



## U.S. Department of Justice

Office of Tribal Justice

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Room 2318, RFK Main Justice Building (202) 514-8812  
950 Pennsylvania Avenue, N.W. FAX (202) 514-9078  
Washington, D.C. 20530-0001

May 10, 2018

Dear Tribal Leader:

This letter follows up on our letters of March 16 and 27, 2018, and the related discussions. Based on the comments received pursuant to those discussions, the Department of Justice and the Environmental Protection Agency invite you to participate in a third discussion session on the process for distribution of the Tribal Allocation Subaccount of the Environmental Mitigation Trust Agreement for Indian Tribe Beneficiaries (Trust Agreement) established pursuant to a partial settlement of *In re Volkswagen "Clean Diesel" Marketing, Sales Practices and Products Liability Litigation*, Case No. 15-md-2672 CRB (JSC) (N.D. Cal.). Under the partial settlement of EPA's Clean Air Act claims in *In re Volkswagen "Clean Diesel" Marketing, Sales Practices and Products Liability Litigation*, the Defendants were required to establish an Environmental Mitigation Trust to fund specific actions to mitigate excess emissions of nitrogen oxides (NOx) from the cars subject to the lawsuit by reducing NOx emissions from other sources (Eligible Mitigation Actions). On September 19, 2017, the Court approved the Trust Agreement, which established the Indian Tribe Trust (Trust).

The Trust is administered by a Trustee, Wilmington Trust, N.A. The purpose of the Trust is to timely and efficiently fund Eligible Mitigation Actions to be proposed and administered by the Beneficiaries. The Indian Tribe Trust Agreement is available at: <https://www.epa.gov/enforcement/environmental-mitigation-trust-agreements>. Further information regarding the general terms of the consent decree is available at: <https://www.epa.gov/enforcement/volkswagen-clean-air-act-partial-settlement>.

On January 29, 2018, the Trustee filed notice with the Court that 29 Indian Tribes had qualified as Beneficiaries under the Trust, and that 27 of those Beneficiaries had submitted requests for funding of Eligible Mitigation Action projects in the first funding cycle under the Trust. One of those 27 Beneficiaries did not receive a DERA Award from the U.S. Environmental Protection Agency and is not eligible to participate in the first funding cycle. On March 2, 2018, the United States and the parties to the Trust Agreement, namely the Defendants and the Trustee, informed the Court that the amount of approvable funding requests from the Beneficiaries exceeded the amount of available funding in the first funding cycle, and that if funds are distributed for the first funding cycle in accordance with the applicable allocation method in the Trust, the result would be inconsistent with the purpose of the Trust. The Court issued an Order directing the United States and interested Beneficiaries to meet and confer, in consultation with the Trustee, to discuss whether any

adjustment to the Trust's allocation methodology, which is applicable when approvable funding requests from Beneficiaries exceed available funding, is necessary to ensure that the Trust funds are distributed in a manner that is consistent with the purpose of the Trust.

The Department of Justice and the Environmental Protection Agency invite you to confer on a method for allocating annual funding in the Tribal Allocation Subaccount for Eligible Mitigation Actions when approvable funding requests from Beneficiaries exceed the available funding for a funding cycle of the Trust.

### Background of Trust Agreement: Allocation in an Oversubscribed Funding Cycle

In order to qualify as a Beneficiary under the Trust, a federally-recognized Indian Tribe must submit a certification for beneficiary status in accordance with Appendix D-3 of the Trust Agreement. In addition, for the first funding cycle under the Trust, a Beneficiary had to submit to the Trustee a Beneficiary Eligible Mitigation Action Certification form, which is Appendix D-4 of the Trust, by the deadline of January 2, 2018. Twenty-seven Indian Tribe Beneficiaries filed an Appendix D-4 certification to the Trustee by the deadline for the first funding cycle. One of those Beneficiaries requested funds for an ineligible project, meaning that twenty-six Beneficiaries submitted approvable funding requests to receive funding for Eligible Mitigation Actions for the first funding cycle. The total amount of approvable funding requests received by the Trustee greatly exceeded the amount of funds available to be committed for the first funding cycle, which is called an "oversubscribed funding cycle" in the Trust Agreement. In this situation, the Trust Agreement sets out an allocation formula that would allocate a share to each Indian Tribe Beneficiary weighted in accordance with the total population living within each Indian Tribe's tribal area according to the 2010 Census, including reservations, off-reservation trust lands, and statistical areas. If the Trust Agreement's allocation formula is applied, however, a large majority of the Beneficiaries in the first funding cycle would receive an insufficient allocation to fund any Eligible Mitigation Action, frustrating the Trust's purpose. Moreover, based on the total amount of approvable funding requests submitted during the first funding cycle, it appears likely that this same problem will recur in future funding cycles.

### Issues for Discussion

We received substantial input regarding many concepts during our first two discussion sessions and in subsequently submitted written comments. All of this input was carefully considered and reviewed from both an equitable and operational perspective. Based on those comments, we would like to discuss the following interrelated allocation concepts for all funding cycles:

1. Group Division based on population. After applying an approved algorithm based in population statistical analysis, divide the federally recognized Indian Tribes into two groups based on population: (1) Group One with a population range of 0 to 65,678; and (2) Group Two with a population of 65,679 and above. Group One consists of 554 Tribes, representing 34 percent of the total Indian Tribe population (as reported on Table DP-1 of the 2010 Census); Group Two consists of 14 Tribes, representing 66 percent of the total Indian Tribe population (as reported on Table DP-1 of the 2010 United States Census). These two Groups would form the basis for a pro rata population-based portion of the

allocation in each funding cycle. See discussion of pro rata population-based distribution in Paragraph 2, Step 2.

2. Allocation formula for first funding cycle.

Step 1: Per Capita Distribution. Divide 50 percent of the funding available in the funding cycle equally among the Beneficiaries participating in that funding cycle (e.g., among the 26 Beneficiaries in the first funding cycle).

Step 2: Pro Rata Population-based Distribution. Divide the other 50 percent of the available funding for the funding cycle into two separate funding pools, allocating 34 percent to Group One and 66 percent to Group Two. Within each of the two Groups (Group One and Group Two), allocate an amount to each of the participating Beneficiaries based on the pro rata share of a Beneficiary's population within its Group.

Step 3: Funding Limit. Limit the funding for a Beneficiary to no more than the Beneficiary requested in its Eligible Mitigation Action Certification Form (Appendix D-4). The Trustee should reallocate any "overage" among other Beneficiaries within that Group. For example, assume a Beneficiary in Group 2 requested funding of \$479,000 for the first funding cycle, but application of Steps 1 and 2 would result in a projected allocation of \$499,000. The overage of \$20,000 would be reallocated among other Beneficiaries within Group 2 based on a reapplication of Step 2.

Step 4: Notice. After applying the allocation in Steps 1 through 3, the Trustee will notify each of the 26 Beneficiaries by Intralinks and subsequently post on the Indian Tribe Trust's public-facing website a determination of the amount of funding available for each Beneficiary.

Step 5: Revised Eligible Mitigation Action Certification. Within 30 Days after notification of the available allocations, each Beneficiary will submit to the Trustee either: (i) a revised Eligible Mitigation Action Certification Form (Appendix D-4) to implement Eligible Mitigation Actions within the amount allocated to that Beneficiary, or (ii) a Notice to opt out of the first funding cycle. If a Beneficiary elects to opt out, the amount allocated to it will be returned to the Tribal Allocation Subaccount to be distributed in a future funding cycle.

3. Eligibility for subsequent funding cycles. Beginning in the second funding cycle, all federally-recognized Tribes that: (i) have submitted a certification for beneficiary status form (Appendix D-3 of the Trust Agreement), and (ii) have already been designated by the Trustee to be a Beneficiary, can qualify for consideration for funding in the second and all subsequent funding cycles by submitting a standardized Designated Beneficiary's Participation Notice from its designated Lead Agency to the Trustee by the deadline for that funding cycle, stating that the Tribe wants to participate in the funding cycle.

4. Allocation formula for second through fourth funding cycles. Allocate half of the available funding in each of the second through fourth funding cycles as a per capita distribution

equally among the number of participating Beneficiaries that have submitted a Designated Beneficiary's Participation Notice in each cycle, and the other half of the available funding among the participating Beneficiaries on a pro rata population-based distribution within two Groups. See discussion of Group division based on population in Paragraph 1, and allocation formula in Paragraph 2, Steps 1 and 2.

5. Reduce number of funding cycles. Reduce the number of initial funding cycles to four, which will result in a larger amount of funds available in each funding cycle and an overall reduction of time and effort, and will put the Trust's funds to work sooner.
6. Modification of deadlines for Beneficiary designation by the Trustee and United States' notice of objection. Establish a deadline for Indian Tribes to file a certification for beneficiary status form (Appendix D-3) for each funding cycle, and require the Trustee to file its notice of Beneficiary designation on a date certain after the filing deadlines for the second through fourth funding cycles. The United States will file any notice of objection to any certification form within 30 days after the filing deadline for each funding cycle.
7. Separate deadlines for Designated Beneficiary's Participation Notice and funding request. Beginning in the second funding cycle, the Trustee will use the number of Designated Beneficiary's Participation Notices to calculate the amount allocated to each Beneficiary in a funding cycle in accordance with Paragraph 2, Steps 1 and 2. The deadline for a Beneficiary to submit an Eligible Mitigation Action funding request (Appendix D-4) will occur after the Trustee has posted its allocation determination, allowing a Beneficiary to know the amount of funds available to it before it completes a funding request.
8. Change deadline for participation in second funding cycle. Postpone the application deadline for the second funding cycle from September 1, 2018 until December 1, 2018. Pursuant to the Partial Consent Decree, Volkswagen will have fully funded the Trust Fund by that date, increasing the amount of funds available for the second funding cycle.
9. Fifth funding cycle to exhaust Trust funds. After the first four funding cycles, the Trustee will conduct an accounting to determine whether there are remaining funds in the Tribal Allocation Subaccount. After completing the accounting, the Trustee will meet and confer with the United States to determine whether there are sufficient funds available for a fifth funding cycle. If so, Beneficiaries may apply for those funds in a fifth funding cycle.

We are interested in discussing these concepts with you in our May 21 discussion, after which we will ask that you submit written comments regarding these conceptual approaches and other ways to address allocation for an oversubscribed funding cycle under the Trust Agreement.

#### Schedule

The schedule for the third telephonic session and for providing any written comments is as follows:

**Monday, May 21, 2018:** Discussion Session 2:00 pm Eastern

Link to register for the call and receive the call-in information: <http://dpreister.com/10120428>

Those without internet access or unable to preregister may dial in by calling: 1-866-777-2509 (toll free)

**Monday, July 2, 2018** deadline for written comments

Please note that you will be asked to provide your name and Tribal affiliation when you register for the discussion session. Please submit any written comments by **July 2, 2018**, via email to [OTJ@usdoj.gov](mailto:OTJ@usdoj.gov) or (if necessary) via regular mail to:

Office of Tribal Justice  
Department of Justice  
950 Pennsylvania Avenue NW, Room 2318  
Washington, DC 20530

If you have questions or have trouble using the links to register, please contact the Office of Tribal Justice at [OTJ@usdoj.gov](mailto:OTJ@usdoj.gov). We hope you will be able to participate in this discussion session and look forward to working with you on this important issue.

Sincerely,



Gina L. Allery  
Deputy Director  
Office of Tribal Justice  
U.S. Department of Justice