

APPENDIX D-3
Certification for Beneficiary Status
Under Environmental Mitigation Trust Agreement

APPENDIX D-3**CERTIFICATION FOR BENEFICIARY STATUS
UNDER ENVIRONMENTAL MITIGATION TRUST AGREEMENT**1. Identity of Lead Agency

The State of New Mexico (“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 New Mexico Environment Department (“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:	Rita Bates, Planning Section Chief, Air Quality Bureau
Address:	525 Camino de los Marquez, Suite 1, Santa Fe, NM 87505
Phone:	505-476-4304
Fax:	505-476-4375
Email:	rita.bates@state.nm.us

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:

Signature: 

Name: Susana Martinez
Title: Governor, State of New Mexico

Date: 11-21-2017

Location: Santa Fe, NM

FOR THE SECRETARY OF ENVIRONMENT:

Signature: Butch Tongate

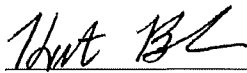
Name: Butch Tongate

Title: Cabinet Secretary, New Mexico Environment Department

Date: 9.20.17

Location: Santa Fe, NM

FOR THE ATTORNEY GENERAL:

Signature: 

Name: Hector Balderas
Title: Attorney General, State of New Mexico
Date: November 28, 2017
Location: Santa Fe, New Mexico

ATTACHMENTS REQUIRED BY PARAGRAPH SEVEN REGARDING PUBLICALLY AVAILABLE INFORMATION

Pursuant to Appendix D-3, paragraph seven, the following information is provided regarding publicly available information, public input for New Mexico's Beneficiary Mitigation Plan, and applicable laws and regulations governing the publication of confidential business information and personally identifiable information.

- i. Publicly available information on projects, project selection criteria, summary financial information, and the Request for Proposal processes will be made available on the New Mexico Environment Department website at <https://www.env.nm.gov/vw-settlement/>. Additional detailed financial information will be available to the public through the New Mexico Inspection of Public Records Act (IPRA) NMSA 1978, § 14-2-1, *et seq.* (2011).
- ii. The beneficiary mitigation plan will be drafted using procedures that insure public input. The New Mexico Environment Department held a series of public informational meetings in August 2017 concerning the beneficiary mitigation plan in six locations across New Mexico. Public input from those meetings will be evaluated and used as we develop our beneficiary mitigation plan. The draft beneficiary mitigation plan will be released for public comment for at least 30 days. Following evaluation of the public comments and revisions, as needed, to the beneficiary mitigation plan, the plan will be submitted to the trustee not later than 30 days prior to submitting our first funding request.
- iii. In general, New Mexico's applicable laws and regulations governing the publication of confidential business information and personally identifiable information are typical of most other states, and should not present an impediment to our certification for beneficiary status. The following sections describe each applicable area of law or regulation.

Inspection of Public Records Act (IPRA)

Under the Inspection of Public Records Act every person has the right to inspect public records, with exceptions. See New Mexico Statutes Annotated (NMSA) 1978, §§ 14-2-1 through 14-2-12 (2011). The exceptions pertaining to confidential business information and personally identifiable information include NMSA, 1978 § 14-2-1(A)(6), which protects trade secrets; and NMSA 1978, § 14-2-1(B), which protects personally identifiable information. Other terms that relate to the protection of confidential business information include "proprietary" and "business information." See NMSA 1978, § 6-25-27 and NMSA 1978, § 62-16A-16.

The New Mexico Environment Department may redact any personally identifying information on forms it receives, and furthermore, neither the Department nor another entity representing the Department shall publish any forms containing un-redacted personally identifying information. NMSA 1978, § 14-2-1(B).

N.M. Stat. Ann. § 14-2-1; Right to inspect public records; exceptions.

A. Every person has a right to inspect public records of this state except:

- (1) records pertaining to physical or mental examinations and medical treatment of persons confined to an institution;

- (2) letters of reference concerning employment, licensing or permits;
- (3) letters or memoranda that are matters of opinion in personnel files or students' cumulative files;
- (4) law enforcement records that reveal confidential sources, methods, information or individuals accused but not charged with a crime. Law enforcement records include evidence in any form received or compiled in connection with a criminal investigation or prosecution by a law enforcement or prosecuting agency, including inactive matters or closed investigations to the extent that they contain the information listed in this paragraph;
- (5) as provided by the Confidential Materials Act [14-3A-1 NMSA 1978];
- (6) trade secrets, attorney-client privileged information and long-range or strategic business plans of public hospitals discussed in a properly closed meeting;
- (7) tactical response plans or procedures prepared for or by the state or a political subdivision of the state, the publication of which could reveal specific vulnerabilities, risk assessments or tactical emergency security procedures that could be used to facilitate the planning or execution of a terrorist attack; and
- (8) as otherwise provided by law.

B. Protected personal identifier information contained in public records may be redacted by a public body before inspection or copying of a record. The presence of protected personal identifier information on a record does not exempt the record from inspection. Un-redacted records that contain protected personal identifier information shall not be made available on publicly accessible web sites operated by or managed on behalf of a public body (emphasis added).

Trade Secrets

New Mexico state agencies are prohibited from revealing trade secrets. Under the Uniform Trade Secrets Act, NMSA 1978, § 57-3A-2 (1989), a trade secret is defined as information, including a formula, pattern, compilation, program, device, method, technique or process, that:

1. Derives independent economic value, actual or potential, from not being generally known to and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use; and
2. Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Companies gain a property right in their trade secret if they take reasonable steps to maintain the confidentiality of certain business information. If the business information is “sufficiently valuable . . . to afford an actual or potential economic advantage over others”, then it qualifies as a trade secret. *Restatement (Third) of Unfair Competition* § 39. Examples of trade secrets include customer lists, methods of production, marketing strategies, pricing information, and chemical formulas. See Brian T. Yeh, *Intellectual Property Law Dictionary*, 2016.

Confidential Business Information

Confidential business information can be identified and protected through various strategies, but the most common ones fall into two categories. The first category requires the business entity to inform and demonstrate to the New Mexico state agency that specific information should remain confidential. Typically, this information must meet the requirements of being a trade secret. See, for example, NMSA 1978, § 74-1-7.1(B) (the “Green Zia” program). The state agency then determines whether the organization’s request meets the threshold of a trade secret and issues a determination of confidentiality along with an order of confidentiality.

The second category of protection afforded to confidential business information used by state agencies is created through specific regulations or program statutes. For example, under the Statewide Economic Finance Act, NMSA 1978, § 6-25-27, “proprietary technical” or “business information” and other information related to a business’ relocation or expansion is explicitly protected from inspection through the Inspection of Public Records Act (NMSA 1978, §14-2-4). Proprietary confidential information, as defined in NMSA § 62-16A-16, the New Mexico Renewable Energy Transmission Authority Act, includes power purchase agreements, costs of production, costs of transmission, transmission service agreements, credit reviews, detailed power models, and financing statements. Under 20.2.1.115 NMAC, confidential business information submitted to the New Mexico Environment Department as part of a permit application must be protected from disclosure.

Personally Identifiable Information

New Mexico state agencies are required to protect personally identifiable information and cannot publish personally identifiable information on publicly accessible websites. NMSA 1978, § 14-2-1(B). Personally identifiable information means “information that identifies an individual, including an individual’s photograph, social security number, driver identification number, name, address other than zip code, telephone number and medical or disability information. Id. Under NMSA 1978, 14-2-1(B) all personal information must be redacted from files before they are published on publicly available websites. Moreover, agencies must act to protect personal information when sharing any files that contain personal information. Id.

Conclusion

New Mexico’s state laws governing the publication of confidential business information and personally identifiable information are typical of most other states and should not present an impediment to New Mexico’s certification for beneficiary status. Most of the information contained in funding requests will typically not be subject to these statutes, but Environment Department staff will need to redact all legally protected information before funding applications are put up on our public-facing websites, and when responding to requests pursuant to our Inspection of Public Records Act.