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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

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14 IN RE: VOLKSWAGEN "CLEAN DIESEL"
15 MARKETING, SALES PRACTICES, AND
16 PRODUCTS LIABILITY LITIGATION

No. 15-MD-2672 CRB

**NOTICE OF FILING OF
CERTIFICATION FOR
BENEFICIARY STATUS UNDER
THE ENVIRONMENTAL
MITIGATION TRUST AGREEMENT
FOR THE STATE OF WASHINGTON**

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Judge Charles R. Breyer

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Please see attached.

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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 Washington (“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 Washington State Department of Ecology (“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: | Maia D. Bellon, Director |
| Address: | 300 Desmond Drive, PO Box 47600, Olympia, WA 98504-7600 |
| Phone: | (360) 407-7001 |
| Fax: | (360) 407-6989 |
| Email: | Maia.Bellon@ecy.wa.gov |

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.

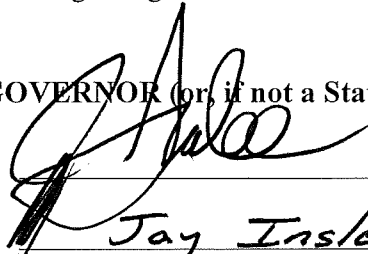
(c) May identify Subject Vehicles as having been modified, or not modified, in accordance with the Approved Emissions Modification or the Emissions Compliant Recall on the basis of VIN-specific information provided to the Beneficiary by the Defendants.

(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).

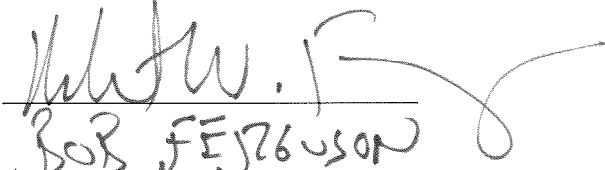
10. Reliance on Certification

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: Jay Inslee
 Title: Governor
 Date: Nov 3, 2017
 Location: Olympia, WA

[FOR OTHER REQUIRED SIGNATORIES]:

Signature: 
 Name: BOB FERGUSON
 Title: A.G.
 Date: 11-14-17
 Location: Seattle

[FOR OTHER REQUIRED SIGNATORIES]:

Signature: _____

Name: _____

Title: _____

Date: _____

Location: _____

ATTACHMENT A
to Appendix D-3

***Certification for Beneficiary Status
Under Environmental Mitigation Trust Agreement***

**RE: SUPPLEMENTAL INFORMATION REQUIRED BY PARAGRAPH 7 OF
APPENDIX D-3 CONCERNING PUBLICLY AVAILABLE INFORMATION**

In response to paragraph # 7. Publicly Available Information, Washington hereby provides the following:

7. (i) Procedures by which documents and records submitted in support of funding requests and supporting expenditures of trust funds may be accessed which shall be designed to support access and limit burden for the general public;

Ecology will make documents and records submitted in support of funding requests and documents and records supporting expenditures of trust funds available to the public through an application, system, or library on the agency's website at ecology.wa.gov. Easy-to-use functionality will be incorporated as much as possible to ensure unburdened, public access to project documentation and other pertinent mitigation fund information.

7. (ii) Procedures by which public input will be solicited and considered for the Beneficiary Mitigation Plan required under Paragraph 4.1 of the Trust Agreement, the ;

PUBLIC INPUT STRATEGY

Ecology is working with interested stakeholders and the public to seek and consider public input on the Beneficiary Mitigation Plan. Our goal is to promote a transparent process to keep people informed and provide multiple opportunities for engagement at key decision points.

We will provide an opportunity for the public to comment on the proposed Beneficiary Mitigation Plan and we will consider public comments as we finalize the plan. We will use public input from a variety of stakeholders to help us determine the types of projects that best serve communities' needs. In addition to the general public, organizational representatives with potential interests include:

- Business and trucking companies
- Utilities
- Environmental organizations
- Environmental justice groups
- State and local governments
- Local air agencies
- Tribes
- Port authorities
- Transit and transportation agencies

Ecology will seek input from the public through three levels of public involvement: we will inform the public, consult with the public, and involve the public. Below we describe these strategies for seeking input, as well as criteria we will consider in evaluating input.

INFORM THE PUBLIC

- Use the Ecology website as an information hub.
- Provide educational opportunities through online webinars, videos, blogs, and speaking engagements.
- Provide information in multiple languages in addition to English.
- Use an email listserv to inform and notify.
- Provide legislative briefings to keep state leaders informed.
- Share information through social media channels, e.g. Twitter and Facebook.
- Broadcast public service announcements to encourage public participation to comment on the state's draft Beneficiary Mitigation Plan.

CONSULT WITH THE PUBLIC

We have already begun developing opportunities for the public to provide input on key decisions. We will continue to ask the public for their opinions and fully consider the input we receive:

- Encourage early, active and ongoing participation.
- Engage cross-agency coordination to expand reach.
- Deploy multiple surveys to gather input on decisions around:
 - Plan goal, principles, and priorities (completed March 2017).
 - Eligible projects Washington should invest in (completed June 2017).
- Solicit formal public comments on the state's draft Beneficiary Mitigation Plan mitigation plan.

INVOLVE THE PUBLIC

Ecology has already involved the public and invited stakeholder groups to engage in the development of Washington's Beneficiary Mitigation Plan. Ecology will continue to provide opportunities for public input as decision-making progresses through:

- Surveys.
- Round table discussions.
- State and local cross-agency coordination.
- Sounding board sessions to gain feedback as the draft Beneficiary Mitigation Plan is developed.

CONSIDERING INPUT

In considering the input we receive, Washington will first determine whether comments are consistent with the Environmental Mitigation Trust Agreement¹, including but not limited to the following key elements:

- Intent of the Environmental Mitigation Trust, "...to fully mitigate the total, lifetime excess NOx emissions..." from the subject vehicles.
- Eligible mitigation actions and mitigation action expenditures.

¹ Found in Appendix D to the consent decree as filed by the parties on October 2, 2017 in *In re: Volkswagen "Clean Diesel" Marketing, Sales Practices and Products Liability Litigation, Case No. 15-MD-2672 (CRB) (JSC) (N.D.Cal.)*

- Beneficiary Mitigation Plan requirements.
- Required certifications.

For input consistent with the Environmental Mitigation Trust Agreement, Washington will consider, qualitatively, the degree to which the input aligns with and supports Washington's Beneficiary Mitigation Plan.

Washington will also consider the degree to which the input supports and furthers progress toward the goals of the Washington State Legislature, Gov. Jay Inslee's Results Washington performance management system and Washington Department of Ecology's strategic plan:

- The Washington State Legislature's limits for greenhouse gas emissions (Chapter 70.235 RCW). The limits require Washington to reduce greenhouse gas emissions to 1990 levels by 2020, 25 percent below 1990 levels by 2035, and 50 percent below 1990 levels by 2050.
- Governor Jay Inslee's Results Washington Goal(s) regarding Clean Transportation and Healthy Air. The Clean Transportation goal is to reduce transportation greenhouse gas emissions by getting 50,000 electric vehicles on the road by 2020, accelerating fleet turnover to cleaner engines, and increasing the overall efficiency of the transportation system. The Healthy Air goal is for all of the state to continue to have healthful air that meets federal air quality standards.
- Washington Department of Ecology, Air Quality Program Strategic Plan (esp. re: transportation). The plan includes strategies to prevent unhealthful air and violations of air quality standards, reduce health and environmental threats from motor vehicle emissions, and advance the public's understanding of their role in reducing motor vehicle emissions.

7. (iii) 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.

Like all records provided to state agencies in Washington, records provided to Ecology in connection with the Volkswagen Mitigation Trust will be subject to the Washington state Public Records Act, codified at Chapter 42.56 RCW. The Public Records Act requires an agency to provide all requested documents responsive to a public records request, unless a specific exemption applies. RCW 42.56.070(1). Two exemptions apply to confidential business information provided to Ecology in connection with the Volkswagen Mitigation Trust, one in Ecology's enabling statute (RCW 43.21A.160) and one in the state Clean Air Act (RCW 70.94.205). Exemptions in the Public Records Act itself (RCW 42.56.210 and RCW 42.56.230) govern the disclosure of personally identifiable information.

1. Confidential Business Information

Under both RCW 43.21A.160¹ and RCW 70.94.205², Ecology may determine that information that "relate[s] to the processes of production unique to the owner or operator thereof, or may affect adversely the competitive position of such owner or operator if released to the public or to a competitor" should be held confidential. The Clean Air Act provision adds the caveat that ambient air quality data and emission data may not be kept confidential. RCW 70.94.205.

Ecology has adopted procedures that must be followed when an owner or operator seeks to have information treated as confidential business information. See Ecology Administrative Procedure 20-13-02, attached. Under these procedures, the owner or operator must submit a request identifying the information for which confidentiality is requested, along with an explanation of how the information meets the requirements for being held confidential. Ecology staff evaluate the request and make a recommendation to the Ecology Director, who makes the final determination on confidentiality.

Owners or operators may use this procedure to request that qualifying information provided to Ecology as part of the Volkswagen Mitigation Trust process be held confidential.

2. Personally Identifiable Information

Two provisions in Washington's Public Records Act directly address personally identifiable information. The first, RCW 42.56.230³, provides that certain taxpayer information is exempt from disclosure (RCW 42.56.230(4)) as well as "[c]redit card numbers, debit card numbers, electronic check numbers, card expiration dates, or bank or other financial information ... including social security numbers, except when disclosure is expressly required by or governed by other law." RCW 42.56.230(5). The second, RCW 42.56.210⁴, provides that the exemptions for personal information are inapplicable "to the extent the information ... can be deleted from the specific records sought." RCW 42.56.210(1). RCW 42.56.210 goes on to explain that, notwithstanding the exemptions, records may be disclosed if the superior court determines that "exemption of such records is clearly unnecessary to protect any individual's right of privacy or any vital governmental function." RCW 42.56.210(2).

Under these laws, Ecology will exempt from disclosure all of the above-listed personally identifiable information provided to Ecology as part of the Volkswagen Mitigation Trust process, unless a court determines otherwise.

¹ RCW 43.21A.160 provides: "Whenever any records or other information furnished under the authority of this chapter to the director, the department, or any division of the department, relate to the processes of production unique to the owner or operator thereof, or may affect adversely the competitive position of such owner or operator if released to the public or to a competitor, the owner or operator of such processes or production may so certify, and request that such information or records be made available only for the confidential use of the director, the department, or the appropriate division of the department. The director shall give consideration to the request, and if such action would not be detrimental to the public interest and is otherwise within accord with the policies and purposes of this chapter, may grant the same."

² RCW 70.94.205 provides: "Whenever any records or other information, other than ambient air quality data or emission data, furnished to or obtained by [Ecology] relate to processes or production unique to the owner or operator, or is likely to affect adversely the competitive position of such owner or operator if released to the public or to a competitor, and the owner or operator of such processes or production so certifies, such records or information shall be only for the confidential use of [Ecology]."

³ The relevant portions of RCW 42.56.230 provide: "The following personal information is exempt from public inspection and copying under this chapter: (4) Information required of any taxpayer in connection with the assessment or collection of any tax if disclosure of the information to other persons would (a) be prohibited to such persons under [certain state and local laws] or (b) violate the taxpayer's right to privacy or result in unfair competitive disadvantage to the taxpayer. (5) Credit card numbers, debit card numbers, electronic check numbers, card expiration dates, or bank or other financial information as defined in RCW 9.36.005 including social security numbers, except when disclosure is expressly required by or governed by other law."

⁴ RCW 42.56.210 provides: "(1) Except for information described in RCW 42.56.230(3)(a) and confidential income data exempted from public inspection pursuant to RCW 84.40.020, the exemptions in this chapter are inapplicable to the extent that information, the disclosure of which would violate personal privacy or vital governmental interests, can be deleted from the specific records sought. No exemption may be construed to permit the nondisclosure of statistical information not descriptive of any readily identifiable person or persons. (2) Inspection or copying of any specific records exempt under the provisions of this chapter may be permitted if the superior court in the county in which the record is maintained finds, after a hearing with notice thereof to every person in interest and the agency, that the exemption of such records is clearly unnecessary to protect any individual's right of privacy or any vital governmental function."



Chapter 20: Public Information, Records, & Publications

Administrative Procedure 20-13-02

Resource Contact: Agency Records Officer

Established: November 30, 2011

References: [RCW 43.21A.160](#)
[Policy 20-12](#)
[Policy 20-13](#)
[Procedure 20-13-01](#)
[Task 20-13-01A](#)

Revised:

Processing Requests to Designate Records Confidential Under RCW 43.21A.160

Some people submitting information to Ecology request the agency treat all or some of that information as confidential proprietary information. To comply with RCW 43.21A.160, this procedure must be followed whenever Ecology receives a request that records containing proprietary information be kept confidential, *unless the information is already classified as confidential per an existing federal law, another state law or rule, or court order or ruling (these are typically handled through program-specific processes)*. In those cases, the process below does not apply (see step 3C below).

Action By:

Action:

Person who sent information to Ecology

1. Sends request to Ecology for the information sent to us be kept confidential.

Request Receiver (person initially contacted)

2. Ensures the request and any accompanying documents get to the appropriate Program or Regional Public Disclosure Coordinator or the agency Public Disclosure Officer.

Public Disclosure Coordinator/Officer

3. Reviews request and does one of the following:
- a. If the information provided by the requestor is not complete or sufficient for making a determination about certifying the records as confidential, go to step 4.
 - b. If the information received from the requestor is complete, and sufficient for making a determination about certifying the records as confidential, go to step 7.
 - c. Makes the initial determination that the information may already be classified as confidential due to another rule, law (state or federal) court mandate, etc. Go to step 8.
4. Within three working days of receiving the request, sends a letter (use [Attachment A](#)) to the person requesting confidentiality, asking for information that shows how the records relate to processes of production unique to the owner or operator or how releasing the records to the public or a competitor may adversely affect the owner or operator's competitive position.

NOTE: The requestor has 14 days to respond to the letter.

Procedure 20-13-02: Processing Requests to Designate Records Confidential Under RCW 43.21A.160

5. During the 14-day time period the requestor has for response, keeps the records secure, including:
 - Restricting access to appropriate Ecology employees and the Attorney General's Office and not be releasing them to the public. **NOTE:** If a public records request comes in for any of the subject records while the confidentiality request is pending, contacts the agency Public Records Officer.
 - Ensuring the records are secured every night.
 - Keeping a log listing each person who accesses the records.
- 6a. Receives response from requestor within 14 days. Go to step 7.
- 6b. Does not receive response from requestor within 14 days. Go to step 16.
7. Notifies the section head in the program where the records are being kept (and AAG if necessary) to determine if Ecology agrees that the records fit the criteria for confidentiality given in RCW 43.21A.160, and sends all pertinent information.
8. Sends all pertinent information to section head to confirm whether the information is already classified as confidential due to another rule, law (state or federal) court mandate, etc.
9. **Section Head where records are being kept** Receives information from the Program Public Disclosure Coordinator and does one of the following:
 - a. Determines the information is already classified as confidential due to another rule, law (state or federal) or court order or ruling. Go to step 12.
 - b. Determines the information fits the criteria for confidentiality per RCW 43.21A.160. Go to step 10.
 - c. Determines the information does **not** fit the criteria for confidentiality per RCW 43.21A.160. Go to step 11.
10. Sends a memorandum to the Director, through his or her program manager (use Attachment B) to recommend the request for confidentiality be granted. Go to step 13.
11. Sends a memorandum to the Director, through his or her program manager (use Attachment C) to recommend the request for confidentiality **not** be granted. Go to step 13.
12. Sends a letter to the requestor (use Attachment F) explaining how the information is already be classified as confidential due to another rule, law (state or federal) court mandate, etc. Go to step 17.

Procedure 20-13-02: Processing Requests to Designate Records Confidential Under RCW 43.21A.160

Ecology Director

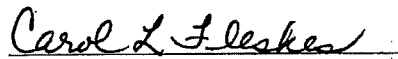
13. Examines the request for confidential records and program recommendation and does one of the following:
 - a. Determines the request to keep the records confidential would not be detrimental to the public interest and is consistent with the policies and purposes of RCW 43.21A.160, and notifies Public Disclosure Coordinator/Officer of this decision. Go to step 14.
 - b. Determines that keeping the information confidential would be detrimental to the public interest and/or is not consistent with RCW 43.21A.160, and notifies Public Disclosure Coordinator/Officer of this decision. Go to step 15.
14. Grants the request and signs and sends a letter (use Attachment D) to the requestor noting their request for confidentiality has been approved. Go to step 17.
15. Denies the request and signs and sends a letter to the requester denying the request (use Attachment E) and stating Ecology will not treat the information as confidential. Go to step 16.

Public Disclosure Coordinator/Officer

16. If any of the following conditions exist, incorporates the documents into central files.
 - The requestor does not provide the needed information requested in step 4, according to this procedure.
 - The Director denies the request for confidentiality.
17. Keeps the records secure, including:
 1. Restricting access to appropriate Ecology employees and the Attorney General's Office and not be releasing them to the public.
 2. Ensuring the records are secured every night.
 3. Keeping a log listing each person who accesses the records.

END

Approved:



Carol Fleskes
Administrative Services Director

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