

14 June 2017

Dear Minister,

**RE: Volkswagen AG diesel noncompliance with CEPA**

This is an application for investigation pursuant to s. 17 of the *Canadian Environmental Protection Act* (CEPA).<sup>1</sup>

As evidenced in a January 11, 2017 press release of the U.S. Department of Justice<sup>2</sup> and the Plea Agreement before the US District Court<sup>3</sup>, from 2006 onward Volkswagen AG (hereinafter “VW”) designed and built diesel cars under the Volkswagen, Audi and Porsche marks equipped with a secret software “defeat device” designed to cheat on emissions tests. VW was prosecuted for several acts related to this fraudulent deception, and pleaded guilty. As the US Department of Justice summarized in the press release dated January 11, 2017:

Volkswagen AG (VW) has agreed to plead guilty to three criminal felony counts and pay a \$2.8 billion criminal penalty as a result of the company’s long-running scheme to sell approximately 590,000 diesel vehicles in the U.S. by using a defeat device to cheat on emissions tests mandated by the Environmental Protection Agency (EPA) and the California Air Resources Board (CARB), and lying and obstructing justice to further the scheme, the Justice Department announced today.

[ ... ]

VW is charged with and has agreed to plead guilty to participating in a conspiracy to defraud the United States and VW’s U.S. customers and to violate the Clean Air Act by lying and misleading the EPA and U.S. customers about whether certain VW, Audi and Porsche branded diesel vehicles complied with U.S. emissions standards, using cheating software to circumvent the U.S. testing process and

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<sup>1</sup> *Canadian Environmental Protection Act*, SC 1999, c 33 [CEPA].

<sup>2</sup> The United States Department of Justice, Press Release, 17-037 “Volkswagen AG Agrees to Plead Guilty and Pay \$4.3 Billion in Criminal and Civil Penalties; Six Volkswagen Executives and Employees are Indicted in Connection with Conspiracy to Cheat U.S. Emissions Tests” (11 January 2017), online: <<https://www.justice.gov/opa/pr/volkswagen-ag-agrees-plead-guilty-and-pay-43-billion-criminal-and-civil-penalties-six>> [Volkswagen Press Release].

<sup>3</sup> *United States of America v Volkswagen AG*, 2017 WL 1093308 (ED Mich) (Verdict, Agreement and Settlement), online: <<https://www.justice.gov/opa/press-release/file/924436/download>> [Plea Agreement, including Statement of Facts at Exhibit 2].

concealing material facts about its cheating from U.S. regulators. VW is also charged with obstruction of justice for destroying documents related to the scheme, and with a separate crime of importing these cars into the U.S. by means of false statements about the vehicles' compliance with emissions limits. Under the terms of the plea agreement, which must be accepted by the court, VW will plead guilty to all these crimes...

Canada is similarly affected by VW's fraud. A statement on the Government of Canada website dated September 22, 2015 reads that ECCC opened an investigation into VW's cheating shortly after the United States.<sup>4</sup> However, as of this writing, that investigation has not concluded, and ECCC says it is still "looking into the matter to determine the most appropriate course of action."<sup>5</sup> ECCC's slowness is both unimpressive and unacceptable, considering that in less time the American authorities not only concluded an investigation, but prosecuted VW, obtained guilty pleas, and extracted a \$2.8 billion criminal penalty (among other payments).<sup>6</sup>

I therefore require the Minister to conduct an investigation of the following allegations. In doing so, please take into account the sources cited herein, and especially the admissions that VW made when pleading guilty in the US District Court and which are contained in Exhibit 2 (the "Statement of Facts") attached to the Plea Agreement.

**It must be strongly emphasized that the Statement of Facts legally binds VW, including in Canada. Under the terms of its Plea Agreement VW agreed not to make any statement whatsoever that contradicts the Statement of Facts, including in litigation in Canada, and agreed that if it did so it could be prosecuted again in the US.<sup>7</sup>**

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<sup>4</sup> Environment Canada, Statement, "Government of Canada opens an investigation into Volkswagen's alleged use of defeat devices to circumvent emissions regulations (22 September 2015), online: <<https://www.canada.ca/en/news/archive/2015/09/government-canada-opens-investigation-into-volkswagen-alleged-use-defeat-devices-circumvent-emissions-regulations.html>>.

<sup>5</sup> David Bruser and Jesse McLean, "Volkswagen Canada resumes selling diesel cars at centre of emissions-testing scandal" *Toronto Star* (17 May 2017), online: <<https://www.thestar.com/news/canada/2017/05/17/volkswagen-canada-resumes-selling-diesel-cars-at-centre-of-emissions-testing-scandal.html>> [Toronto Star Volkswagen Story].

<sup>6</sup> Plea Agreement, *supra* note 3 at page 13.

<sup>7</sup> Page 31 of the Plea Agreement reads in part, "The Defendant [VW] expressly agrees that it shall not, through present or future attorneys, officers, directors, employees, agents or any other person authorized to speak for the Defendant make any public statement, in litigation or otherwise, contradicting the acceptance of responsibility by the Defendant set forth above, contradicting the fact that the Defendant has pled guilty to the charges set

Because of this, investigating and prosecuting VW in Canada can be made very simple. Anything contained in the Statement of Facts does not need to be reinvestigated *de novo* by ECCC, but is admissible evidence in a Canadian court (as an “admission against interest” that is exempt from the hearsay rule). ECCC can therefore piggyback on the already-completed US investigation.

The following sections set out several approaches that could lead to VW being prosecuted in Canada, with little or no additional investigatory effort on ECCC’s part.

## 1. VW UNLAWFULLY IMPORTED NONCOMPLIANT DIESEL CARS

VW has admitted in a press release dated April 21, 2017 that there are about 105,000 of cars with affected 2.0L diesel engines in Canada (plus an unknown number of cars with affected 3.0L diesel engines).<sup>8</sup> VW has admitted on several occasions (including at para. 32 *et seq* of the Statement of Facts) that it equipped these 2.0L and 3.0L diesel cars and engines with a “defeat device.” VW also admits that because of the defeat device, the “effectiveness of the vehicle’s emissions control systems was reduced substantially, causing the vehicle to emit substantially higher NOx [nitrogen oxides], sometimes 35 times higher than U.S. standards.”<sup>9</sup> Since Canadian vehicle emissions standards are aligned with those of the US, this admission applies equally in Canada.

Because VW does not manufacture cars in Canada, it stands to reason that VW must have imported these affected diesel cars and engines into Canada. I allege that such importation was criminal.

Section 154 of CEPA reads that “No person shall import any vehicle, engine or equipment of a prescribed class unless the requirements of paragraphs 153(1)(a), (b), (d) and (e) are met in respect of the vehicle, engine or equipment.”<sup>10</sup> In turn, s. 153(1)(a) requires that the vehicle, engine or equipment “[conform] to the standards prescribed ... at the time its

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forth in the Third Superseding Information, or contradicting the facts described in Exhibit 2 [the Statement of Facts]. Any such contradictory statement shall, subject to cure rights of the Defendant described below, constitute a breach of this Agreement, and the Defendant thereafter shall be subject to prosecution ... as set forth in Paragraph 9 of this Agreement.”

<sup>8</sup> Volkswagen Group Canada Inc., Press Release, “Courts approve consumer settlement in Canada for Volkswagen and Audi 2.0L TDI vehicles nationwide (21 April 2017), online: <<http://www.newswire.ca/news-releases/courts-approve-consumer-settlement-in-canada-for-volkswagen-and-audi-20l-tdi-vehicles-nationwide-620099603.html>>.

<sup>9</sup> Plea Agreement, *supra* note 3, at Exhibit 2 and para 34 thereof. [Statement of Facts].

<sup>10</sup> CEPA, *supra* note 1, s. 154.

main assembly or manufacture was completed.”<sup>11</sup> Among those standards is s. 11(1) of the *On Road Vehicle and Engine Emission Regulations*, which reads that “No vehicle or engine shall be equipped with a defeat device.”<sup>12</sup>

Since VW has admitted that its affected diesel cars and engines had a defeat device, it is inarguable that VW violated the above-cited provisions of law.

VW could argue that because its diesel cars were certified by the U.S. Environmental Protection Agency (“EPA”), VW could elect to comply with the EPA standards rather than the CEPA standards pursuant to s. 153(3) of CEPA and s. 19 of the *On Road Vehicle and Engine Emission Regulations*. While this is true, it does not absolve VW of wrongdoing, because the EPA’s standards prohibit defeat devices just as Canada’s standards do (see 40 CFR § 86.1809-10, entitled “Prohibition of defeat devices”).

Simply put, about 105,000 imported VW’s diesel cars and engines had a defeat device, which is noncompliant, whether under Canadian or American standards.

Thus, VW’s importation of the affected cars violated s. 154 of CEPA. Doing so constitutes an offence under s. 272(1)(a) of CEPA, punishable by summary conviction or indictment.

## 2. VW UNLAWFULLY APPLIED THE NATIONAL EMISSIONS MARK ON NONCOMPLIANT DIESEL CARS AND SOLD THOSE CARS

I allege that VW acted criminally when it applied the national emissions mark upon the affected diesel cars and sold them in Canada. Since this allegation covers much of the same ground as allegation #1, what is written there should be applied here again *mutatis mutandis*, save for the following:

Section 153(1)(a) of CEPA reads as follows:

No company shall apply a national emissions mark to any vehicle engine or equipment, [or] sell any vehicle, engine or equipment to which a national emissions mark has been applied ... unless ... the vehicle, engine or equipment conforms to the standards prescribed for vehicles, engines or equipment of its class at the time its main assembly or manufacture was completed.

Since all cars marketed in Canada must have a national emissions mark in order to be sold, it is a reasonable assumption that the 105,000 affected cars bore that mark. This gives rise to two different but related offences.

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<sup>11</sup> *Ibid*, s 153(1)(a).

<sup>12</sup> *On Road Vehicle and Engine Emission Regulations*, SOR/2003-2, s 11. [Regulations].

First, VW applied the national emissions mark to the affected cars, though they contained a defeat device. This is clearly a violation of the requirement not to “apply a national emissions mark to any vehicle” that does not conform to prescribed standards under CEPA s. 153(1)(a).

Second, VW sold those cars on a wholesale basis, presumably to local Canadian Volkswagen, Audi and Porsche dealers. This is also a violation of the requirement not to “sell any vehicle” that does not conform to prescribed standards under CEPA s. 153(1)(a).

Thus VW broke s. 153(1)(a) of CEPA. Doing so is an offence under CEPA s. 272(1)(a), punishable by summary conviction or indictment.

### 3. VW KNOWINGLY PROVIDED FALSE OR MISLEADING INFORMATION

Like all manufacturers, VW is required by CEPA s. 153(1)(b) to submit evidence of conformity to the Minister before importing, selling, or applying a national emissions mark to a car. The required evidence of conformity is set out in the *Regulations* (particularly ss. 35-36) for cars that do rely or do not rely on an EPA certificate, respectively.

As part of its Plea Agreement in the United States, VW admitted in the Statement of Facts that it provided false information to EPA so as to obtain certification of its cars.<sup>13</sup> Indeed, that admission is the heart of VW’s guilty plea.

If, as seems likely, VW relied on that fraudulent EPA certification and other material submitted to EPA as evidence of conformity in Canada pursuant to s. 35(1)(c) of the *Regulations*—not a difficult matter to confirm or deny—that gives rise to a mirror criminal offence in Canada. Under that section, VW must provide an exact “copy of the records [it] submitted to the EPA in support of the application for the EPA certificate” to the Minister.

Any false information given to EPA therefore would have been given to the Minister too, triggering a criminal offence under CEPA ss. 273(1)(k) and 273(1)(l), which prohibit providing false or misleading information or documents to the Minister.

I emphasize that this would be a sure-fire prosecution. VW has pleaded guilty to providing false information to EPA, and the *Regulations* makes it mandatory that VW give a copy of the same information given EPA be given to the Minister as evidence of conformity. If VW gave that copy, it broke the law in Canada by misleading the Minister. Contrariwise if VW did not give that copy, it broke the law in Canada by not submitting evidence of conformity. There is no third way.

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<sup>13</sup> Statement of Facts. *supra* note 3, at paras. 41-42.

#### 4. VW AND ITS DEALERS RESUMED SALES OF 2015 MODEL YEAR CARS

I allege that VW and its local dealers acted criminally when in and around May 2017, they conspired to sell the affected 2015 model year diesel cars to retail customers in Canada, despite these cars being noncompliant.

According to a story in the *Toronto Star*, although the 2015 model year diesel cars are noncompliant (for the reasons set out in the previous sections), VW and its local dealers enacted a scheme to put these cars back on the Canadian market. To do this, VW designed and its local dealers installed only a half-fix for the cars, by equipping them with a software upgrade but not the hardware needed to make the cars fully compliant. As the *Toronto Star* reported:

Volkswagen has said the 2015 models for sale in the U.S. and Canada have been retrofitted with a software upgrade, and will receive a hardware fix when parts are available next year.<sup>14</sup>

Obviously, regulatory compliance is not achieved when a car is sold with only part of the measures needed to make it truly compliant. Knowingly selling such a car is, on the contrary, an intentional violation.

Both VW and its local dealers appear to be liable for conspiring in this violation. As already explained, s. 153(1)(a) of CEPA prohibits a company from selling a noncompliant vehicle. A “company” is defined in s. 149 to mean a person who is “engaged in the business of manufacturing vehicles”. In turn, “manufacturing” is expansively defined in s. 149 to include “...any process of assembling or altering any vehicle, engine or equipment before its sale to the first retail purchaser.”

Under this definition, both VW and its local dealers were engaged in “manufacturing” the 2015 model year diesel cars. VW did so by building the cars from nuts and bolts around 2015, while VW’s local dealers did so by altering the cars with a software upgrade just before selling them in 2017. Under CEPA s. 153(1)(a), both would therefore be considered a company that sold cars illegally: VW by wholesaling the cars to its local dealers, and the local dealers by retailing the cars to ordinary Canadians.

An investigation is needed to establish whether VW told its local dealers sometime in early 2017 that they could sell their mothballed 2015 model year diesel cars after applying the software upgrade. The US Government authorized the resumption of sales after the software update as part of a consent decree that it signed with VW in October

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<sup>14</sup> Toronto Star Volkswagen Story, *supra* note 5.

2016—but that consent decree did not bind ECCC or alter legalities in Canada.<sup>15</sup> VW and its local dealers probably assumed, erroneously, that because the cars could be sold in the US, they could be sold in Canada too.

If indeed VW and its local dealers acted together to “manufacture” and sell the mothballed 2015 model year diesel cars, that is not just criminal under CEPA, but a further offence of conspiracy under ss. 465(3) and 465(4) of the *Criminal Code*.

The decision in 2017 to resume the sale of the 2015 model year diesel cars should be prosecuted with the full weight of the law. It was common knowledge, two years after VW’s defeat device scandal broke, that these cars were noncompliant, and yet VW and its local dealers chose to resume sales and dump these vehicles on the Canadian market anyway with an incomplete, software-only fix. Both VW and its local dealers chose not to wait the additional year it would take to develop and install a complete fix, including the hardware. The decision of VW and its local dealers to turn a quick profit, rather than comply, should be prosecuted as an indictable offence at the maximum penalty, because it was done premeditatedly after the scandal broke.

## 5. ENVIRONMENTAL AND HEALTH CONSIDERATIONS

There is no doubt that VW’s actions had a serious impact on both the environment and human health. As VW admitted in the Plea Agreement, the defeat device operated such that affected cars “emit substantially higher NO<sub>x</sub>, sometimes 35 times higher than U.S. standards”.<sup>16</sup> Canadian standards likewise would be exceeded.

NO<sub>x</sub> is an indisputably harmful environmental pollutant. ECCC itself writes:

Nitrogen oxides include the gases nitrogen oxide (NO) and nitrogen dioxide (NO<sub>2</sub>). NO<sub>x</sub> is formed primarily from the liberation of nitrogen contained in fuel and nitrogen contained in combustion air during combustion processes. NO emitted during combustion quickly oxidizes to NO<sub>2</sub> in the atmosphere. NO<sub>2</sub> dissolves in water vapour in the air to form acids, and interacts with other gases and particles in the air to form particles known as nitrates and other products that may be harmful to people and their environment.

Both NO<sub>2</sub> in its untransformed state, and the acid and nitrate transformation products of NO<sub>2</sub>, can have adverse effects on human health or the environment. NO<sub>2</sub> itself can cause adverse effects on respiratory systems of humans and animals, and damage to vegetation. When dissolved by water vapour, the acids

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<sup>15</sup> Letter from EPA and California Air Resources Board to VW, dated 6 January 2017, available at <https://www.epa.gov/sites/production/files/2017-01/documents/vw-2l-gen-3-ems-modf-appvl-issued-2017-01-06-exec.pdf>.

<sup>16</sup> Statement of Facts, *supra* note 3, at para 34.

formed can have adverse effects on the respiratory systems of humans and animals. Nitric acid (HNO<sub>3</sub>) can cause damage to vegetation, buildings and materials, and contribute to acidification of aquatic and terrestrial ecosystems. When NO<sub>2</sub> is transformed into nitrate particles that are subsequently deposited on aquatic and terrestrial ecosystems, acidification can result. When nitrate is combined with other compounds in the atmosphere, such as ammonia, it becomes an important contributor to the secondary formation of respirable particulate matter (PM<sub>2.5</sub>). NO<sub>2</sub> is one of the two primary contributing pollutants, along with volatile organic compounds (VOCs), to the formation of ground-level ozone. Both ozone and PM<sub>2.5</sub> is known to have harmful effects on human health and the environment.<sup>17</sup>

Scientists have also studied the effect of VW's defeat device specifically on human health. A peer reviewed study by authors at the Massachusetts Institute of Technology demonstrates that just in Germany, VW's deception has caused about 1,200 premature deaths and €4.1 billion in health costs.<sup>18</sup>

While there is no such study yet done for Canada, it stands to reason that VW's actions would cause deaths and health costs here too.

## 6. RECOMMENDED DISPOSITION

This is an appropriate case for ECCC to invoke s. 20 of CEPA and to coordinate with the Attorney General of Canada for prosecution, and it is explicitly requested that the Minister do so.

VW's decision to place a defeat device into its cars was not accidental or negligent, but done with full criminal intent or *mens rea*. As VW admits in paras. 32-38 of the Statement of Facts, VW managers directed employees to create cars with the defeat device, and did so over the repeated warnings of employees who drew attention to that illegality. Recall that this has been admitted by VW in a guilty plea; there is no dispute about it.

Since VW's crimes were intentional, and part of a fraud that went on for many years, there is no basis to argue that Canada, unlike the US, should not prosecute. Indeed, VW likely would plead guilty, just as it did in the US.

It is very important to understand that CEPA does not criminalize VW's single "big" decision to engineer a defeat device into its diesel cars. Instead CEPA criminalizes the

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<sup>17</sup> Environment and Climate Change Canada, "Nitrogen Oxides - NO<sub>x</sub>" (24 April, 2013). Available at <https://www.ec.gc.ca/air/default.asp?lang=En&n=489FEE7D-1>

<sup>18</sup> Chossière GP, Malina R, Ashok A, et al. Public health impacts of excess NO<sub>x</sub> emissions from Volkswagen diesel passenger vehicles in Germany. *Environmental Research Letters* 2017;12:034014. Available at <https://doi.org/10.1088/1748-9326/aa5987>

105,000 “small” car-by-car decisions it made, namely to import, apply national emissions marks upon, and sell those noncompliant cars. As such, each act gives rise to a unique criminal count, 105,000 of them in all (or potentially three times that number if the importation, emissions mark, and sales were all charged for each car).

Going with the figure of 105,000, and applying the minimum fines under s. 272(3) of CEPA for all but the first count (\$1,000,000 for an indictable offence, and \$100,000 for a summary offence), the penalty would work out to at least \$10.5 billion if the Crown proceeds by summary conviction, or at least \$105 billion if the Crown proceeds by indictment. Absent a settlement these minimum fines absolutely must be imposed, because that is what Parliament intended for the very severe s. 273 offences.<sup>19</sup>

VW might protest that a penalty at the high end of this range could force it into insolvency. Perhaps so, but that is a business consideration and immaterial to ECCC’s enforcement mandate under CEPA. It was incumbent on VW, in its due diligence, to consider the legal and business consequences before engineering an illegal defeat device into its cars, and if it did not, it alone bears responsibility. Certainly, it is not incumbent on ECCC to shy away from prosecution, just because Parliament set minimum penalties as it did.

On the contrary, Parliament’s stipulation of minimum penalties is, no doubt, very helpful in bringing VW to the negotiating table. If Canada were to charge VW with 105,000 indictable counts, VW would no doubt prefer a plea bargain in which it accepts guilt for a small number of offences (say 1000, for argument’s sake), rather than run the risk of bankrupting the company if it is convicted on the full number. This is a powerful negotiating stick that the Government of Canada possesses, and that should be used to extract a multibillion-dollar criminal penalty as the U.S. did.

Any amounts that ECCC obtains under the settlement could be spent appropriately on future air pollution mitigation or clean technology efforts in Canada. In the US, the EPA reached an approved settlement on October 25, 2016 (in a different settlement cited in this letter), in which VW agreed to pay EPA another \$2 billion USD for future investment into zero emissions vehicles (ZEVs).<sup>20</sup>

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<sup>19</sup> Parliament wrote s. 273 of CEPA to allow the Court to reduce some minimum fines if they “cause undue hardship”, but very importantly, Parliament refused to allow any such reduction for the s. 273(1) offences because of their extreme seriousness. Thus these penalties must be applied unless VW agrees to a settlement.

<sup>20</sup> *In Re: Volkswagen “Clean Diesel: Marketing, Sales Practices, and Products Liability Litigation*, Partial Consent Decree (28 June 2016) (US Div Ct NCal 2016) available at <https://www.epa.gov/sites/production/files/2016-06/documents/vwpartialsettlement-cd.pdf>; see also Volkswagen Group of America, *National ZEV Investment Plan: Cycle 1*, available at <https://www.epa.gov/sites/production/files/2017-04/documents/nationalzevinvestmentplan.pdf>.

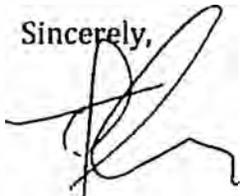
It is extremely disappointing that ECCC has not followed the EPA's example in Canada. While the EPA has succeeded to both penalize VW and create investment in clean technology for tomorrow, ECCC has not, and is choosing instead to let VW go unpunished. ECCC's unreasonable inaction means is that while American people are benefitting from healthier air and the US auto industry is benefitting from investment in ZEV technology and infrastructure, Canadian people and the Canadian auto industry are left without those benefits—which is appalling.

It would be a gross abdication of the Minister's duty if Canada were not to investigate and prosecute VW as the US has done, and extract from it a very substantial penalty, the proceeds of which could be used for the good of Canada's people, environment and industry.

Pursuant to CEPA s. 17(2), I request this investigation in my personal capacity and declare that: (i) I am a resident of Canada over 18 years of age; (ii) I believe the evidence and allegations as herein described to be correct, and; (iii) I have furnished my true name and address.

Please update me every 90 days on your investigation, as required by CEPA s. 19.

Sincerely,

A handwritten signature in black ink, appearing to read 'Tim Gray', written over a horizontal line.

Tim Gray  
Executive Director, Environmental Defence  
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Toronto, Ontario  
M5V 2K6

*ENCL: Book of Authorities*