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Congress of the United States

House of Representatives

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November 1, 2016

The Honorable Gina McCarthy
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Ave, N.W.
Washington, DC 20460

Dear Administrator McCarthy:

We write regarding the Partial Consent Decree in the matter of *In Re: Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation*, Case No: MDL No. 2672 CRB (JSC), particularly with respect to Appendix C and its corresponding terms in the body of the Consent Decree. Judge Breyer approved the Partial Consent Decree on October 25, marking that day as the Effective Date of the Partial Consent Decree.[1]

The Partial Consent Decree requires Volkswagen AG, Audi AG, Volkswagen Group of America, Inc., and Volkswagen Group of America Chattanooga Operations, LLC (collectively, VW or "Settling Defendants") to make $2 billion in Zero Emission Vehicle (ZEV) investments. Appendix C further provides that the investments shall be made "over a 10-year period to support increased use of Zero Emission Vehicles (ZEV) in California and the United States and may include investments related to ZEV infrastructure, access to ZEVs, and ZEV education."[2] The investments will be split into two distinct plans: one for the State of California, which will receive $800 million over 10 years; and one for the rest of the United States, which will receive $1.2 billion during the same time.[3]

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[1] *In Re: Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation*, Case No: MDL No. 2672 CRB (JSC), Partial Consent Decree at 48 ("The Effective Date of this Consent Decree shall be the date upon which this Consent Decree is entered by the Court or a motion to enter the Consent Decree is granted, whichever occurs first, as recorded on the Court's docket.").
[2] *Id.* at 4.
[3] *Id.* at App. C, § 1.2, 1.6.

Under the terms of the Partial Consent Decree, VW must provide a great deal of information to the Environmental Protection Agency in a short time frame. Section 2.3 of Appendix C requires VW to provide a National ZEV Outreach Plan for EPA review and approval within 15 days after the Effective Date.[4] Similarly, VW must submit a proposed National Creditable Cost Guidance to EPA for review and approval within 30 days after the Effective Date.[5] And, within 120 days of the Effective Date or 30 days after the end of the comment acceptance period under the National ZEV Outreach Plan, VW must submit an extensive Draft National ZEV Investment Plan to EPA describing in detail the proposed National ZEV Investments implemented for at least the next 30 months.[6] VW and EPA must meet and confer "as soon as practicable" after this submission, and VW must finalize and submit its final National ZEV Investment plan to EPA for review and approval within 30 days of the meet and confer.[7]

These tight deadlines are concerning as there remain a number of unanswered questions about the ZEV Investment Commitment and the EPA's role in overseeing the investment. These questions implicate the competiveness of the electric vehicle industry, EPA management and authorities, and the public interest. For example, under the structure of the ZEV Investment Commitment, VW may be able to obtain substantial competitive benefits, if not a monopoly on electric vehicle infrastructure, under the required investments. These investments, in addition, appear to be subject to limited oversight by the federal government. While affected parties raised some of these concerns during the comment period for the Partial Consent Decree and in other briefs before the court, the extent to which EPA and the Department of Justice considered them is unknown.

News reports and company announcements show VW plans a large move into the electric vehicle market in coming years.[8] For example, *Fortune* recently reported on VW's efforts to reshape the company in the wake of the emissions scandal:

> The Volkswagen board made a more substantial move six months later [in June 2016] when it adopted a plan that would reshape the company's core automotive business to focus more on electric vehicles and autonomous driving technology, increase profit margins to 7% to 8% from 6% last year, and possibly sell some of its assets. The company plans to introduce more

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[4] *Id.* at App. C, § 2.3
[5] *Id.* at App. C, § 2.2
[6] *Id.* at App. C, § 2.4.
[7] *Id.* at App. C., § 2.4, 2.5.
[8] *See e.g.*, Brian Silvestro, *Volkswagen's New Strategy Is All About Electric Cars*, ROAD & TRACK, Aug. 6, 2016, http://www.roadandtrack.com/new-cars/future-cars/news/a30278/volkswagens-new-strategy-is-all-about-electric-cars/; Kirsten Korosec, *Volkswagen Promises Its Next Electric Car Will Be as Revolutionary as the Beetle*, FORTUNE, Sept. 6, 2016, http://fortune.com/2016/09/16/volkswagen-paris-teaser/; & Jerry Garrett, *Range is All the Rage in Paris, as Electric Cars Steal the Show*, N.Y. Times, Oct. 6, 2016, http://www.nytimes.com/2016/10/07/automobiles/autoshow/range-is-all-the-rage-in-paris-as-electric-cars-steal-the-show.html?_r=1.

than 30 all-electric vehicles over the next 10 years with a goal of selling two to three million of these EVs in 2025.[9]

It appears that, just as the company plans to enter the EV market, it will be consenting to a court-required $2 billion investment—potentially into its own infrastructure and to support its own newly entered market. This is a curious outcome for the settlement of a cheating scandal.

We seek your assistance in clarifying this situation. We seek to understand the mechanisms of the ZEV Investment Commitment and whether and how the process will protect the integrity and competitiveness of the existing ZEV marketplace. Moreover, it is not clear what EPA's role will be regarding management and oversight of the investment process.

Accordingly, and pursuant to Rules X and XI of the U.S. House of Representatives, we ask that you respond to the following questions by November 15, 2016.

Effect of the ZEV Investment Commitment on the Pre-Existing EV Market

1. How does EPA intend to evaluate how projects approved under the National ZEV Investment Plan will affect the existing electric vehicle infrastructure marketplace, including but not limited to any negative effects on existing electric vehicle infrastructure manufacturers or service providers?

2. What measures may state or federal authorities take to ensure the ZEV Investment Commitment does not undermine competition in the marketplace or create the opportunity for VW to gain a competitive advantage over other firms in the provision of ZEV infrastructure?

3. Under the ZEV Investment Commitment, will VW be able to sell or provide electric vehicle (EV) charging stations or otherwise enter the EV infrastructure market through the provision of such equipment or related services, including through a subsidiary or contract with a single company?

4. Manufacturers of some EV charging stations obtain revenue by operating or providing information software and services for these charging stations. Will VW investments under the ZEV Investment Commitment potentially generate revenue for VW or a subsidiary through the provision, manufacture, or operation of software and services?

5. Section 1.10 of the ZEV Investment Commitment defines a "ZEV Investment" to include the installation of EV charging stations. Under section 2.6, the Settling Defendants are further obligated to pay maintenance costs for such facilities for at least ten years. Will VW offer these installations at no or reduced cost to the property owner? If yes, please explain how any such offers of no-cost charging stations will affect for-profit businesses

[9] Kirsten Korosec, *Volkswagen Promises Its Next Electric Car Will Be as Revolutionary as the Beetle*, FORTUNE, Sept. 6, 2016, http://fortune.com/2016/09/16/volkswagen-paris-teaser.

that are already in the marketplace but not in a position to offer infrastructure to customers at no charge.

Objectives of the ZEV Investment Commitment

6. The purpose of the ZEV Investment Commitment is stated broadly in the preamble to Appendix C as "direct[ing] $2 billion of investments over a period of up to 10 years into actions that will support increased use of zero emission vehicle ("ZEV") technology in the United States."

    a. Please describe what EPA believes are the goals for developing infrastructure for the electric vehicle industry in the United States.

    b. Please describe the current state of investment in ZEV infrastructure and why those investments are expected to be insufficient over the next ten years.

    c. Please describe the amount of additional infrastructure expected to be developed through the implementation of the proposed ZEV Investment Commitment.

7. Under the terms of the National ZEV Investment Plan, VW is "solely responsible for every aspect of selecting the National ZEV investments," subject to review and approval by EPA.

    a. What criteria will EPA use to evaluate National ZEV investments for electric vehicle infrastructure proposed by VW?

    b. How will EPA evaluate the need, benefits, and potential utility of National ZEV investments in electric vehicle infrastructure?

8. Section 1.10.1 of the ZEV Investment Commitment defines an "infrastructure" investment as one "addressing an existing need or supporting a reasonably anticipated need." Please explain and document the criteria EPA will use to determine whether there is an "existing need" or a "reasonably anticipated need" for proposed infrastructure investments.

9. Section 2.5.5 requires the Settling Defendants to include in their National ZEV Investment Plan proposal an explanation of how proposed programs and actions will "increase access to underserved areas." How does EPA define "underserved areas"?

EPA's Role and Resources in Implementing the ZEV Investment Commitment

10. Please provide a detailed summary of EPA's experience in making determinations related to electric vehicle infrastructure.

11. In course of implementing the National ZEV Investment Plan, which federal entity will be responsible for engaging with electric utilities to evaluate the potential impacts to grid reliability from electric vehicle infrastructure projects proposed under the plan?

    a. How does EPA intend to assess this information in its review and approval of projects proposed under the National ZEV Investment Plan?

12. Please describe the manner in which EPA will engage and consult, if at all, with other federal agencies with expertise in the areas of EV infrastructure and transportation infrastructure, such as the Department of Energy, Department of Transportation, and the Federal Energy Regulatory Commission (FERC).

    a. Please detail the involvement of these agencies or other federal agencies in the development of the ZEV Investment Commitment.

    b. On February 24, 2016, FERC issued an order approving an amendment to a 2012 settlement agreement between the California Public Utility Commission and NRG Energy, Inc. to install a statewide network of charging stations for electric vehicles in California, including at least 200 public fast-charging stations and the infrastructure for 10,000 plug-in units at 1,000 locations across the state. Did EPA consult with FERC about this agreement or any other consent agreements when developing the proposed ZEV Investment Commitment?

13. Given the scale of the ZEV Investment Commitment, it would appear that the EPA officials responsible for implementing and administering the program would need extensive experience with the electric vehicle marketplace. Please identify the Agency officials who will have these responsibilities and provide their qualifications.

14. Section 1.10.2 of the proposed ZEV Investment Commitment provides that VW may make "investments" in "brand-neutral education or public outreach" but that such investment should not "feature or favor Settling Defendants' vehicles or services."

    a. Please provide and explain the criteria EPA will use to determine whether investments in such education or public outreach will not "feature or favor" VW's products or services.

    b. Please explain why this particular prohibition does not apply to the provision of ZEV infrastructure or services under the ZEV Investment Commitment.

15. Section 2.5.3 provides that EPA's approval of each 30-month National ZEV Investment Plan "does not constitute approval of any anticipated costs set forth therein." What is the process for determining whether the Settling Defendants' specific expenditures are proper Creditable Costs? What entities, other than EPA, will have the authority to question whether an expenditure is a proper Creditable Cost?

16. Section 2.5.4 requires that the Settling Defendants' National Investment Plan include the locations and types of infrastructure constructed under the plan, the quantities of chargers or fueling stations per site, and the dates by which construction of each site will commence and be complete, among other detailed information. The draft National Investment Plan must be submitted just four months after the Effective Date of the agreement, or 30 days after the end of the comment acceptance period for the ZEV Outreach Plan. Since section 1.10.1 recognizes that most Level 2 charging stations will be installed at "multi-unit dwellings, workplaces and public sites," it appears that the requirements of Section 2.5.4 will require that the Settling Defendants initiate negotiations with all potential Level 2 charging locations within 120 days of the Effective Date of the Investment Commitment. Is this correct? If so, how will EPA ensure that the Settling Defendants provide the required level of detail in the proposed National Investment Plan?

17. Section 2.5.7 requires the Settling Defendants to provide in their draft National ZEV Investment Plan an explanation of the extent to which each investment "increases the use of ZEVs in the US." Please explain how EPA plans to evaluate these explanations.

18. Under Section 2.7, the Settling Defendants are required to retain a third-party certified public accounting firm primarily for the purpose of auditing and reviewing costs asserted by Settling Defendants to be Creditable Costs. The third-party auditor appears to have the responsibility and the authority to determine whether expenditures are legitimate Creditable Costs. Section 2.8, however, gives EPA the authority to approve or disapprove claimed costs. This creates the potential for a conflict between the third-party auditor and EPA. Please explain how any such differences will be resolved.

19. The ZEV Investment Commitment requires EPA to oversee and implement aspects of this proposal, including the overall plan and costs incurred by Settling Defendants. Yet, the proposal does not include any deadlines for EPA to make decisions required by Sections 2.2, 2.3, and 2.5. What are the deadlines for EPA's decision-making under the Investment Commitment?

20. The ZEV Investment Commitment requires continuing and detailed oversight by EPA over the full 10-year term of the Commitment. Section 2.1 further gives EPA the unilateral authority to extend the 10-year scope of the ZEV Investment Commitment. Please describe the resources EPA expects to expend in support of its obligations under the ZEV Investment Commitment, including an estimate of the FTE involved.

Public Participation in the ZEV Investment Commitment

21. The ZEV Investment Commitment raises several questions concerning the public's opportunity to have input into EPA's decisions regarding implementation and enforcement of the requirements of the Investment Commitment. Since these authorities of, and obligations on, EPA do not arise from federal law, it is unclear what obligations EPA has with respect to allowing and encouraging public participation in the implementation of the Commitment.

a. Section 2.2 of the ZEV Investment Commitment requires EPA and the Settling Defendants to "meet and confer as soon as practicable" after VW has submitted the proposed National Creditable Cost Guidance for review and approval. Will this be a public meeting? Does EPA intend to provide any opportunity for public comment on the proposed National Creditable Cost Guidance?

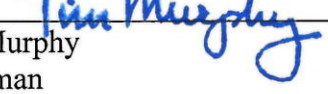
b. Section 2.4 of the ZEV Investment Commitment requires EPA and the Settling Defendants to "meet and confer as soon as practical [sic]" after VW has submitted the Draft National ZEV Investment Plan for review and approval. Will this be a public meeting? Does EPA intend to provide any opportunity for public comment on the Draft National ZEV Investment Plan?

c. Section 2.3 of the ZEV Investment Commitment requires the Settling Defendants to solicit input from "interested States, municipal governments, federally-recognized Indian tribes…and federal agencies" on the development of each 30-month phase of the National ZEV Investment Plan. The provision does not, however, require Settling Defendants to solicit input from the general public or from any private-sector organization. Section 2.3 also requires EPA to review and approve the Settling Defendants' National ZEV Outreach Plan. Will EPA require Settling Defendants to include in the National ZEV Outreach Plan provisions for soliciting input from individuals not affiliated with one of the enumerated categories, and from private sector organizations?

We appreciate your prompt responses to this request. Please contact Charles Ingebretson of the majority committee staff at (202) 225-2927 with any questions.

Sincerely,

Fred Upton
Chairman



Tim Murphy
Chairman
Subcommittee on Oversight
and Investigations

cc: The Honorable Frank Pallone, Jr., Ranking Member
Committee on Energy and Commerce

The Honorable Diana DeGette, Ranking Member
Subcommittee on Oversight and Investigations