NOx 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 NOx emissions can aggravate respiratory diseases, particularly asthma, and may also contribute to asthma development in children.

## The Mitigation Trust

In the partial settlement, Volkswagen agreed to establish and fund an environmental mitigation trust with

an initial amount of \$2.7 billion. The environmental mitigation trust will allow beneficiaries, including federally recognized tribal governments, to remediate the excess NOx emissions from the 2.0-liter vehicles by enabling the governmental beneficiaries to implement projects to reduce NOx emissions from other sources. These projects are identified in the partial consent decree as “eligible mitigation actions.” The potential beneficiaries must first elect to become beneficiaries under the partial consent decree and the terms of the trust agreement.<sup>4</sup> Under the environmental mitigation trust, the Tribal Allocation Subaccount is a separate allocation for tribal beneficiaries totaling approximately \$50 million to be shared by federally recognized tribes.

Eligible mitigation actions that can be fully funded under the terms of the partial consent decree and trust agreement include projects to reduce NOx from heavy-duty diesel sources near population centers, such as: delivery or freight trucks; school, shuttle, and transit buses; forklifts and port cargo handling equipment; airport ground-support equipment; tugs and ferries; diesel locomotive switchers; shore power for ocean-going vessels; and light-duty, zero-emission-vehicle supply equipment (ZEV infrastructure). In addition, the partial consent decree permits up to 5 percent of the Tribal Allocation Subaccount to be used for technical assistance to help tribes prepare funding requests for eligible mitigation actions.

Federally recognized tribes that elect to become beneficiaries will have the flexibility to choose which projects on the list of eligible mitigation actions are the best options for their tribal communities. Tribal beneficiaries may also use trust funds for Diesel Emissions Reduction Act (DERA) program tribal grants. Because DERA enables the U.S. Environmental Protection Agency (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 list of eligible mitigation actions, such as repowering fishing vessels,

repowering or replacing generators, and electrifying parking spaces.<sup>5</sup> Under the DERA tribal grant program, tribes submit grant applications in response to an annual request for proposals. DERA program funding for federally recognized tribes is competitive in nature, so eligibility for DERA funding is determined under that program. Technical assistance is available from the EPA with respect to mitigation actions taken under the DERA program.

### Consultation

The partial consent decree established a default process for distributing the funds in the Tribal Allocation Subaccount. The U.S. Department of Justice and the U.S. Environmental Protection Agency then consulted with federally recognized tribes to determine whether the default process outlined in the partial consent decree would work well for tribes, or whether an alternative method for distributing the funds in the Tribal Allocation Subaccount should be established. In addition to the default process outlined in the partial consent decree and trust agreement, the two agencies consulted on using 5 percent of the Tribal Allocation Subaccount toward technical assistance to help tribes prepare funding requests, whether and how tribes would nominate candidates to serve as trustee under the partial consent decree, and whether tribes were interested in ZEV infrastructure actions and how to implement the limitation that no governmental beneficiary may spend more than 15 percent of its allocation on ZEV actions.

The results of that consultation should be available soon and, depending on the outcome, the trust agreement states that the United States may file a motion with the court requesting changes to the terms of the trust agreement regarding the Tribal Allocation Subaccount. 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.

### Trustee Selection

Paragraph 15 of the partial consent decree includes a procedure for selecting the trustee for the mitigation trust. On Nov. 17, 2016, 30 days after the court approved the partial consent decree, the states and tribes were required to submit trustee candidates to the United States. The federally recognized tribal governments were asked to submit one consolidated list of three to five candidates to be considered for selection as the trustee. The court will select and appoint the trustee of the mitigation trust from among a list of final candidates. On March 15, the court appointed Wilmington Trust, N.A. as the trustee for the Volkswagen Environmental Mitigation Trust.<sup>6</sup>

### Conclusion

The National Tribal Air Association (NTAA), a member-based organization with 115 principal member federally recognized Indian tribes, formed a Volkswagen Tribal Work Group to assist tribes in understanding the terms of the partial consent decree and trust agreement. Federally recognized tribes can refer to the NTAA Volkswagen website for additional information on the tribal provisions.<sup>7</sup> The U.S. Environmental Protection Agency has also posted information online on the Volkswagen settlement and the options available to beneficiaries, including federally recognized tribal governments.<sup>8</sup>

The historic recognition of federally recognized tribal governments in a nationwide class action is an important step in the recognition of tribal governments as sovereigns and hopefully this will lay the groundwork for the inclusion of federally recognized tribal governments in future nationwide class action lawsuits. ☉

### Endnotes

<sup>1</sup>*In re: Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation*, No. 15-md-02672 (N.D. Cal. filed Dec. 8, 2015). The first settlement was a partial settlement because it only addressed what Volkswagen must do to regarding the 2.0-liter cars on the road and the pollution from these vehicles; it did not address other aspects of the United States' complaint, including claims relating to 3.0-liter vehicles and civil penalties.

<sup>2</sup>Bill Chappell, *Volkswagen Used 'Defeat Device' To Skirt Emissions Rules, EPA Says*, NPR (Sept. 18, 2015), [www.npr.org/sections/thetwo-way/2015/09/18/441467960/volkswagen-used-defeat-device-to-skirt-emissions-rules-epa-says](http://www.npr.org/sections/thetwo-way/2015/09/18/441467960/volkswagen-used-defeat-device-to-skirt-emissions-rules-epa-says).

<sup>3</sup>On Dec. 20, 2016, the parties entered into a second partial consent decree regarding the 3.0-liter diesel vehicles that includes an additional \$225 million for the trust mitigation fund.

<sup>4</sup>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 appointed by the court.

<sup>5</sup>Additional information about the DERA program tribal grants can be found at [www.epa.gov/cleandiesel/clean-diesel-tribal-grants](http://www.epa.gov/cleandiesel/clean-diesel-tribal-grants).

<sup>6</sup>*Wilmington Trust Selected as Trustee for \$2.7 Billion Volkswagen Environmental Mitigation Trust*, WILMINGTON TRUST (Mar. 20, 2017), <http://news.wilmingtontrust.com/volkswagen-environmental-mitigation-fund-trustee-appointment.htm>.

<sup>7</sup>Volkswagen Settlement Work Group, NAT'L TRIBAL AIR ASS'N, [www7.nau.edu/itep/main/ntaa/Resources/Volkswagen](http://www7.nau.edu/itep/main/ntaa/Resources/Volkswagen).

<sup>8</sup>Volkswagen (VW) Settlement: DERA Option, ENVTL. PROT. AGENCY, [www.epa.gov/cleandiesel/volkswagen-vw-settlement-dera-option](http://www.epa.gov/cleandiesel/volkswagen-vw-settlement-dera-option); Volkswagen Light Duty Diesel Vehicle Violations for Model Years 2009-2016, ENVTL. PROT. AGENCY, [www.epa.gov/vw](http://www.epa.gov/vw).

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