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August 4, 2016

The Honorable John C. Cruden
Assistant Attorney General
Environment and Natural Resources
U.S. Department of Justice
P.O. Box 7611
Washington, DC 20004-7611

Re: *Volkswagen “Clean Diesel” Marketing, Sales Practices, and Products Liability Litigation*, Case No: MDL No. 2672 CRB (JSC), and D.J. Ref. No. 90–5–2–1–11386

Dear Mr. Cruden:

On behalf of the American Lung Association, I am writing to provide our comments on *Volkswagen “Clean Diesel” Marketing, Sales Practices, and Products Liability Litigation*. The American Lung Association is the nation’s oldest voluntary health organization. Our mission is to save lives by improving lung health and preventing lung disease. There are more than 33 million Americans living with chronic lung disease, and according to our 2016 *State of the Air* report, more than 166 million people live in counties that receiving a failing grade for ozone or particulate matter pollution. On behalf of all these individuals who are at high risk of adverse health effects from breathing polluted air, we offer our comments on the proposed consent decree.

The continued use of these high emitting Volkswagen vehicles threatens the health of millions of Americans each day. We commend the U.S. Department of Justice, the U.S. Environmental Protection Agency, the California Attorney General and the California Air Resources Board for working diligently to reach this settlement promptly and to send a signal to Volkswagen and others about the importance of compliance with vehicle emission standards.

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In September 2015, we wrote to the Attorney General outlining our concerns about the magnitude of violation and our recommendations for enforcement actions and mitigation. We are encouraged by many elements of the proposed consent decree designed to mitigate the excess oxides of nitrogen (NOx) emissions from the Volkswagen vehicles. However, we believe that this settlement could provide greater protection for the public from the significant health threats discussed below.

Volkswagen's Intentional Actions Pose Serious Threats to Human Health

The health effects of air pollution are well established. Excess emissions from the Volkswagen diesel vehicles creates nitrogen dioxide and contributes to ozone and particulate matter. These pollutants cause premature deaths and other well-documented adverse health effects. The reckless and deliberate violation of the law by Volkswagen created thousands of tons of additional pollution that continues to impact the health of the American people.

Nitrogen dioxide

Nitrogen dioxide (NO₂) has long been recognized as a widespread and harmful air pollutant. As EPA concluded in the 2016 *Integrated Science Assessment* for this pollutant (ISA), nitrogen oxides, including NO₂, cause a range of harmful effects on the lungs, including increased inflammation of the airways; worsened cough and wheezing; reduced lung function; increased risk of asthma attacks; greater likelihood of emergency department and hospital admissions; and increased susceptibility to respiratory infection, such as influenza. Greater evidence now exists showing that long-term exposure to NO₂ likely causes the development of asthma in children. New evidence also links short- and long-term exposure to cardiovascular harm, diabetes, premature death, poor birth outcomes and cancer.¹

Children, older adults, and people with asthma or other lung disease and people with cardiovascular disease are at greatest risk. These categories include millions of people. For example, there are an estimated 24 million people, including 6.3 million children, with asthma in the U.S.²

In addition, people who work, live or attend school along major highways also face increased risk, especially those living within 300 feet of a 4-lane or larger highway, railroad or airport.³ In 2008, EPA cited the most current assessment of that population at 47.8 million people, based on the 2003 American Housing Survey.⁴ EPA cited the likelihood that "[p]eople living or spending time near or on roads" would face "increased risk for NO₂-related health effects" as one of the major findings in this current review of the science in the 2016 ISA.⁵



Ozone

Oxides of nitrogen are primary precursors in the formation of ozone, one of the nation's most widespread air pollutants. As documented in the 2013 *Integrated Science Assessment*, ozone poses multiple risks to human health. The strongest research documents the impact of ozone on respiratory symptoms, lung function changes, emergency department visits for respiratory disease, and hospital admissions, particularly for children with asthma. Evidence has also accumulated about the cardiovascular effects of ozone, particularly for increased risk of premature death. New studies warn that short- or long-term exposure to ozone may affect cognitive abilities and pose reproductive and developmental harms.⁶

Particulate matter

Nitrogen oxides form particulate matter in the atmosphere. Particulate matter can stay suspended in the atmosphere for days or weeks and be transported into nearby neighborhoods or even hundreds of miles, affecting people in neighboring cities and states. Once inhaled, fine and ultrafine particulate matter bypasses clearance mechanisms and penetrates deep into the lung, and crosses into the cardiovascular and other systems carrying with it other toxic substances.⁷

Exposure to particulate matter can kill. Multiple long-term studies have confirmed that breathing high levels of particulate matter pollution day in and day out can be deadly.⁸ In late 2013, the International Agency for Research on Cancer, part of the World Health Organization, concluded that particle pollution could cause lung cancer.⁹

Several Provisions in the Proposed Consent Decree Must Be Strengthened

We have significant concerns about the following provisions and believe these inadequacies must be addressed in the proposed consent decree or through the civil penalties and injunctive relief that is still to come.

Buyback and Repair

We object to the provisions of Appendix A VII 7.2.3 Sale and Export of Returned Vehicles of the consent decree that indicates that Volkswagen may sell, resell or export returned vehicles, provided the Approved Emission Modification has been made. The proposed consent decree indicates that even after such an approved modification is made, the vehicles will continue to emit NOx well in excess of the levels that were required by the certification standards. This means that the public will continue to breathe additional air pollution emitted from the tailpipes of these vehicle in their communities. This is unacceptable because it will perpetuate the excess pollution burden for more than a decade. As has been shown through numerous studies of

communities with elevated levels of pollution, continuing to allow excess emissions disproportionately burdens the people living, working or attending school there.

We believe that ALL vehicles should be repaired to comply with the Clean Air Act new vehicle certification and in-use compliance requirements. We strongly object to the provisions of the proposed consent decree that permit Volkswagen to resell any vehicle it or its dealers buy back from a customer unless such vehicle can be repaired in such a way that it complies with its original certification standards and the original in-use standard.

Volkswagen should be required to scrap returned vehicles that cannot be repaired to full compliance with the original certifications standards. Volkswagen should be prohibited from selling or exporting these high-emitters, which will halt the continued harm to public health and air quality from their excess pollution.

We acknowledge that some individual consumers will not want to sell their vehicles back to Volkswagen. To ensure that such consumers comply with the recall, it may be prudent to allow that smaller number of vehicles to be repaired with a fix that partially mitigates the damage as much as is technically feasible, rather than having those vehicles continue to operate with the defeat devices in use. We appreciate that the proposed consent decree includes incentives to encourage consumer participation and penalties on Volkswagen if the 85 percent compliance threshold is not met.

Registration of 2.0 Liter Subject Vehicles

We strongly object to the provisions of Appendix D 4.2.9 and Appendix D-3 paragraph 9 that preclude states from preventing the registration of noncompliant vehicles. States should not waive their rights to protect the health of their citizens by using all available tools, including the denial of registrations to vehicles that do not participate in the recall and repair. Many communities continue to be burdened with unhealthy levels of air pollution. States should be able to enact and enforce state regulations to require that vehicles that emit up to 40 times the allowable limit of air pollution comply with the recall. The proposed consent decree includes significant financial incentives for vehicle owners to comply with the recall and repair of their vehicles. States should not be required to waive their rights to maximize compliance with the recall program.

Mitigation Fund and Reporting

The American Lung Association strongly supports the creation of the mitigation fund. The ten categories of projects present opportunities for significant pollution reduction and strongly support the provisions that require the scrappage of eligible vehicles. However, we see elements in the proposed consent decree that must be addressed.



We are concerned about the lack of transparency and reporting of the expected NOx reductions from the mitigation actions. Appendix D 3.3 requires financial accounting and reporting, but section 3.3.1.7 requires only a “brief description of all action,” and section 4.1 (iii) requires a description of the “potential beneficial impact ... on air quality in areas that bear a disproportionate share of air pollution and 4.1 (iv) “a general description of the expected ranges of emission benefits” ... and “only provide the level of detail reasonably ascertainable at the time of submission.”

This reporting is woefully inadequate. The proposed consent decree is designed to mitigate the excess NOx pollution of approximately 500,000 vehicles that were willfully designed to circumvent certification tests and greatly exceed emission standards. The breathing public has a right to know that the mitigation fund will underwrite cleanup strategies that will actually mitigate all the past and future excess NOx pollution.

We strongly recommend that the proposed consent decree be modified to provide detailed public reporting and auditing. At minimum, the semiannual reports required by Appendix D Section 3.3. should include a detailed listing of each project, including the model year or manufacturing year of the original vehicle and the relevant NOx emissions profile for such vehicle and, where applicable, the mileage or hours of operation and expected remaining useful life for the vehicle and/or engine. In addition, the primary operating location of the vehicle should be reported. The report also must include NOx emissions certification standard for the replacement.

The expected NOx reductions should be calculated and reported for each vehicle on an annualized basis for the remaining useful life of the replaced vehicle or engine. These reports should be published on a publicly accessible website within 30 days of their receipt by the U.S. Environmental Protection Agency. Further, a comprehensive report on total NOx emission reductions by state should be compiled and published on a publicly available website.

Finally, an independent auditor should be engaged to review and audit all the semiannual reports and the annual comprehensive report. The audit findings must be published on a publicly accessible website.

ZEVs

We support the ZEV Investment Commitment. We believe the program would be strengthened if the annual and final reporting included data on NOx emission reductions or NOx emissions avoided as a result of the ZEV investment.



Conclusion

Volkswagen's willful violation of Clean Air Act and California law is inexcusable. It is clear that the public will continue to bear the burden of additional air pollution for many years. We appreciate that the proposed consent decree strives to mitigate the harm. We urge you to address the concerns we raise to show to the public that there is a robust program to offset the excess the pollution.

Sincerely,



Harold P. Wimmer
National President and CEO

CC. The Honorable Charles R. Breyer, Senior District Judge, U.S. District Court, Northern District of California
The Honorable Gina McCarthy, Administrator, U.S. Environmental Protection Agency
The Honorable Kamala Harris, Attorney General, State of California
The Honorable Mary Nichols, Chair, California Air Resources Board



¹ U.S. Environmental Protection Agency. Integrated Science Assessment for Oxides of Nitrogen -- Health Criteria. EPA/600/R15/069. January 2016.

² Centers for Disease Control and Prevention. National Center for Health Statistics. National Health Interview Survey, 2007-2010 and 2014. Analysis performed by American Lung Association Epidemiology and Statistics Unit using SPSS software.

³ U.S. EPA, 2016.

⁴ U.S. EPA, "Primary National Ambient Air Quality Standards for Nitrogen Dioxide, Final Rule." 75 *Fed. Reg.* 126 (9 February 2010).

⁵ U.S. EPA, 2016. Executive Summary, page 1xxxvii.

⁶ U.S. Environmental Protection Agency. Integrated Science Assessment for Ozone and Related Photochemical Oxidants. EPA/600/R-10/076F. February 2013.

⁷ U.S. Environmental Protection Agency. Integrated Science Assessment for Particulate Matter. EPA 600/R-08/139F. December 2009.

⁸ U.S. EPA, 2009.

⁹ Hamra GB, Guha N, Cohen A, Laden F, Raaschou-Nielsen O, Samet JM, Vineis P, Forastiere F, Saldiva P, Yorifuji T, and Loomis D. Outdoor Particulate Matter Exposure and Lung Cancer: A Systematic Review and Meta-Analysis. *Environ Health Perspect.* 2014; 122: 906-911.