



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

NOV 18 2016

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

ASSISTANT ADMINISTRATOR
FOR ENFORCEMENT AND
COMPLIANCE ASSURANCE

Dear Mr. Chairman:

Thank you for your letter of November 1, 2016, regarding the Mitigation component of the Volkswagen 2.0 liter Partial Consent Decree (CD). I appreciate the opportunity to address the concerns raised in your letter.

The violations at issue in this case involve the use of vehicle software that was designed to trigger one set of operating parameters during emission compliance tests and another set of parameters when operating on the road. The primary impact of the cheating software was the emission of substantially more oxides of nitrogen (NOx) from vehicles when on the road than when being tested.

As you know, in addition to requiring Volkswagen to buy back or modify approximately 475,000, 2.0 liter vehicles, the CD also requires Volkswagen to mitigate the harm to the public resulting from the violations. Mitigation is injunctive relief sought by the government to remedy, reduce, or offset past (and in some cases ongoing and future) harm caused by the alleged violations in a particular case¹ and

¹ A court's authority to order mitigation is inherent in the Court's equitable jurisdiction. "For several hundred years, courts of equity have enjoyed sound discretion to consider the necessities of the public interest when fashioning injunctive relief." *United States v. Oakland Cannabis Buyers' Co-op.*, 532 U.S. 483, 496 (2001) (internal citations and quotation marks omitted). Indeed, "the court may go beyond the matters immediately underlying its equitable jurisdiction and decide whatever other issues and give whatever other relief may be necessary under the circumstances. Only in that way can equity do complete rather than truncated justice." *Porter v. Warner Holding Co.*, 328 U.S. 395, at 398 (1946). A district court's equitable authority is at its apex when the public interest is involved. In such cases, a district court's "equitable powers assume an even broader and more flexible character than when only a private controversy is at stake." *Porter*, 328 U.S. at 398 (citing *Virginian Ry. Co. v. System Federation No. 40*, 300 U.S. 515, 552 (1937)); see also *United States v. Lane Labs-USA Inc.*, 427 F.3d 219, 231 (3d Cir. 2005) (quoting *Porter*); *United States v. Miami Univ.*, 294 F.3d 797, 819 (6th Cir. 2002) ("Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved.") (quoting *Virginian Ry.*, 300 U.S. at 552). Statutes like the Clean Air Act that are devoted to, among other goals, protecting public health provide a compelling justification for expansive injunctive relief. Once a violation has been found, "[T]he Court has the responsibility in this case of crafting a remedy that is protective of public health, and this responsibility necessarily takes preeminence over all other

many settlements of Clean Air Act violations require mitigation. The purpose of mitigation requirements in enforcement settlements is to require pollution reductions or other actions that attempt to redress the harm caused by the violating emissions. This is part of the injunctive relief, and is in addition to the usual requirement that the company comply with legal requirements in the future; the mitigation component attempts to redress the harm caused by the past violations and any violations that will continue into the future as the company comes back into compliance.

As is true with most settled cases, the CD is the result of settlement discussions. The amount and the structure of the mitigation provisions were part of the settlement discussions in this case. The EPA cannot discuss specific information on the negotiations that lead to this settlement because that information is subject to a confidentiality order and disclosure of confidential settlement discussions is contrary to the EPA's long-standing policy and practice. In addition, we note that this enforcement action is not complete, as we are still pursuing a remedy for the 3.0 liter vehicles and the penalty phase of this case also remains unresolved. Some of the matters about which you inquire are relevant to those phases of the ongoing case.

However, we can say that this case stands out in that the violations at issue were egregious and aimed directly at evading laws that require control of air pollution. It is appropriate that Volkswagen, not the people adversely affected by the illegal acts, bear the cost to fully mitigate the consequences of the violations. The fact that this case involves mobile sources of pollution also presents challenges in determining where the unlawful pollution occurred.²

The CD includes a mitigation provision worth \$2.7 billion, and directs that the decisions for how these funds are spent be made by the states, tribes, the District of Columbia, and Puerto Rico (Beneficiaries). The CD lists the projects that are eligible, and the Beneficiaries have flexibility to select the project types and allocations that makes the most sense for their location. To avoid saddling the Beneficiaries with significant implementation costs, the mitigation funds can be used to cover administrative costs of selecting and implementing mitigation projects. The CD also provides that no cost share or match is required for projects related to government owned vehicles and engines, which reduces burden on governments and provides benefits to local communities in addition to the pollution reduction requirements. As you may be aware, some revisions to the mitigation provisions were made in the final CD approved by the Court in response to comments and suggestions from prospective Beneficiaries.

considerations." *United States v. Alisal Water Corp.*, 326 F. Supp. 2d 1010, 1027 (N.D. Cal. 2002) (Safe Drinking Water Act case) (emphasis added).

² Without endorsing the methods or the conclusions of the private researchers, we note that there are two published papers seeking to estimate the health impacts of Volkswagen's violations that the Committee may find of interest. *See, e.g.*, Thompson, Carder, Besch, Thiruvengadam, Kappanna, *In-use Emissions Testing of Light-Duty Vehicles in the U.S.*, Center for Alternative Fuels, Engines, & Emissions (May 15, 2014) available at http://www.theicct.org/sites/default/files/publications/WVU_LDDV_in-use_ICCT_Report_Final_may2014.pdf (last visited November 14, 2016); Barrett, Speth, Eastham, Dedoussi, Ashok, Malina, and Keith, *Impact of the Volkswagen Emissions Control Defeat Device on US Public Health*, 10 *Env'tl. Res. Letter* 11 (October 29, 2015), at <http://iopscience.iop.org/article/10.1088/1748-9326/10/11/114005> (last visited November 14, 2016).

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