

APPENDIX D-3

**CERTIFICATION FOR BENEFICIARY STATUS
UNDER ENVIRONMENTAL MITIGATION TRUST AGREEMENT**

1. Identity of Lead Agency

The State of Alaska _____ (“Beneficiary”), by and through the Office of the Governor (or, if not a State, the analogous Chief Executive) of the Appendix D-1 and Appendix D-1A entity on whose behalf the Certification Form is submitted: (i) hereby identifies the Alaska Energy Authority _____ (“Lead Agency”) as the Lead Agency for purposes of the Beneficiary’s participation in the Environmental Mitigation Trust (“Trust”) as a Beneficiary; and (ii) hereby certifies that the Lead Agency has the delegated authority to act on behalf of and legally bind the Beneficiary for purposes of the Trust.

BENEFICIARY’S LEAD AGENCY CONTACT INFORMATION:

Contact:	Executive Director
Address:	813 West Northern Lights Blvd., Anchorage Alaska, 99503
Phone:	(907) 771-3000
Fax:	(907) 771-3044
Email:	vwsettlement@aidea.org

2. Submission to Jurisdiction

The Beneficiary expressly consents to the jurisdiction of the U.S. District Court for the Northern District of California for all matters concerning the interpretation or performance of, or any disputes arising under, the Trust and the Environmental Mitigation Trust Agreement (“Trust Agreement”). The Beneficiary’s agreement to federal jurisdiction for this purpose shall not be construed as consent to federal court jurisdiction for any other purpose.

3. Agreement to be Bound by the Trust Agreement and Consent to Trustee Authority

The Beneficiary agrees, without limitation, to be bound by the terms of the Trust Agreement, including the allocations of the Trust Assets set forth in Appendix D-1 and Appendix D-1A to the Trust Agreement, as such allocation may be adjusted in accordance with the Trust Agreement. The Beneficiary further agrees that the Trustee has the authorities set forth in the Trust Agreement, including, but not limited to, the authority: (i) to approve, deny, request modifications, or request further information related to any request for funds pursuant to the Trust Agreement; and (ii) to implement the Trust Agreement in accordance with its terms.

4. Certification of Legal Authority

The Beneficiary certifies that: (i) it has the authority to sign and be bound by this Certification Form; (ii) the Beneficiary’s laws do not prohibit it from being a Trust Beneficiary; (iii) either (a)

the Beneficiary's laws do not prohibit it from receiving or directing payment of funds from the Trust, or (b) if the Beneficiary does not have the authority to receive or direct payment of funds from the Trust, then prior to requesting any funds from the Trust, the Beneficiary shall obtain full legal authority to receive and/or direct payments of such funds within two years of submitting this Certification Form; and (iv) if the Beneficiary does not have the authority to receive or direct payment of funds from the Trust and fails to demonstrate that it has obtained such legal authority within two years of submitting this Certification Form, it shall become an Excluded Entity under the Trust Agreement and its initial allocation shall be redistributed among the Beneficiaries pursuant to subparagraph 5.0.1 of the Trust Agreement.

5. Certification of Legal Compliance and Disposition of Unused Funds

The Beneficiary certifies and agrees that, in connection with all actions related to the Trust and the Trust Agreement, the Beneficiary has followed and will follow all applicable law and will assume full responsibility for its decisions in that regard. The Beneficiary further certifies that all funds received on account of any Eligible Mitigation Action request that are not used for the Eligible Mitigation Action shall be returned to the Trust for credit to the Beneficiary's allocation.

6. Waiver of Claims for Injunctive Relief under Environmental or Common Laws

Upon becoming a Beneficiary, the Beneficiary, on behalf of itself and all of its agencies, departments, offices, and divisions, hereby expressly waives, in favor of the parties (including the Settling Defendants) to the Partial Consent Decree (Dkt. No. 2103-1) and the parties (including the Defendants) to the Second Partial Consent Decree (Dkt. No. 3228-1), all claims for injunctive relief to redress environmental injury caused by the 2.0 Liter Subject Vehicles and the 3.0 Liter Subject Vehicles (jointly, "Subject Vehicles"), whether based on the environmental or common law within its jurisdiction. This waiver is binding on all agencies, departments, offices, and divisions of the Beneficiary asserting, purporting to assert, or capable of asserting such claims. This waiver does not waive, and the Beneficiary expressly reserves, its rights, if any, to seek fines or penalties.

7. Publicly Available Information

The Beneficiary certifies that it will maintain and make publicly available all documentation and records: (i) submitted by it in support of each funding request; and (ii) supporting all expenditures of Trust Funds by the Beneficiary, each until the Termination Date of the Trust pursuant to Paragraph 6.8 of the Trust Agreement, unless the laws of the Beneficiary require a longer record retention period. Together herewith, the Beneficiary attaches an explanation of: (i) the procedures by which the records may be accessed, which shall be designed to support access and limit burden for the general public; (ii) for the Beneficiary Mitigation Plan required under Paragraph 4.1 of the Trust Agreement, the procedures by which public input will be solicited and considered; and (iii) a description of whether and the extent to which the certification in this Paragraph 7 is subject to the Beneficiary's applicable laws governing the publication of confidential business information and personally identifiable information.

8. Notice of Availability of Mitigation Action Funds

The Beneficiary certifies that, not later than 30 Days after being deemed a Beneficiary pursuant to the Trust Agreement, the Beneficiary will provide a copy of the Trust Agreement with Attachments to the U.S. Department of the Interior, the U.S. Department of Agriculture, and any other Federal agency that has custody, control or management of land within or contiguous to the territorial boundaries of the Beneficiary and has by then notified the Beneficiary of its interest hereunder, explaining that the Beneficiary may request Eligible Mitigation Action funds for use on lands within that Federal agency's custody, control or management (including, but not limited to, Clean Air Act Class I and II areas), and setting forth the procedures by which the Beneficiary will review, consider, and make a written determination upon each such request.

9. Registration of Subject Vehicles

The Beneficiary certifies, for the benefit of the Parties (including the Settling Defendants) to the Partial Consent Decree and the Parties to the Second Partial Consent Decree (including the Defendants) and the owners from time-to-time of Subject Vehicles, that upon becoming a Beneficiary, the Beneficiary:

- (a) Shall not deny registration to any Subject Vehicle based solely on:
 - i. The presence of a defeat device or AECD covered by the resolution of claims in the Partial Consent Decree or in the Second Partial Consent Decree; or
 - ii. Emissions resulting from such a defeat device or AECD; or
 - iii. The availability of an Approved Emissions Modification, an Emissions Compliant Recall or the Buyback, Lease Termination, and Owner/Lessee Payment Program.
- (b) Shall not deny registration to any Subject Vehicle that has been modified in accordance with an Approved Emissions Modification or an Emissions Compliant Recall based solely on:
 - i. The fact that the vehicle has been modified in accordance with the Approved Emissions Modification or the Emissions Compliant Recall; or
 - ii. Emissions resulting from the modification (including, but not limited to, the anticipated emissions described in Appendix B to the Partial Consent Decree and Appendix B to the Second Partial Consent Decree); or
 - iii. Other emissions-related vehicle characteristics that result from the modification; or

iv. The availability of an Approved Emissions Modification, an Emissions Compliant Recall or the Buyback, Lease Termination, and Owner/Lessee Payment Program.

(c) May identify Subject Vehicles as having been modified, or not modified, in accordance with the Approved Emissions Modification or the Emissions Compliant Recall on the basis of VIN-specific information provided to the Beneficiary by the Defendants.

(d) Notwithstanding the foregoing, the Beneficiary may deny registration to any Subject Vehicle on the basis that the Subject Vehicle fails to meet EPA's or the Beneficiary's failure criteria for the onboard diagnostic ("OBD") inspection; or on other grounds authorized or required under applicable federal regulations (including an approved State Implementation Plan) or under Section 209 or 177 of the Clean Air Act and not explicitly excluded in subparagraphs 9(a)-(b).

10. Reliance on Certification

The Beneficiary acknowledges that the Trustee is entitled to rely conclusively on, without further duty of inquiry, and shall be protected in relying upon, this Appendix D-3 Certification, or a subsequent communication from the Lead Agency designating new or additional authorized individuals, as setting forth the Lead Agency and the authorized individuals who may direct the Trustee with respect to all of the Beneficiary's rights and duties under the Trust Agreement. The Beneficiary and its delegated Lead Agency, including all authorized individuals, agree to comply with all security procedures, standard payment and signatory authorization protocols, as well as procedures for designating new or additional authorized individuals, as set forth by the Trustee.

FOR THE GOVERNOR (or, if not a State, the analogous Chief Executive):

Signature: 

Name: Bill Walker

Title: Governor

Date: November 15, 2017

Location: Juneau, Alaska

[FOR OTHER REQUIRED SIGNATORIES]:

Signature: 

Name: Jahna Lindemuth

Title: Attorney General

Date: November 14, 2014

Location: Anchorage, Alaska

Appendix D-3

Certification for Beneficiary Status under Environmental Mitigation Trust

Alaska Energy Authority

Explanation Regarding Publicly Available Information

7. Publicly Available Information

(i) Procedures by which records may be accessed.

The Alaska Energy Authority (AEA) intends to make many records related to the VW Environmental Mitigation Trust (Trust), including related to mitigation projects, publicly available on AEA's website. However, AEA will likely delay posting information on specific mitigation projects during the pendency of any competitive processes respecting the decision to award an allocation of VW Trust monies.

Any VW Trust records not posted on AEA's website will be made available to the public under the Alaska Public Records Act (AS 40.25) and the Act's implementing regulations (2 AAC 96), unless one of the following applies: (1) the records are not "public records," as defined in AS 40.25.220(3); (2) the records are protected under state or federal law or otherwise exempt from disclosure under AS 40.25.120(a) (Categories of potentially protected records are discussed in section (iii) below.); (3) the records are excluded from the Act under another state statute; or (4) the records are readily available for public inspection—e.g., available on the Internet or "during state business hours in an agency's office or in a public library," 2 AAC 96.100(b). (The Alaska Public Records Act does not require AEA "to compile or summarize" records or "to manipulate its data to create new records." 2 AAC 96.210.) Steps AEA will take in response to public records requests are outlined here.

If a records request is made orally, AEA will inform the requester of the provisions of 2 AAC 96.310, and "[i]f the request involves a variety of records," AEA may require that the requester submit the request in writing. 2 AAC 96.310. If AEA does not grant the request within five business days after the office responsible for maintaining the requested records receives the request, the request will be deemed denied. 2 AAC 96.310(c). The requester's remedy is to make a written request. *Id.* If a requester "is unable to write a request due to a physical or mental disability," AEA will assist the requester in preparing a written request or will treat the oral request as a written request. 2 AAC 96.310(d). (AEA keeps a log of all written public records requests that it receives. *See* 2 AAC 96.320(a).)

In responding to a request, AEA will not ask about the requester's purpose for seeking the records. But AEA may ask a requester if it is a party or represents a party involved in

judicial or administrative litigation with the state in which the requested records are obtainable. *See* AS 40.25.122. If the requester is such a person, rather than provide the records under the Alaska Public Records Act, AEA may advise the requester to seek the records in accordance with the applicable court or administrative rules. *See* 2 AAC 96.220. Also, as explained below, a requester may need to explain why the records are sought to qualify for fee relief. *See* 2 AAC 96.370(a).

Within ten working days of receiving a written request for public records, AEA will undertake the following: (1) request clarification; (2) provide an estimate of any recoverable search and copying costs; (3) take a ten-working-day extension to respond to the request; and/or (4) provide the non-protected, requested public records in the form in which AEA maintains or disseminates them and, in most cases, a log of the withheld or redacted records (i.e., to the extent the information that AEA would log is not itself protected or included on a redacted record). *See* AS 40.25.110; 2 AAC 96.315; 2 AAC 96.325; 2 AAC 96.355; 2 AAC 96.360.

AEA may continue to request clarification (within 10 working days after receiving a response), until the request is clear. *See* 2 AAC 96.315.

For a requester other than a news organization, AEA may require that the requester pay any estimated recoverable fees in advance of undertaking search and copying tasks. *See* AS 40.25.110(c); 2 AAC 96.360(c). AEA may require news organizations to provide a commitment to pay any estimated recoverable fees and, in certain circumstances, may require that they pay any estimate in advance: i.e., when “the request is unreasonable or in bad faith”; when the news organization “has failed to pay for previous requests”; and when responding “requires extraordinary expenditure of state resources.” 2 AAC 96.360(c). If AEA determines that any recoverable costs will exceed the estimate, it will suspend the work, provide an estimate of the cost to complete the work, make available the non-protected, requested public records identified by then, and provide a log of the withheld or redacted records (i.e., again, to the extent the information that AEA would log is not itself protected or included on a redacted record). If a paid estimate exceeds the actual recoverable costs, AEA will return the difference. All requesters must pay the recoverable costs before records are made available unless they satisfy the requirements for a fee waiver or reduction. *See* AS 40.25.110(c); 2 AAC 96.370.

Under the following circumstances, AEA may extend the time to respond by up to 10 working days: (1) AEA needs to search for or collect “records from field or other offices that are separate from the office responsible for maintaining the records”; (2) AEA “need[s] to search for, collect, and examine a voluminous amount of separate and distinct records sought in a single request”; (3) AEA needs to “consult[] with an officer or employee who is absent on approved leave or official business; (4) “the basic response period comes during a peak workload period;” or (5) AEA “need[s] to consult with legal counsel to ensure that protected interests of private or government persons or entities are

not infringed.” 2 AAC 96.325(d). If AEA needs more than 20 working days to avoid “substantially impair[ing] the other functions of the public agency or an office responsible for maintaining the requested records, the agency head may request an additional extension from the attorney general,” who must give the requester and AEA an opportunity to be heard. 2 AAC 96.325(e).

In addition to a fee for paper copies and for materials on which electronic records are copied (e.g., removable storage devices), the requester must pay personnel costs “[i]f the production of records for . . . [that] requester in a calendar month exceeds five person-hours.” *See* AS 40.25.110(c). “The personnel costs may not exceed the actual salary and benefit costs for the personnel time required to perform the search and copying tasks.” *Id.* Also, AEA may charge for, among other things, a contractor’s costs of providing records, the cost of retrieving records from and returning records to storage locations, and postage. As noted above, in certain circumstances, AEA will grant a request for a fee waiver or reduction. Specifically, AEA will grant fee relief if the requester certifies and AEA finds that the requester has established the following: (1) “the records are likely to contribute significantly to the public’s understanding of the operations or activities of the state government”; (2) “the records are not sought primarily for a purpose that is commercial or financial”; (3) “the records are not sought by or on behalf of a person involved in litigation, including any judicial or administrative proceeding, arbitration, or mediation, with a public agency in which the records are relevant”; (4) the combined amount of all fee relief “granted to the requester and to any other requesters acting in concert with the requester in making requests for the same or related records” will not exceed \$500 during any period of twelve consecutive months; and (5) the combined amount of all fee relief “granted by all public agencies to the requester” under 2 AAC 96.370 and 2 AAC 96.470 will not exceed \$500 during any period of twelve consecutive months. 2 AAC 96.370.

AEA will deny a request for the following reasons: (1) despite a diligent search, a record is not known to exist or was not found; (2) the record was destroyed; or (3) nondisclosure is authorized by federal law or regulation or by state law. *See* 2 AAC 96.335(a). If AEA denies a request because it cannot locate a record that it believes it possesses, it will continue to search for the record and will periodically update the requester of its progress. *See* 2 AAC 96.335(f). When denying a request, AEA will follow the regulations, including the requirement to inform the requester of the right to file an administrative and/or judicial appeal. *See* 2 AAC 96.335.

A requester who seeks to administratively appeal a denial must mail or hand-deliver a written appeal to the AEA Executive Director within 60 working days after the denial is issued or, if no denial is issued, within 60 working days after “the expiration of the time period within which the public agency should have responded.” 2 AAC 96.340. In the appeal, the requester must include the date of the denial and the name and address of the person who issued the denial and must “identify the records to which access was denied

and which are the subject of the appeal.” *Id.* And “[i]f an appeal is from the failure of the agency to respond to the records request within the appropriate time limit under 2 AAC 96.325, the appeal must so state, must identify the records sought, and must identify the public agency to which the request was directed and the date of the request.” *Id.* AEA will follow the regulations that govern an agency’s response to such appeals. *See* 2 AAC 96.345–2 AAC 96.350.

These steps do not apply to requests for “electronic services and products,” which are defined in AS 40.25.220(1). Electronic services and products include responses to requests for electronic searches of an AEA employee’s email account or for an AEA employee’s text messages. *See* AS 40.25.220(1). If AEA decides that a request is for electronic services and products, within 10 working days after receiving the request, AEA will so advise the requester and provide the reasons for its decision; and AEA will follow the procedures (in AS 40.25.115 and 2 AAC 96.400 – 2 AAC 96.470) that apply to such requests. *See* 2 AAC 96.325(b). Requesters who seek electronic services and products must pay “the actual incremental costs of providing the electronic services and products, and a reasonable portion of the costs associated with building and maintaining the information system of the public agency,” even if providing the electronic service or product does not exceed five person-hours in a calendar month, unless the requester establishes that the request satisfies the requirements for a fee waiver or reduction: the fee relief requirements for electronic services and products are the same as those for public records. *See* AS 40.25.115(b); 2 AAC 96.370; 2 AAC 96.470.

If AEA asks the State Security Office in the Alaska Department of Administration to search the state’s email system, the State Security Office will provide the requester a cost estimate and a description of the proposed search, including the search terms and other search parameters. Upon receiving the requester’s agreement to the cost estimate and proposed search and the payment of the estimate, the State Security Office will search for the emails and provide the collected emails to AEA. Upon reviewing the emails, AEA will provide the requester the responsive, non-protected public records and a log of withheld or redacted responsive public records (i.e., again, to the extent the information that AEA would log is not itself protected or included on a redacted record).

(ii) Procedures for AEA soliciting and considering public input on the Beneficiary Mitigation Plan.

AEA will seek and consider public input during the development of the Beneficiary Mitigation Plan. This approach will provide stakeholders and interested persons the opportunity to have their interests fully considered. In communicating to stakeholders and interested persons, AEA will emphasize that the Volkswagen settlement provides an opportunity to fund ten categories of mitigation projects that reduce pollution, particularly nitrogen oxides, by upgrading and/or replacing diesel engines that meet

certain criteria. Because the Beneficiary Mitigation Plan will prioritize how available funds will be allocated by project category and other factors, stakeholders with projects potentially eligible for funding and interested persons will have incentive to comment so that project types they prefer might be prioritized in the plan.

AEA intends to use a variety of methods and tools to communicate with the public about the Beneficiary Mitigation Plan. AEA has already obtained informal public comments from March 2017 through October 2017, which AEA collected through email and an online form. Additional future communications methods will include the following:

- Before publishing the Beneficiary Mitigation Plan, AEA will conduct a survey soliciting information both about interest in eligible mitigation actions and current fleet/equipment in-use. This survey will assist AEA to evaluate where the most impactful opportunities exist.
- AEA anticipates it will publish the initial Beneficiary Mitigation Plan and initiate a formal public comment period in January 2018.
- AEA will conduct public meetings in at least two locations to provide for statewide participation. To increase that participation, some of the meetings will be live broadcast as webinars for on-line participation. AEA anticipates there will be meetings both before and after the initial draft Beneficiary Mitigation Plan is published. Those occurring after will be part of the formal public comment process.
- AEA has a website (<http://www.akenergyauthority.org/programs/vwsettlement>) and an e-mail address (vwsettlement@aidea.org) dedicated to VW Trust matters. AEA will publish the Beneficiary Mitigation Plan and solicit comments about it on the website, and will maintain this website and regularly update information regarding the plan and the Trust. The website also provides links to other websites that provide information regarding the VW Trust.
- AEA regularly communicates to working groups with information regarding various AEA energy grant programs, energy efficiency and conservation programs, and similar related programmatic matters. To communicate effectively to working groups, AEA uses listserves. This approach enables AEA to specifically target stakeholders and other interested individuals. AEA will develop a similar working group listserve for VW Trust matters, and use it to communicate to the public when substantive events occur. AEA will also communicate with people already on various AEA working groups to invite them to consider joining the VW Trust group.
- AEA regularly attends conferences and other meetings in Alaska regarding energy, conservation, alternative energy, and related matters. AEA will use these meetings to inform stakeholders about the VW Trust and opportunities to participate in the creation of the Beneficiary Mitigation Plan.

- AEA will also communicate to various entities and associations which may be interested in the Trust. Examples include Power Cost Equalization communities and utilities (those eligible for State electric power subsidies), state and federal agencies, local governments, Tribal governments and entities, Alaska Native Corporations/Entities, ARDORS, the Alaska Power Association, and airports.
- AEA is completing a survey of rural powerhouses to define the opportunity for DERA projects for diesel prime power. This information will be made available to stakeholders.
- AEA will also use the State public notice website-system to publish information about the Beneficiary Mitigation Plan.

(iii) Applicable laws governing confidential business information and personally identifiable information.

Several categories of records are excluded from the disclosure requirements of the Alaska Public Records Act. *See* AS 40.25.120(a). Such categories include the following: “records of vital statistics and adoption proceedings”; “records pertaining to juveniles unless disclosure is authorized by law”; “medical and related public health records”; and records protected by a federal law or regulation or by a state law, including a common law privilege. AS 40.25.120(a)(1)- (4); *see also, e.g., Fuller v. City of Homer*, 75 P.3d 1059, 1062-63 (Alaska 2003) (stating that “Alaska’s statutory definition of ‘state law’ encompasses common law as well as positive law”).

Accordingly, information that AEA will not disclose in response to a public records request or a request for electronic services or products includes confidential business information. *See, e.g.,* AS 45.50.910 – 45.50.945 (protecting trade secrets); AS 40.25.100(a) and AS 43.05.230(a) (protecting certain taxpayer information); *State Dep’t of Nat. Res. v. Arctic Slope Reg’l Corp.*, 834 P.2d 134, 138 (Alaska 1991) (holding that the Fifth Amendment Takings Clause of the U.S. Constitution and Article 1, Section 1 of the Alaska Constitution protect confidential business information).

And information that AEA also will not disclose in response to a public records request or a request for electronic services or products includes information protected under the right to privacy in Article 1, Section 22 of the Alaska Constitution (which provides that “[t]he right of the people to privacy is recognized and shall not be infringed), and includes certain personally identifiable information: e.g., an individual’s passport number; driver’s license number; state identification number; and bank account number or credit, debit, or other payment card number, including any personal codes; financial account information; information from a financial application; and, e.g., an individual’s name and social security number, medical information, insurance policy number, employment information, or employment history. *See*, AS 45.48.010 – AS 45.48.995.