

The DERA Option: Eligible Mitigation Action #10 under the Volkswagen Partial Settlement, Appendix D

Factsheet for States, District of Columbia and Puerto Rico

Background

The United States District Court, Northern District of California approved a partial 2.0 liter Volkswagen settlement on October 25, 2016, and entered a partial Consent Decree. The Partial Consent Decree requires the defendant, Volkswagen, to establish and fund a \$2.7 billion environmental mitigation trust. The trust will be administered by an independent trustee. The provisions about the mitigation trust are largely found in paragraphs 14–19 of the partial Consent Decree and Appendix D to the partial Consent Decree. The purpose of the mitigation trust is to fund eligible mitigation actions that replace diesel emission sources with cleaner technology to reduce excess emissions of oxides of nitrogen (NOX) caused by the violating 2.0 liter cars. This mitigation work is in addition to the emission reductions achieved by requiring Volkswagen to buy back or modify the violating 2.0 liter cars.

The partial settlement is structured to provide the states, Puerto Rico, the District of Columbia, and federally recognized Indian tribes with the ability to select and implement appropriate mitigation actions funded by Volkswagen. Appendix D-1 to the partial Consent Decree provides an initial allocation of the funds, under which no state receives less than \$7.5 million and Indian tribes receive a separate allocation of more than \$49 million. Appendix D-2 provides a broad array of Eligible Mitigation Actions (EMAs) that beneficiaries can implement. Beneficiaries must elect to become beneficiaries within 60 days of when the final trust agreement is filed with the Court (Trust Effective Date). Beneficiaries have 10 years from the Trust Effective Date to request their allocation and implement mitigation actions and tribal beneficiaries have six years from the Trust Effective Date to request their allocations.

Eligible Mitigation Actions 1-9 may be implemented directly by a Beneficiary; eligibility determinations and funding requests under EMAs 1-9 will be handled exclusively by the appointed Trustee. EMA Option 10 (DERA Option), allows states and tribes to use mitigation trust funds under specific EPA Diesel Emissions Reduction Program (DERA) grants. This document serves to distinguish between EMAs 1-9 and the DERA Option, as well as provide guidance for those states choosing to implement the DERA Option. For the purposes of this document, the term “state” will be used to describe the 50 states, the District of Columbia and Puerto Rico. Separate guidance will be provided for Tribal beneficiaries.

Eligible Mitigation Actions

The information in Table 1 summarizes the eligible vehicles and equipment, emissions reduction activities, and applicable funding limits allowed under EMAs 1-9 versus those allowed under the DERA Option. Many types of projects are eligible under both EMAs 1-9 and the DERA Option. However, there are some differences between the options in terms of project eligibility and funding limits for certain types of projects. Activities allowed under the DERA Option, that are not eligible

under EMAs 1-9, are highlighted below in Table 1. Beneficiaries may split their Mitigation Trust Funds between EMAs 1-9 and the DERA Option as they choose.

Under VW EMAs 1-9, only a certain portion of the cost of an activity is eligible for funding through the trust. The mitigation trust funding limits (percentages) shown in Table 1, column 1, represent the maximum portion of the costs that can be covered with mitigation trust funds under EMAs 1-9. The rest of the cost must be borne from other sources of funds.

Under VW EMA 10, the DERA Option, only a certain portion of the cost of an activity is eligible for funding under EPA's State Clean Diesel Grant Program. The DERA funding limits (percentages) shown in Table 1, column 2, represent the maximum portion of the costs that can be covered with a combination of DERA funds and any non-federal voluntary matching funds provided by a grantee. The portion of the costs that exceed the DERA funding limit is referred to as the "mandatory cost-share," and is the responsibility of the grantee. Voluntary and mandatory cost-shares are discussed in more detail below under "Implementing the DERA Option."

Where the funding limit in Table 1 is listed as a range, the funding limit varies based on the specific type of engine purchased (e.g. conventional diesel vs electric). Full details on EMAs 1-9 may be found in Appendix D, and full details on eligible DERA activities may be found in the applicable EPA State Clean Diesel Grant Program Information Guide. Additionally, a more detailed version of the information provided in Table 1, which contains more specific eligibility information and funding limits, is available in *Detailed Comparison of Volkswagen Eligible Mitigation Action 1-9 and Eligible Mitigation Action #10 (DERA Option)*, EPA-420-R-16-022 at www.epa.gov/cleandiesel/volkswagen-vw-settlement-dera-option.

Table 1. Comparison of EMAs 1-9 and EMA 10 (DERA Option)

VW EMAs 1-9 Eligible Activities and Mitigation Trust Funding Limits	VW EMA 10 (DERA Option) Eligible Activities and DERA Funding Limits*
Class 4-7 Local Freight Truck Class 8 Local Freight Trucks Class 8 Port Drayage Trucks Engine Model Year 1992-2009 Repower: 40-75% non-gov, 100% gov Replacement: 25-75% non-gov, 100% gov Engine Model Year 2010-2012 only where State regulations already require upgrades to 1992-2009 engine model year trucks Repower: 40-75% non-gov, 100% gov Replacement: 25-75% non-gov, 100% gov	Class 5-8 All Diesel Highway Vehicles Class 8 Diesel Drayage Trucks Engine Model Year 1995-2006 Repower: 40-60% Replacement: 25-45% (50% for Dray) Retrofits +/- Aero, Tires, and Idle: 100% Engine Model Year 2007-2010 Repower (All-electric): 60% Replacement (All-electric): 45% (50% for Dray) Retrofits +/- Aero, Tires, and Idle: 100%

VW EMAs 1-9 Eligible Activities and Mitigation Trust Funding Limits	VW EMA 10 (DERA Option) Eligible Activities and DERA Funding Limits*
Class 4-8 School Bus Class 4-8 Shuttle or Transit Bus Engine Model year 2009 or Older Repower 40-75% non-gov, 100% gov Replacement: 25-75% non-gov, 100% gov Engine Model Year 2010-2012 only where State regulations already require upgrades to 1992-2009 engine model year buses Repower: 40-75% non-gov, 100% gov Replacement: 25-75% non-gov, 100% gov	Type A, B, C, D Diesel School Bus Class 5-8 Diesel Shuttle, Transit or Other Bus Engine Model Year 1995-2006 Repower: 40-60% Replacement: 25-45% Retrofits +/- Aero, Tires, and Idle: 100% Engine Model Year 2007-2010 Repower (All-electric): 60% Replacement (All-electric): 45% Retrofits +/- Aero, Tires, and Idle: 100%
Freight Switchers 1000+ hours per year Pre-Tier 4 Repower: 40-75% non-gov, 100% gov Replacement: 25-75% non-gov, 100% gov	Diesel Locomotives 1000+ hours per year Unregulated - Tier 2 line haul and switcher Tier 2+ switcher Repower: 40-60% Reman/Upgrade: 40% Replacement: 25-45% Retrofits: 100% Idle Reduction/Shorepower: 40% Tier 2+ line haul Retrofits: 100% Idle Reduction/Shorepower: 40%
Ferries/Tugs Unregulated-Tier 2 Ferry and Tug Engines Repower/Reman/Upgrade: 40-75% non-gov, 100% gov Replacement: 25-75% non-gov, 100% gov	Marine Diesel Engines 1000+ hours per year Unregulated – Tier 2 Marine Engines Repower/Reman/Upgrade: 40-60%
Ocean Going Vessel and Great Lakes Vessels Shorepower Costs associated with the shore-side system and installation Non-government Owned: 25% Government Owned: 100%	Marine Shore Power Connection Systems Costs associated with the shore-side system and installation: 25%

VW EMAs 1-9 Eligible Activities and Mitigation Trust Funding Limits	VW EMA 10 (DERA Option) Eligible Activities and DERA Funding Limits*
	Electrified Parking Spaces (EPS) Costs associated with the equipment and installation to provide off-board electrical power to heating/cooling/electrical systems of hoteling trucks, or to plug-in trailer refrigeration systems: 25%
Airport Ground Support Equipment (GSE) Tier 0-Tier 2 Diesel engines Uncertified, or certified to 3 g/bhp-hr or higher emissions, spark ignition engines Repower (All-electric): 75% non-gov, 100% gov Replacement (All-electric): 75% non-gov, 100% gov	Nonroad Diesel Engines Construction, Cargo Handling (Ports and Airports), Agriculture, Mining, Energy Production 500+ hours per year Tier 0 - Tier 3 0-50 HP, 2005 and newer 51-300 HP, 1995 and newer 301+ HP, 1985 and newer Repower/ Reman/Upgrade : 40-60% Replacement (Diesel, Alt Fuel, Hybrid) : 25-35% Replacement (All-electric): 45% Retrofits : 100% Repower (diesel, Alt Fuel) : 40-50% Repower (All-electric): 60% Reman/Upgrade : 40%
Forklifts and Port Cargo Handling Equipment Forklifts, reach stackers, side loaders, and top loaders with >8000lbs lift capacity Rubber-tired gantry cranes, straddle carriers, shuttle carriers, terminal tractors Repower (All-electric): 75% non-gov, 100% gov Replacement (All-electric): 75% non-gov, 100% gov	
Light Duty Zero Emission Vehicle Supply Equipment A State may use up to fifteen percent (15%) of its allocation of Trust Funds on costs for the acquisition, installation, operation and maintenance of new light duty zero emission vehicle supply equipment for projects as specified in Appendix D-2, EMA #9.	

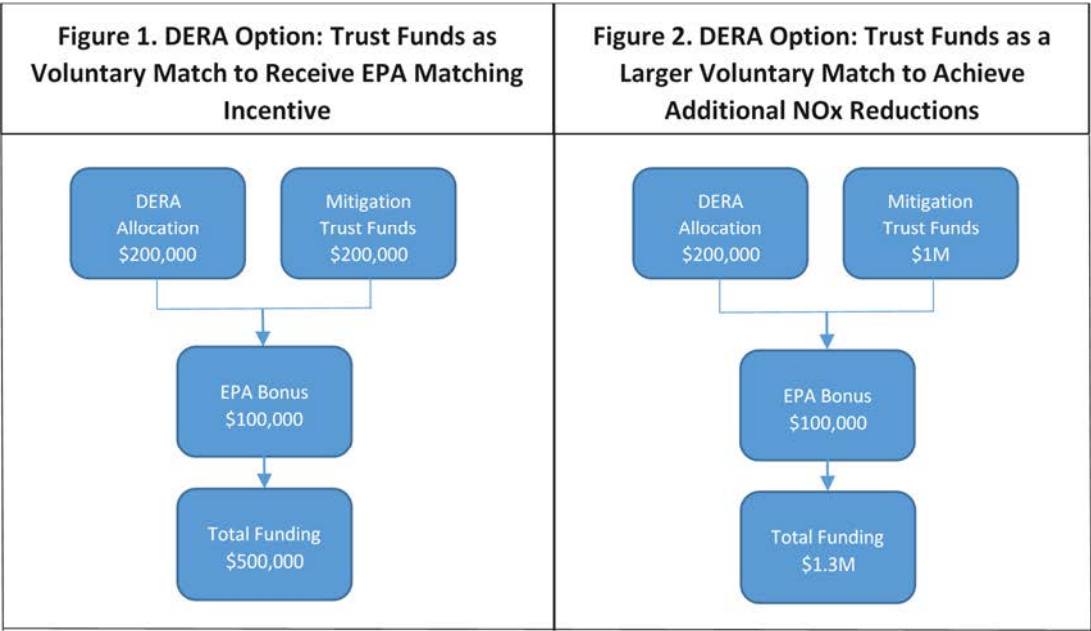
*Notes

- Project eligibility criteria and applicable funding limits for the DERA Option are subject to change pending final program guidance issued by EPA for the State Clean Diesel Grant Program.
- Items that are **highlighted** are allowed under the DERA Option, and are not eligible under EMAs 1-9.

Implementing the DERA Option

As defined in Title 2 Code of Federal Regulations Section 200.99, *voluntary committed cost sharing (or matching)* means funds specifically pledged on a voluntary basis in the proposal's budget or the Federal award on the part of the non-Federal entity and that becomes a binding requirement of

Federal award. Under the DERA Option, states may use mitigation trust funds as their non-federal voluntary match under EPA’s State Clean Diesel Grant Program. Per DERA’s statutory authority, if a state provides a voluntary match equal to the base allocation offered by EPA, EPA will provide a matching incentive equal to 50 percent of the base allocation. For example, if EPA offers a base allocation of \$200,000 to the state, the state could contribute \$200,000 of its Trust Funds as a voluntary match and the state would receive an additional \$100,000 in EPA funding as a matching incentive. The total project budget would then be \$500,000, not including any mandatory cost-share funds contributed by project partners, fleet owners, or other another source (not Federal or trust funds). See Figure 1 below for an example. In addition to a voluntary match provided by a state in order to receive the EPA matching incentive, a state may contribute mitigation trust funds as a larger voluntary match in order to achieve additional NOx reductions under their State Clean Diesel Program grant. See Figure 2 below for an example.



Any voluntary matching funds provided by the state, including mitigation trust funds, are subject to the DERA funding limits defined in the applicable State Clean Diesel Grant Program guidance. Many of the eligible project types under EPA’s State Clean Diesel Grant Program are funded at less than 100% and therefore require a mandatory cost-share. These mandatory cost-share requirements are typically provided by project partners (e.g., fleet owners). Under the DERA Option, **mitigation trust funds cannot be used to meet the non-federal mandatory cost-share requirements of any DERA grant.** See Table 2 for a summary of DERA funding limits and mandatory cost-shares required under EPA’s State Clean Diesel Grant Program.

It is possible that the state entity which is designated as the Mitigation Trust Beneficiary is not the same entity that has been designated as the lead state agency which receives and administers DERA funds under the State Clean Diesel Grant Program. In these instances, the Beneficiary and the state DERA grantee will need to coordinate project planning, reporting, and funding.

**Table 2. Maximum Funding Limits and Minimum Mandatory Cost-Shares for
EPA's State Clean Diesel Grant Program**

DERA Eligible Activities	Maximum Funding Limits (DERA Funds + Voluntary Match)	Minimum Mandatory Cost-Share (Fleet Owner Contribution)
Retrofits	100%	0%
Engine Upgrade / Remanufacture	40%	60%
Locomotive Idle Reductions	40%	60%
Marine Shore Power	25%	75%
Electrified Parking Spaces	25%	75%
Engine Repower – Diesel or Alt Fuel	40%	60%
Engine Repower – All-Electric	60%	40%
Engine Repower – Low NOx	50%	50%
Replacement – Diesel or Alternative Fuel	25%	75%
Replacement – All Electric	45%	55%
Replacement - Low NOx	35%	65%

Note: Project eligibility criteria and applicable funding limits for the DERA Option are subject to change pending final program guidance issued by EPA for the State Clean Diesel Grant Program

2017 State Clean Diesel Grant Program Applications

At the beginning of the annual State Clean Diesel Grant Program cycle, EPA asks for a Notice of Intent to Participate from each state. EPA anticipates that the Notice of Intent to Participate for the FY2017 State Clean Diesel Grant Program will be due to EPA in February of 2017, with final workplans and applications due to EPA by April 30, 2017. It is anticipated that the period of performance for FY2017 State Clean Diesel Program grants will begin on October 1, 2017. States choosing to implement the DERA Option may include mitigation trust funds as a non-federal voluntary match in their FY2017 State Clean Diesel Program application as shown in Figures 1 and 2, even if the state's Beneficiary status has not been confirmed at the time of application. States that wish to receive the matching incentive from EPA for FY2017 must include a voluntary match at least equal to the base EPA funding amount on their Notice of Intent to Participate and on their FY2017 application submitted to EPA by April 30, 2017.

After its FY2017 grant is awarded, a state may request an amendment to their FY2017 State Clean Diesel Program grant to add new or additional voluntary matching funds. However, the matching incentive bonus will not be provided to a state that did not include a voluntary match at least equal to the base EPA funding amount on its Notice of Intent to Participate and on its FY2017 application submitted to EPA by April 30, 2017.

For a state that participates in the State Clean Diesel Grant Program in FY2017 and then chooses to also participate in FY2018, State Clean Diesel Grant Program funds for FY2018 will be awarded as an amendment/extension to the state's FY2017 grant. A state that chooses to receive the matching incentive from EPA for FY2018 must include a voluntary match at least equal to the FY2018 base EPA funding amount on its FY2018 Notice of Intent to Participate and on its FY2018 application submitted to EPA.

Note: If DERA funding is not available in FY2017, then Trust funds will not be available under the DERA Option until such time as DERA may be appropriated funding and the state is awarded a new State Clean Diesel Program grant.

Reporting Requirements

Recipients of DERA grants must submit Quarterly Programmatic Reports and a Final Programmatic Report to EPA as required under the DERA grant terms and conditions. A Beneficiary implementing the DERA Option may submit its DERA reports to the trustee to fulfill its reporting requirement for any portion of its mitigation trust funds utilized under the DERA Option. Additionally, a Beneficiary may submit its state's Final Approved State Clean Diesel Workplan to the trustee as its Beneficiary Mitigation Plan and as its funding request for actions funded under the DERA Option.

Resources

Link to Partial Consent Decree: <https://www.epa.gov/enforcement/partial-consent-decree-volkswagen>

Link to FAQs: <https://www.epa.gov/enforcement/faqs-beneficiaries-vw-mitigation-trust-agreement>

Link to Consent Decree informational slides: https://www.epa.gov/sites/production/files/2016-11/documents/webinar_for_prospective_beneficiaries_11_22_2016.pdf

State Program Guide: www.epa.gov/cleandiesel/clean-diesel-state-allocations#elig. Will update with current guidance when available.

Questions

Please submit questions related to Appendix D of the VW Consent Decree to the Clean Diesel helpline with the subject line "VW Question."

Clean Diesel Helpline: cleandiesel@epa.gov | 1-866-623-2322