



STATE OF VERMONT
OFFICE OF LEGISLATIVE COUNCIL

MEMORANDUM

To: Rep. Mary Sullivan

From: Aaron Adler, Legislative Counsel and Helena Gardner, Legislative Counsel

Date: December 24, 2017

Subject: 18-0483; Questions on VW Mitigation Trust

This memorandum responds to your request on the ability of the General Assembly to pass legislation¹ concerning the funds available to Vermont under the VW Mitigation Trust and, in the absence of a new enactment, the authority of the Agency of Natural Resources (ANR) with respect to those funds and the authority of the Executive Branch to disburse Trust monies.

I. **Questions and Brief Answers**

A. **Authority to Legislate**

Question: Under the terms of the Mitigation Trust Agreement that became effective on October 2, 2017 arising out of Volkswagen's partial settlements of litigation brought by the United States and the State of California, does the Vermont General Assembly have authority to enact legislation directing the Executive Branch of the State and its agencies as to how to spend Mitigation Trust monies allocated to Vermont?

Brief Answer: Yes, the General Assembly has authority to enact legislation providing such direction. However, the State will not be eligible to receive the Mitigation Trust monies unless they are directed to be spent on an Eligible Mitigation Action or Expenditure as specified in the Trust Agreement and the State otherwise complies with the procedural requirements of the Trust Agreement.

B. **Absence of New Enactment**

First question: Under current law, does ANR have sufficient authority to allow it to act as "lead agency" under the Mitigation Trust Agreement and perform all of the actions that such an agency will need to or may perform, such as acting in a decision-making capacity with

¹On December 8, 2017, we sent you a preliminary memo on the first question related to the General Assembly's authority to legislate in this area. For ease of reference, both questions are addressed in this memorandum.

respect to Eligible Mitigation Actions for which Vermont will seek funding and directing the flow and payment of funds?

Brief Answer: There is only one statute that colorably provides ANR with authority to act as lead agency for Vermont on the VW Mitigation Trust, 10 V.S.A. § 554(15). This statute does not provide authority for ANR to direct disbursement from the Trust to a third party and instead directs ANR to deposit all monies received into the State Treasury. In addition, the statute does not clearly authorize ANR to function as lead agency for Vermont’s allocation of the VW Mitigation Trust monies, including acting in a decision-making capacity regarding Eligible Mitigation Actions and Expenditures.

Second question: Assuming for the sake of argument that ANR has authority to act as lead agency for the purpose of Vermont’s participation in the Mitigation Trust and that it has authority to accept Trust monies:

- i. Does the Vermont Constitution or other law require that the Trust monies be specifically appropriated by the General Assembly before such monies are disbursed from the Treasury?
- ii. Does the Executive Branch have authority under the Vermont Constitution or other law to disburse Trust monies from the Treasury without the opportunity for prior approval by the Joint Fiscal Committee or by the General Assembly?

Brief Answer: Assuming that the General Assembly has delegated authority to ANR to act as lead agency and to accept Trust monies, under the Vermont Constitution and case law interpreting it, the Trust monies likely do not need to be specifically appropriated in order to be disbursed from the Treasury because the General Assembly has authorized such disbursements through general statutes that operate outside the annual appropriations process.

However, even if ANR has delegated authority to act as lead agency and to accept Trust monies, any acceptance and disbursement of Trust monies would be subject to prior approval by the Joint Fiscal Committee (JFC) or, if the General Assembly is in session, by the General Assembly, if such approval is sought by a member of JFC.

II. **Background and Timeline**

1. On September 3, 2015, Volkswagen admitted to the U.S. Environmental Protection Agency (“EPA”) and the California Air Resources Board (“CARB”) that it had installed defeat devices² on its model years 2009 through 2015 Volkswagen and Audi 2.0-liter diesel engine vehicles.
2. On September 18, 2015, the EPA issued a notice of violation to Volkswagen AG, Audi AG, and Volkswagen Group of America, Inc., alleging that use of the defeat devices in the 2.0-liter vehicles violated the Clean Air Act (CAA), 42 U.S.C. chapter 85. EPA

²The “defeat device” Volkswagen used is software that interferes with or disables emissions controls under real world driving conditions, even if the vehicle passes formal emissions testing.

issued a subsequent notice of violation with respect to 3.0-liter vehicles that also cited Dr. Ing. h.c. F. Porsche AG and Porsche Cars North America, Inc.

3. On January 4, 2016, and as amended on October 7, 2016, the United States (on behalf of the EPA) filed a complaint against Volkswagen³ alleging violations of the CAA with regard to approximately 500,000 model year 2009 to 2015 vehicles containing 2.0-liter diesel engines and approximately 80,000 model year 2009 to 2016 vehicles containing 3.0-liter diesel engines. On June 28, 2016, the State of California (through the CARB) filed a complaint against Volkswagen alleging numerous violations of California law.
4. These lawsuits were consolidated with other lawsuits brought by private and public persons into a multidistrict litigation (MDL) in the U.S. District Court for the Northern District of California.
5. On July 26, 2016, Volkswagen entered into a Partial Consent Decree with the United States and the State of California to resolve claims concerning the 2.0-liter diesel engines.
6. On October 25, 2016, the court approved the Partial Consent Decree. Among other provisions, the Decree:
 - a. In ¶ 14, requires the Settling Defendants to pay a total of \$2.7 billion into a Mitigation Trust “to fund Eligible Mitigation Actions to achieve reductions in NOx⁴ emissions” in accordance with the Trust Agreement.
 - b. In ¶ 7, includes an intent statement that “[t]he funding for the Eligible Mitigation Actions required by this Consent Decree is intended to fully mitigate the total, lifetime excess NOx emissions from the 2.0 Liter Subject Vehicles.”
 - c. In ¶ 15, describes a procedure for selection of the Trustee for the Mitigation Trust;
 - d. In ¶ 16, provides that the Trust Agreement will not be finalized until the Trustee is selected and has an opportunity to request changes to the Mitigation Trust Agreement.
7. On December 20, 2016, Volkswagen entered into a Second Partial Consent Decree with the United States and the State of California to resolve claims with respect to the 3.0-liter vehicles, which settlement required Volkswagen to pay an additional \$225 million into the Mitigation Trust.
8. On March 15, 2017, the court entered an order appointing Wilmington Trust, N.A. as Trustee of the Mitigation Trust.
9. On May 17, 2017, the court approved the Second Partial Consent Decree resolving claims with respect to the 3.0-liter vehicles.

³For simplicity, this memo refers to the various defendant entities collectively as “Volkswagen.”

⁴As used in the consent decree, NOx stands for “oxides of nitrogen.”

10. On September 6, 2017, the United States⁵ filed an unopposed motion for the court to approve the Finalized Trust Agreements, which were amended from the form of the trust agreements previously filed with the court. The motion recited that the Trust will be funded with the \$2.7 billion in payments pursuant to the Partial Consent Decree and the \$225 million in payments pursuant to the Second Partial Consent Decree, and that “[t]he Trust’s purpose is to fund Eligible Mitigation Actions to be proposed and administered by the Beneficiaries, which are the 50 States, Puerto Rico, the District of Columbia, and the federally-recognized Indian Tribes.”
11. Vermont’s allocation under the Mitigation Trust is \$18.7 million.
12. On September 19, 2017, the court granted the United States’ September 6, 2017 motion, and ordered that:
 - a. within two weeks following the date of the order, “(a) the Trustee and the Settling Defendants shall execute and deliver to the United States each of the executed Trust Agreements, and (b) the United States shall file the fully executed Trust Agreements with the Court”; and
 - b. the Trust Effective Date for each Trust Agreement shall be the date that the fully executed Trust Agreements are filed with the Court.
13. On October 2, 2017, the United States filed the “Environmental Mitigation Trust Agreement for State Beneficiaries” (“Trust Agreement”). As a result, the Trust Effective Date is October 2, 2017.
14. Under the October 2, 2017 Trust Agreement, Eligible Mitigation Actions are described in Appendix D-2.⁶ There are 10 categories of eligible mitigation actions, most of which involve repowering and replacing vehicles with new vehicles or engines that use a variety of fuels. They also include new, light, zero-emission vehicle supply equipment, such as electric vehicle charging stations located in a public place, workplace, or multi-unit dwelling. The actions do not include support for regulatory programs.
15. The States had 60 days from the Trust Effective Date (i.e., until December 1) to elect to become a Beneficiary by filing a Certification for Beneficiary Status. On November 1, 2017, the Governor and the AG submitted this certification on behalf of Vermont, designating ANR as the “Lead Agency” for purposes of the State’s participation in the Mitigation Trust and purporting to certify that ANR has delegated authority to act on behalf of and legally bind the State for purposes of the Trust. In filing the Certification Form, the Governor and the AG certified that:
 - a. “it has legal authority to sign and be bound by” the certification form;
 - b. its laws “do not prohibit it from being a Trust Beneficiary”;

⁵The motion stated that the State of California would file a joinder in the motion.

⁶Copy attached.

- c. “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” the certification form; and
 - d. “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” the certification form, “it shall become an Excluded Entity under the Trust Agreement and its initial allocation shall be redistributed among the Beneficiaries....”⁷
16. Under ¶ 4.0.1 of the Trust Agreement, the Trustee had 30 days after the State filed the certification to object to the certification. No objection was filed within this period.
 17. Under ¶ 4.0.2 of the Trust Agreement, the Trustee has 120 days from the Effective Date of the Trust (i.e., until January 30, 2018) to file with the Court a Notice of Beneficiary Designation. Under ¶ 4.0.2.1, upon the Trustee’s filing of this Notice of Beneficiary Designation, each Certifying Entity for which no notice of objection is filed shall be deemed a “Beneficiary.”
 18. As of the date of this memo, Vermont is a “Certifying Entity” and not yet a Beneficiary.
 19. If the Trustee takes the entire 120 days to file the Notice of Beneficiary Designation, and assuming no intervening events require a contrary result, the State of Vermont will be deemed a Beneficiary of the Mitigation Trust on January 30, 2018.
 20. Under ¶ 4.1 of the Trust Agreement, after being deemed a Beneficiary, each Beneficiary, *not later than 30 days prior to submitting its first funding request*, must submit and make publicly available a “Beneficiary Mitigation Plan.” The Plan must summarize “how the Beneficiary plans to use the mitigation funds allocated to it under this Trust.”
 21. The Plan is not binding and “Beneficiaries may adjust their goals and specific spending plans at their discretion and, if they do so, shall provide the Trustee with updates to their Beneficiary Mitigation Plan.”
 22. Under ¶ 5.0.2 of the Trust Agreement, upon the State being deemed a Beneficiary—which as noted will occur when the Trustee files a Notice of Beneficiary Designation and may occur on or before January 30, 2018—“each Beneficiary shall have the right under this State Trust Agreement to request Eligible Mitigation Action funds up to the total dollar amount allocated to it. Provided, however, that no Beneficiary may request payout of more than: (i) one-third of its allocation during the first year after the Settling

⁷These certifications in the form operationalize the requirement set forth in ¶ 4.2.4 of the Trust Agreement (Certification of Legal Authority).

Defendants make the Initial Deposit, or (ii) two-thirds of its allocation during the first two years after the Settling Defendants make the Initial Deposit.”⁸ Under ¶ 14.a of the Partial Consent Decree, the Initial Deposit is required “not later than 30 days after the” Trust Effective Date, i.e., not later than November 1, 2017.

23. Under ¶ 5.1 of the Trust Agreement, the “Trustee may only disburse funds for Eligible Mitigation Actions” and “for the Eligible Mitigation Action Administrative Expenditures” in accordance with Appendix D-2 to the Trust Agreement.
24. Under ¶ 2.0.4 of the Trust Agreement, disbursements from the Trust “shall be directed by each Beneficiary pursuant to a Beneficiary Eligible Mitigation Action Certification (Appendix D-4).”
25. The Beneficiary Eligible Mitigation Action Certification (Appendix D-4) allows the Beneficiary to elect that payment of Trust monies be made either:
 - a. to the Beneficiary; or
 - b. to “Other (specify): _____”
26. As of the writing of this memo, the AG’s office has conveyed to staff that the “Other” payment option would allow the Executive Branch to elect that Trust monies allocated to Vermont flow directly from the Trustee’s bank account to a third party that is not a State entity, but staff is awaiting confirmation of this interpretation from the Trustee.
27. On November 29, 2017, ANR released a “Proposed Vermont Beneficiary Mitigation Plan for the Volkswagen Environmental Mitigation Trust.” On its website, ANR states that it will finalize the Plan “following the close of the public comment period on January 13, 2018” and submit it for the Trustee in “accordance with the timeline prescribed in the Partial Consent Decree (30 days before Vermont submits its first request for funding).”
28. ANR’s release of this “proposed” plan does not trigger any right of the State to receive trust monies, because the State is not yet a Beneficiary, and will not be a Beneficiary, until the Trustee files the Notice of Beneficiary Designation.
29. In the course of our work on your request, the Attorney General’s office (AG) offered to set up a meeting among it, ANR, and us. After a meeting date of December 15, 2018 was arranged, ANR asked for our questions in advance. In response, we e-mailed the questions listed immediately below. After we sent the questions, ANR cancelled the meeting. The questions were:

⁸Deadlines for use of funds by a Beneficiary (without risking reallocation of its funds) are addressed in ¶5.4 of the Trust Agreements. Vermont will have 10 years to spend at least 80% of the funds allocated to it under the Trust. If it does not meet this deadline, any remaining funds will revert to the Trust to be redistributed to beneficiaries that used 80% or more of their allocation within 10 years. If Vermont uses 80% or more of its allocation within 10 years, it will be eligible for redistributed funds from other states that did not meet this deadline. Vermont will then have five additional years to use this supplemental funding.

- a. What is or are the Vermont constitutional or statutory provision(s) that were relied on in the Governor's designation of ANR as the lead agency? Please see ¶ 1 of the completed certification submitted by Vermont through the Governor on or about 11/1/17 (Vermont certification).
 - b. What is or are the Vermont statute(s) that were relied on in the Governor's and AG's certification that ANR has the delegated authority to act on behalf of and bind Vermont for purposes of the Trust? Please see ¶ 1 of the Vermont certification.
 - c. What is or are the Vermont statute(s) that ANR relies on for authority to act as the lead agency for the purpose of Vermont's participation in the Trust?
 - d. What is or are the Vermont statute(s) that ANR relies on for authority with respect to deciding which Eligible Mitigation Actions it will request to receive funding from Vermont's allocation of Trust monies?
 - e. Do you believe the Executive Branch has authority under the Vermont Constitution or statute to expend monies it may receive from the Trust in the absence of a legislative appropriation? If so, what are the constitutional and statutory provisions that you believe provide this authority?
 - f. Do you believe the Executive Branch has authority under the Vermont Constitution or statute to direct disbursements from the Trust to third parties? If so, what are the constitutional and statutory provisions that you believe provide this authority?
30. After the cancellation, by e-mail on December 15, 2017 we asked for a written response to these questions and have received none.
31. On December 18, 2017, the Governor's Counsel called staff and stated the following, among other things:
- a. ANR cancelled the meeting described at the direction of the Governor's office.
 - b. That office was discussing with ANR how best to proceed.
 - c. The Administration anticipates going through the appropriations process on how to spend the VW Mitigation Trust monies
 - d. Those monies cannot be spent except in accordance with the Trust.
32. On December 19, 2017, Commissioner of Finance and Management Adam Greshin sent a memo to the Joint Fiscal Office concerning the VW Mitigation Trust monies, stating in relevant part that:
- ANR will bring it [the Beneficiary Mitigation Plan] to the House Energy & Technology Committee in connection with the pending bill on this matter, H.487 *An Act Relating to the Volkswagen Diesel Litigation Settlement and Mitigation Trust Monies*. When we have a final plan, the Administration looks forward to working with JFO and the legislature to determine the appropriate method for receiving and distributing the funds.

33. On December 20, 2017, Commissioner Greshin affirmed that the Administration plans to use the normal legislative appropriations process to authorize the expenditure of these funds.

III. **Discussion**

This discussion comprises two sections. First, it discusses whether the General Assembly has authority to enact legislation with respect to the monies available to Vermont from the VW Mitigation Trust. Second, assuming the General Assembly passes no new legislation on the Trust monies or such legislation is vetoed without override, it discusses the authority of ANR to act as lead agency and of the Executive Branch to disburse Trust monies.

A. **Authority to Legislate**

The Vermont Constitution provides that the “Supreme Legislative power shall be exercised by a Senate and a House of Representatives.”⁹ The Senate and the House of Representatives “may prepare bills and enact them into laws . . . and shall have all other powers necessary for the Legislature of a free and sovereign State . . .”¹⁰ In addition, the Constitution forbids drawing money “out of the Treasury, unless first appropriated by an act of legislation.”¹¹

The Vermont Supreme Court has stated that the General Assembly’s supreme legislative power is practically absolute but for constitutional limitations. The “Constitution is not a grant of power to the Legislature, but it is a limitation of its general powers. The Legislature’s power is practically absolute, except for constitutional limitations.”¹²

The General Assembly cannot transfer its supreme legislative power to enact laws but can confer on the Executive Branch or grant to a subordinate agency that it has created discretion in the manner and method for the execution of statutes validly adopted.¹³

The General Assembly enacts and amends statutes, including statutes delegating authority to the Executive Branch or a subordinate agency, through the legislative process set forth in the Vermont Constitution.¹⁴

The General Assembly created ANR under 3 V.S.A. chapter 51 and endowed it with authority under that chapter and under other statutes, including 10 V.S.A. chapter 23 (Air Pollution Control).

An administrative agency such as ANR “has only such powers as are expressly conferred upon it by the Legislature, together with such incidental powers expressly granted or necessarily implied as are necessary to the full exercise of those granted.”¹⁵

⁹Vt. Const. Ch. II, § 2.

¹⁰*Id.*, § 6.

¹¹*Id.*, § 27.

¹²*Rufus v. Daley*, 103 Vt. 426, 432-33 (1931).

¹³*Vermont Educ. Buildings Fin. Agency v. Mann*, 127 Vt. 262, 267 (1968).

¹⁴Vt. Const. Ch. II, §§ 6, 11.

In exercising its authority under the Vermont Constitution, the General Assembly therefore may pass bills that create or alter the authority of administrative agencies and that direct the use of any authority conferred.

The General Assembly thus has authority to pass legislation that directs the types of Eligible Mitigation Actions that ANR (or any other Executive Branch agency with authority) may seek to fund under the Mitigation Trust Agreement. In addition, to the extent monies from the Mitigation Trust are received into the State Treasury, the General Assembly also may appropriate those monies through legislation.

However, the State will not be eligible to receive Mitigation Trust monies unless they are to be spent on an Eligible Mitigation Action or Expenditure as specified in the Trust Agreement, and the State otherwise complies with the procedural requirements of the Trust Agreement, such as those for requesting and receiving funds.

Nothing in the Trust Agreement purports to preempt the authority of state legislatures to authorize or direct the spending of Mitigation Trust monies or even to withhold the authority to spend Mitigation Trust monies altogether. Under the Trust Agreement, the Mitigation Plan that the State is required to file with the Trustee prior to requesting funds is not binding and may be adjusted at the discretion of Beneficiaries.

Further, the standard “Certification for Beneficiary Status” form that the Executive Branch filed on November 1 specifically contemplates that a Beneficiary may not have legal authority to receive or direct payment of funds from the Trust; may need to obtain legal authority prior to receiving or directing Trust payments; and may ultimately fail in obtaining such authority, resulting in redistribution of the Beneficiary’s allocation to other Beneficiaries.

B. Absence of New Enactment

This section addresses the existing authority of ANR and whether it enables ANR to perform all of the actions that a lead agency to the Mitigation Trust will need to or may perform.

Next, assuming for the purpose of discussion that ANR does have sufficient authority, this section addresses whether a specific appropriation by the General Assembly is required and the applicability of requirements to notify JFC and the General Assembly.

1. Authority of ANR

As stated above, administrative agencies such as ANR only have those powers conferred by the General Assembly in statute, together with such incidental powers as may be expressly enabled or necessarily implied to perform the grant of authority.¹⁶

¹⁵*In re Houston*, 2006 VT 59, ¶ 9. See also *Perry v. Vermont Med. Practice Bd.*, 169 Vt. 399, 403 (1999); *In re Club 107*, 152 Vt. 320, 323 (1989).

¹⁶*Houston*, 2006 VT 59, ¶ 9.

For this reason, we focused on whether ANR’s current enabling statutes allow it to perform all of the tasks related to being a lead agency to the VW Mitigation Trust. We also reviewed whether the Governor’s designation of ANR as lead agency in the certification submitted on November 1 is sufficient, under Vermont law, to confer such authority.

a. *ANR Enabling Statutes*

On review of the potentially relevant statutes, including particularly 3 V.S.A. chapter 51 (natural resources) and 10 V.S.A. chapter 23 (air pollution control), we conclude that:

- There is only one statute that colorably provides ANR with authority to act as lead agency for Vermont on the VW Mitigation Trust, 10 V.S.A. § 554(15).
- This statute does not enable ANR to direct disbursement from the Trust to a third party and instead directs ANR to deposit all monies received into the State Treasury.
- The statute does not clearly authorize ANR to function as lead agency for Vermont’s allocation of the VW Mitigation Trust monies, including acting in a decision-making capacity regarding Eligible Mitigation Actions and Expenditures.

3 V.S.A. chapter 51 creates ANR, establishes its component parts and fees, and addresses the powers of various ANR officers. However, we do not find in that chapter a general or specific statute that enables ANR to function as lead agency under the Mitigation Trust. 3 V.S.A. § 2805 does create an Environmental Permit Fund and directs that “gifts and appropriations” be deposited into the Environmental Permit Account within that Fund. But the statute does not authorize ANR to act in a decision-making capacity with respect to the use of the monies deposited; instead, the monies deposited into that account are to be used to pay for existing ANR permitting programs.¹⁷

10 V.S.A. chapter 23 concerns air pollution control. It includes a broad declaration of policy and purpose to achieve and maintain those levels of air quality needed to protect human health and safety and achieve other objectives, to support local and regional air pollution control programs, and to provide through the chapter for a “coordinated statewide program of air pollution prevention, abatement, and control. . .”¹⁸

The chapter designates ANR as the air pollution control agency for the State and enables the Secretary of Natural Resources to “perform the functions vested in the agency, as specified in the following sections of this chapter.”¹⁹

The functions vested in the Secretary by the chapter relate primarily to acting as a regulator to control air pollution. The chapter includes broad authority for comprehensive air pollution control planning for the State; conducting studies and research into air pollution issues; establishing air quality standards; classifying air contaminant sources; implementing permit programs for construction, modification, and operation of contaminant sources; establishing

¹⁷3 V.S.A. §§ 2805, 2822.

¹⁸10 V.S.A. § 551.

¹⁹10 V.S.A. § 553.

emission control requirements; taking emergency action to protect human health and safety from air pollution; granting variances; controlling emissions from motor vehicles consistently with federal law; hiring personnel and issuing rules to implement the chapter; conducting inspections; and enforcing the chapter.²⁰

While these statutes give the Secretary broad authority to function as a regulator of air contaminant sources, the Secretary's nonregulatory functions under the chapter are more narrowly written. For example, the Secretary conducts an inventory of greenhouse emissions in Vermont.²¹ The Secretary also is enabled to implement an inefficient outdoor wood-fired boiler change-out program.²²

Within the chapter, only 10 V.S.A. § 554(15) appears potentially applicable to the tasks of a lead agency acting on behalf of a beneficiary of the VW Mitigation Trust. 10 V.S.A. § 554(15) provides that the Secretary shall have the power to (emphasis added.):

Accept, receive and administer grants or other funds or gifts from public and private agencies, including the federal government, for the purpose of carrying out any of the functions of this chapter. The funds received by the secretary pursuant to this section shall be deposited in the state treasury to the account of the secretary.

This section grants ANR broad authority to accept and administer funds *if* they are for carrying out the Secretary's functions under the air pollution control chapter. In such an instance, however, the funds must be deposited into the State Treasury. Therefore, this statute does not grant ANR authority to employ the Mitigation Trust option under which a lead agency can direct payment to a third party directly from the Trust Fund.

Moreover, the other functions of a lead agency under the Mitigation Trust, such as deciding which Eligible Mitigation Actions and Expenditures to fund, are not clearly enabled under the provisions of the air pollution control chapter. Arguments can be made both in support of and against such authority based on the meaning and use of the term "function."

10 V.S.A. chapter 23 does not define "function" and therefore statutory construction is required. When construing statutes, the Vermont Supreme Court has stated that its "primary goal is to give effect to the Legislature's intent."²³ In determining legislative intent, the Court looks "beyond the language of a particular section, standing alone, to 'the whole statute, the subject matter, its effects and consequences, and the reason and spirit of the law.'"²⁴ Relevant principles of statutory construction also include:

²⁰10 V.S.A. §§ 554–558, 560, 561, 567, 568.

²¹10 V.S.A. § 582.

²²10 V.S.A. § 584.

²³*Lydy v. Trustaff, Inc./Wausau Ins. Co.*, 2013 VT 44, ¶ 6.

²⁴*In re Wal-Mart Stores, Inc.*, 167 Vt. 75, 84 (1997) (internal quotations and citations omitted).

- Words are presumed to be used in accordance with their ordinary meaning and that “[w]hen the relevant terms are not defined in the statute, as in this case, we may look to dictionary definitions to determine the plain and ordinary meaning of the language.”²⁵
- The Court presumes “that all language in a statute was drafted advisedly.”²⁶ The Court has found that differences in wording between statutes that are otherwise highly similar can require differing interpretations of the statutes.²⁷

Review of dictionary definitions indicates that “function” has different meanings that can support opposite interpretations. On the one hand, the term “function” can be synonymous with “purpose.” Merriam-Webster provides as its second definition of the term: “[T]he action for which a person or thing is specially fitted or used or for which a thing exists: purpose.”²⁸ This definition supports an argument that subdivision 554(15) enables ANR to accept and administer the VW Mitigation Trust monies, including deciding the Eligible Mitigation Measures for which to seek funding, because accepting the monies and administering the measures is consistent with the broad declaration of policy and purpose contained in 10 V.S.A. chapter 23.²⁹

On other hand, the term “function” can mean an official position, duty, or task. The first definition of the term in Merriam-Webster is “professional or official position: occupation. His job combines the functions of a manager and a worker.”³⁰ Black’s Law Dictionary provides the following definition: “Office; duty; fulfillment of a definite end or set of ends by the correct adjustment of means. The occupation of an office. By the performance of its duties, the officer is said to fill his function.”³¹

Defining “function” as a duty or task suggests that subdivision 554(15) does not enable ANR’s acting as lead agency to the Mitigation Trust because chapter 23 does not assign that duty to ANR. It assigns ANR broad duties to act as an air pollution control regulator but only limited nonregulatory tasks. As indicated above, the tasks of a lead agency under the Mitigation Trust do not involve regulation to control air pollution and the Eligible Mitigation Actions do not include support of such regulation. They involve decision making as to which Eligible Mitigation Acts Vermont will seek to fund and directing the flow of funds.

The presumption that the General Assembly uses words advisedly also supports a conclusion that “function” refers to the existing duties assigned under chapter 23 rather than its general purpose. In subdivision 554(15), the General Assembly specifically chose the words “carrying out any of the functions of this chapter.” When the General Assembly has meant to refer to carrying out the purpose of a chapter, it has used the word “purpose” and not “function.” For example, 10 V.S.A. § 1195 authorizes the Connecticut River Watershed Advisory Commission to “receive and accept grants, aid or contributions of money, property, labor or

²⁵*State v. Perrault*, 2017 VT 67, ¶ 13.

²⁶*Comm. to Save the Bishop’s House, Inc. v. Med. Ctr. Hosp. of Vermont, Inc.*, 137 Vt. 142 (1979).

²⁷*In re Programmatic Changes to Standard Offer Program*, 2014 VT 29, ¶ 11.

²⁸<https://www.merriam-webster.com/dictionary/function>

²⁹10 V.S.A. § 551, summarized above.

³⁰<https://www.merriam-webster.com/dictionary/function>

³¹<https://thelawdictionary.org/function/>

other things of value, to be expended to carry out the *purposes* of this subchapter.” (Emphasis added.) Similarly, 10 V.S.A. § 8020(e) requires that, to intervene in an environmental enforcement proceeding, a motion must show why a proposed enforcement action “is insufficient to carry out the *purposes* of this chapter.” (Emphasis added.)

10 V.S.A. § 553 provides additional support for a conclusion that “function,” as used in 10 V.S.A. § 554(15), does not refer to the broad declaration of policy and purpose in 10 V.S.A. § 551. Section 553 describes the functions vested in the Secretary as those contained in the sections that *follow* section 553 and such a description does not include section 551.

b. *Designation as “Lead Agency” by Governor*

It may be argued that, even without a statute, ANR has authority to act as lead agency because the Governor conferred that status through the certification filed on November 1. We conclude that the Governor does not have the ability to confer such authority based on review of the constitutional framework, potentially applicable statute, and the language of the certification.

The Vermont Constitution separates State government into Legislative, Executive, and Judicial Branches.³² It states: “The Legislative, Executive, and Judiciary departments, shall be separate and distinct, so that neither exercises the powers belonging to the others.”³³

The Vermont Supreme Court has summarized the powers of the three branches thus: “Briefly stated, the legislative power is the power that formulates and enacts the laws; the executive power enforces them; and the judicial power interprets and applies them.”³⁴

The Court has also stated that the separation of powers requirement does not demand an absolute division of authority. “The focus of a separation of powers inquiry is not whether one branch of government is exercising certain powers that may in some way pertain to another branch, but whether the power exercised so encroaches upon another branch’s power as to usurp from that branch its constitutionally defined function.”³⁵

Under this framework, conferring authority on an administrative agency is a legislative and not an executive function. The Court has consistently described the nature of the legislative function as one of making policy and choosing among alternatives.³⁶ The choice of assigning authority to one agency over another agency is a policy choice among different options.

Moreover, the Court has consistently held that agencies only have the authority conferred on them by *statute*,³⁷ and the passage of statutes is the province of the General Assembly.³⁸

³²Vt. Const. Ch. II, §§ 2, 3, 4.

³³*Id.*, § 5.

³⁴*In re D.L.*, 164 Vt. 223, 228 (1995).

³⁵*Id.*, 164 Vt. at 229.

³⁶*Travelers Companies v. Liberty Mut. Ins. Co.*, 164 Vt. 368, 372, (1995); *Martin v. State, Agency of Transp. Dep’t of Motor Vehicles*, 2003 VT 14, ¶ 16; *In re UPC Vermont Wind, LLC*, 2009 VT 19, ¶ 2

³⁷*See, e.g., Houston*, 2006 VT 59, ¶ 9; *Perry*, 169 Vt. at 403; *Club 107*, 152 Vt. at 323.

³⁸Vt. Const. Ch. II, § 6; *D.L.*, 164 Vt. at 228.

In contrast, the Executive Branch executes and enforces the statutes that embody the policy decisions made by the General Assembly. It is the Legislature that makes policy decisions, deciding “which social objectives or programs are worthy of pursuit.”³⁹ The Executive Branch implements those policies through its function of executing the law.⁴⁰ Accordingly, a governor has no authority to change or amend State law as this power resides with the Legislature and cannot be transferred.⁴¹

In addition, we do not find a statute that grants authority to the Governor to confer authority to an agency that is not otherwise delegated to the Executive Branch by statute. Instead, the General Assembly has granted the Governor, through 3 V.S.A. chapter 41, authority to reorganize and transfer functions, personnel, and appropriations within State government by executive order.⁴²

Within this chapter, it may be possible to contend that 3 V.S.A. § 2001, standing alone, authorizes the Governor to confer authority on ANR that is not otherwise delegated to the Executive Branch by statute. 3 V.S.A. § 2001 states:

The Governor may make such changes in the organization of the Executive Branch or in the assignment of functions among its units as he or she considers necessary for efficient administration.

For three reasons, we do not read this language so broadly and instead believe it contemplates reassignment of existing functions already delegated to the Executive Branch. First, the language itself refers to “*changes . . . in the assignment of functions . . . among its units . . .*” (Emphasis added.) It does not refer to assigning new functions.

Second, the context of this language is a chapter entitled “Reorganization by Governor” and section 2001 is immediately followed by sections that apply to changes in “the *existing* organization provided for by law,” the “*transfer* of personnel and any function,” and “the *transfer* of the authority, duties, power, responsibilities, and functions . . .”⁴³ The Court has stated: “In construing a statute, a clause cannot be separated from its context.”⁴⁴

Third, reading section 2001 to allow the Governor to confer authority on an agency that is nowhere provided by statute is to interpret the section to allow the Governor to enact laws, a constitutional power committed to the General Assembly that the Court has held cannot be transferred. A statute “must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score.”⁴⁵

³⁹*Hunter v. State*, 2004 VT 108, ¶ 18; see also *Saratoga Cty. Chamber of Commerce, Inc. v. Pataki*, 100 N.Y.2d 801, 822, 798 N.E.2d 1047, 1060 (2003).

⁴⁰*Hunter*, 2004 VT 108, ¶ 18.

⁴¹*Vermont Educ. Buildings Fin. Agency*, 127 Vt. at 267.

⁴²3 V.S.A. §§ 2001, 2002, 2003.

⁴³3 V.S.A. § 2002(a), 2003(b), 2007.

⁴⁴*Camp v. Superman*, 119 Vt. 62, 65 (1955).

⁴⁵*State v. Auclair*, 110 Vt. 147 (1939).

Finally, the language of the certification does not purport to confer authority. Instead, it recognizes that a lead agency may need to obtain authority. As indicated above, the certification is qualified by the representation that: “[I]f 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 . . .”

2. *Appropriations; Opportunity for Approval by JFC or General Assembly*

a. *Relevant statutes*

As stated above, Vt. Const. Ch. II, § 27 prohibits drawing money from the State Treasury unless first appropriated by legislation. In addition, the following statutes are relied on in the discussion that follows.

32 V.S.A. § 5. ACCEPTANCE OF GRANTS

(a) No original of any grant, gift, loan, or any sum of money or thing of value may be accepted by any agency, department, commission, board, or other part of State government except as follows:

(1) All such items must be submitted to the Governor who shall send a copy of the approval or rejection to the Joint Fiscal Committee through the Joint Fiscal Office together with the following information with respect to said items:

* * *

(2) The Governor’s approval shall be final unless within 30 days of receipt of such information a member of the Joint Fiscal Committee requests such grant be placed on the agenda of the Joint Fiscal Committee, or, when the General Assembly is in session, be held for legislative approval. In the event of such request, the grant shall not be accepted until approved by the Joint Fiscal Committee or the Legislature. The 30-day period may be reduced where expedited consideration is warranted in accordance with adopted Joint Fiscal Committee policies. During the legislative session, the Joint Fiscal Committee shall file a notice with the House and Senate Clerks for publication in the respective calendars of any grant approval requests that are submitted by the administration.

(3)(A) This section shall not apply to the following items, if the acceptance of those items will not incur additional expense to the State or create an ongoing requirement for funds, services, or facilities:

(i) the acceptance of grants, gifts, donations, loans, or other things of value with a value of \$5,000.00 or less;

(ii) the acceptance by the Department of Forests, Parks and Recreation and the Department of Fish and Wildlife of grants, gifts, donations, loans, or other things of value with a value of \$15,000.00 or less; or

(iii) the acceptance by the Vermont Veterans' Home of grants, gifts, donations, loans, or other things of value with a value of \$10,000.00 or less.

* * *

32 V.S.A. § 462(a). APPROPRIATION REQUIRED

(a) Except in the case of funds held by the State in trust, rebates payable to the United States Treasury Department in accordance with the provisions of section 476 of this title, or unless otherwise specified by statute no moneys shall be paid out of the Treasury of the State except upon specific appropriation. The Commissioner of Finance and Management shall not issue his or her warrant except as authorized under the provisions of this section. Such warrant shall be the certificate of the Commissioner of Finance and Management that the account covered by the same is approved for payment by the State Treasurer.

* * *

32 V.S.A. § 502(a). MONIES TO BE PAID OVER WITHOUT DEDUCTION

(a) The gross amount of money received in their official capacities by every administrative department, board, officer, or employee, from whatever source, shall be paid forthwith to the State Treasurer, or deposited according to the direction of the State Treasurer in such bank to the credit of the State Treasurer as the Treasurer shall designate, without any deduction on account of salaries, fees, costs, charges, expenses, claim, or demand of any description whatsoever, unless otherwise provided. Such moneys shall be credited to such funds as are now or may hereafter be designated for the deposit thereof. Money so paid and all moneys belonging to or for the use of the State shall not be expended or applied by any department, board, officer, or employee, except in accordance with the provisions of section 462 of this title.

* * *

b. *Need for Specific Appropriation*

This section discusses whether the Vermont Constitution requires that the Trust monies be specifically appropriated by the General Assembly before disbursement from the Treasury.

Even though the Trust Agreement purports to give ANR the option to direct that Trust monies be received by a third party that may not be a State entity—and therefore never deposited in the State Treasury—we have concluded above that ANR lacks the authority to exercise this option to bypass the State Treasury. Thus, assuming that ANR has authority to act as lead agency and to accept Trust monies, it must elect to receive the Trust monies itself.

32 V.S.A. § 502(a) requires every administrative agency to pay “forthwith to the State Treasurer” (or make a deposit as the Treasurer directs “to the credit of the State Treasurer”) the gross amount of monies received in its official capacity, “unless otherwise provided.” Staff is unaware of any provision of law that would trigger the “unless otherwise provided” exception; thus, Mitigation Trust monies received by ANR must be paid over to the Treasurer or deposited to the credit of the Treasurer.

In turn, monies so paid over to the Treasurer “shall not be expended or applied” except in accordance with 32 V.S.A. § 462.⁴⁶

As shown above, 32 V.S.A. § 462(a) states that no monies shall be paid out of the Treasury of the State “except upon specific appropriation”—but provides three exceptions to this requirement [1] for “funds held by the State in trust”; [2] for “rebates payable to the United States Treasury Department in accordance with” 32 V.S.A. § 476 of this title; or [3] when “otherwise specified by statute.” The discussion below will examine only the third exception.⁴⁷

32 V.S.A. § 462 may be viewed as operationalizing and supplementing Vt. Const. Ch. II, § 27, which provides that no money may be drawn from the Treasury “unless first appropriated by act of legislation.” The third, “otherwise specified by statute” exception in 32 V.S.A. § 462(a) allows the General Assembly to authorize disbursements from the Treasury through operation of general statutes, i.e., outside the annual appropriations process. These general statutes may be viewed as “standing” appropriations that persist for more than one fiscal year. Use of the third exception, i.e., allowing disbursements from the Treasury through such general statutes, is fairly common. For example, tax statutes authorize the Department of Taxes to issue refunds of monies collected from taxpayers and deposited in the Treasury without appropriation of the monies refunded. Similarly—and of direct relevance here—a variety of statutes appear to authorize administrative agencies to accept grants and other monies and things of value. As described below, these statutes are subject to the requirements set forth in 32 V.S.A. § 5 (unless the statute specifically provides otherwise), and if the requirements of that section are followed, it appears that monies accepted pursuant to such statutes may be disbursed from the Treasury without a specific appropriation.

The “otherwise specified by statute” exception in 32 V.S.A. § 462 appears to be consistent with Vermont Supreme Court case law interpreting Vt. Const. Ch. II, § 27. In its decision in *City of Montpelier v. Gates*,⁴⁸ the Court described the nature of the General Assembly’s appropriation authority under Vt. Const. Ch. II, § 27 as follows:

“Section 27 of chapter 2 of our state Constitution provides that ‘no money shall be drawn out of the Treasury, unless first appropriated by act of legislation.’ It is to be

⁴⁶32 V.S.A. § 502(a).

⁴⁷The second exception is not relevant. The first exception might be relevant if, despite being the Beneficiary of the Mitigation Trust, the State also was viewed as serving as Trustee of the Mitigation Trust monies for the benefit of the public. However, staff have not identified any provision that could be construed to confer authority to ANR to accept Mitigation Trust monies to be “held in trust” other than 10 V.S.A. § 554(15), which is the same statute that is the basis for applying the third, “otherwise specified by statute” exception. Thus, examining the first exception does not add anything to the analysis that follows, and it will not be discussed further.

⁴⁸106 Vt. 116 (1934).

noticed that this provision is couched in general terms. No particular requirements are specified. Its purpose is ‘to secure regularity, punctuality and fidelity in the disbursements of the public money.’ Story, Const. § 1342. It is not, and was not intended to be, a restriction of the power of the Legislature over the public revenue. It is the province of that body to cast the appropriation in a mold of its own making.”

In dicta,⁴⁹ the Court went on to describe with apparent approval statutes “of a most general character” that authorized disbursements from Vermont’s Treasury, and to quote a California Supreme Court decision for the proposition that, “When the Constitution, therefore, says that ‘no money shall be drawn from the treasury but in consequence of appropriations made by law,’ it only means that no money shall be drawn except in pursuance of law.” Thus, it appears that general statutes that authorize administrative agencies to accept monies and establish a process to allow such monies to be disbursed without a specific appropriation are consistent with Vt. Const. Ch. II, § 27.

In conclusion, assuming for the purpose of discussion that 10 V.S.A. § 554(15) confers authority to ANR to accept Mitigation Trust monies and that 32 V.S.A. § 5 authorizes disbursement of these monies if its requirements are followed, these statutes are likely to trigger the “except otherwise provided by law” exception to 32 V.S.A. § 462. As a result, we conclude that the Mitigation Trust monies likely do not need to be specifically appropriated by the General Assembly through the annual appropriations process in order to be disbursed from the Treasury.

c. *Opportunity for Approval by JFC or General Assembly*

This section discusses whether the Executive Branch has authority under the Vermont Constitution to disburse Trust monies from the Treasury in the absence of an opportunity for prior approval by the Joint Fiscal Committee or by the General Assembly.

Assuming that 10 V.S.A. § 554(15) confers authority to ANR to accept Mitigation Trust monies, this provision does not stand alone and cannot be read in a vacuum. Instead, it must be construed in light of the requirements of 32 V.S.A. § 5 (Section 5), which, unless an exception applies,⁵⁰ creates a mechanism for legislative oversight and an opportunity for prior approval by JFC or by the General Assembly of the acceptance of the “original of any grant, gift, loan, or any sum of money or thing of value” by a part of State Government. Construed together, whatever authority conferred under 10 V.S.A. § 554(15) *is subject to* the requirements of Section 5.⁵¹

⁴⁹“Dicta” is “a judge’s expression of opinion on a point other than the precise issue involved in determining a case.” *Merriam-Webster’s Online Dictionary*.

⁵⁰32 V.S.A. § 5(a)(3) provides exceptions to the Section 5 notification requirements at various thresholds; the threshold applicable to Mitigation Trust monies is acceptance of a sum of \$5,000 or less. \$18.7 million in Mitigation Trust monies have been allocated to Vermont. Although under the terms of the Trust the monies cannot be disbursed all at once, and ANR could in theory limit its initial request for Trust monies to be \$5,000 or less, the exception only applies if acceptance of the sum “will not incur additional expense to the State or create an ongoing requirement for funds, services, or facilities.” It appears likely that a request of \$5,000 or less would violate the latter proviso, as ANR’s role as lead agency with respect to Mitigation Trust monies will create additional expenses to the State over time, not least in terms of staff time.

⁵¹Section 5 may be viewed as a tool necessary to ensure the separation of powers between the Legislative Branch and Executive Branch required under the Vermont Constitution and the nondelegation requirements of the Vermont Constitution, at least in certain circumstances. It is beyond the scope of this memo to address this issue, or the issue

That 10 V.S.A. § 554(15) should be construed as subject to the provisions of Section 5 is supported by principles of statutory construction articulated by the Vermont Supreme Court. As stated above, in construing statutes, the “primary goal is to give effect to the Legislature’s intent.”⁵² In order to give effect to the Legislature’s intent, the Court “look[s] first to the statute’s language” and “will enforce the plain meaning of the statutory language where the Legislature’s intent is evident from it.”⁵³ However, “if doubts exist, ‘the real meaning and purpose of the Legislature is to be sought after and, if disclosed by a fair and reasonable construction, it is to be given effect.’ The intent should be gathered from a consideration of ‘the whole statute, the subject matter, its effects and consequences, and the reason and spirit of the law.’”⁵⁴ Further, “[w]hen interpreting independent statutory schemes with overlapping subject matters,” the Court “prefer[s] to first look for a construction that will harmonize the seemingly-inconsistent statutes.”⁵⁵ Finally, when there is a conflict between statutes, a “statute enacted later in time generally governs over an earlier statute.”⁵⁶

In order to apply the first of these principles, it is important to understand the nature and requirements of Section 5. Section 5 requires, in relevant part, that the “original of any grant, gift, loan, or any sum of money or thing of value” may not be accepted by an administrative entity without first being submitted to the Governor who must then send a copy of his or her approval or rejection to JFC along with specific information about the monies proposed to be accepted. Once the approval or rejection is submitted to JFC, a member of JFC has the opportunity to request that any decision be held for approval by the General Assembly or, when the General Assembly is not in session, by the JFC. In the event of such a request, “the grant shall not be accepted until approved by the Joint Fiscal Committee or the Legislature.” (Emphasis added.) If a member of the JFC does not make such a request within 30 days⁵⁷ of receipt of the relevant information, then the Governor’s approval or rejection is final.

On its face, the legislative intent underlying Section 5 is to provide the opportunity for legislative oversight when the “original of any grant, gift, loan, or any sum of money or thing of value” is proposed to be accepted. Statutes that confer authority to administrative agencies to accept sums of money merely authorize the agency to initiate—but not to bypass—the Section 5 process and to accept monies and things of value if allowed under Section 5. Reading 10 V.S.A. § 554(15) as being subject to the provisions of Section 5 both effects the intent of the latter and avoids any conflict between the two statutes. Further, Section 5 was enacted later than the authority conferred in 10 V.S.A. § 554(15) and thus, to the extent the statutes might be read to be in conflict, Section 5 should be read to limit the authority conferred in 10 V.S.A. § 554(15).⁵⁸

of whether the oversight that 32 V.S.A. § 5 establishes is sufficient to satisfy any constitutional requirements. Instead, this portion of the memo is limited to addressing whether any authority conferred in 10 V.S.A. § 554(15) is subject to the requirements of 32 V.S.A. § 5.

⁵²*Lydy*, 2013 VT 44, ¶ 6.

⁵³*In re Appeal of Carroll*, 181 Vt. 383, 387–88 (2007).

⁵⁴*Id.* at 388 (internal citation omitted).

⁵⁵ *Hartford Bd. of Library Trustees v. Town of Hartford*, 174 Vt. 598, 599 (2002).

⁵⁶*Id.*

⁵⁷The 30-day review period may be reduced when expedited consideration is warranted in accordance with adopted Joint Fiscal Committee policies. 32 V.S.A. § 5(a)(2).

⁵⁸10 V.S.A. § 554(15) was enacted in 1968, and 32 V.S.A. § 5 was enacted in 1972.

In order for Section 5 to apply, there must be “the original” of a “grant, gift, loan, or any sum of money or thing of value” proposed to be accepted by a part of State government. As no Mitigation Trust monies have yet been disbursed to the State of Vermont, any sum of money received from the Trust would be an “original.” Trust monies to be disbursed plainly are a “sum of money.” Further, as discussed above, ANR does not have authority to elect to have Mitigation Trust monies disbursed to a third party, but instead must accept Trust monies itself. Thus, the monies will be proposed to be accepted by a part of State government. In short, Section 5 applies to the original of Mitigation Trust monies to be received by ANR.

In summary, with respect to the Mitigation Trust monies, Section 5 requires:

- ANR to submit a proposed⁵⁹ acceptance of a sum of the Trust monies to the Governor.
- The Governor to send a copy of his approval⁶⁰ of the proposed acceptance to the Joint Fiscal Committee through the Joint Fiscal Office with certain information.
- If, within 30 days of receipt, a JFC member requests the sum⁶¹ to be placed on JFC’s agenda or, when the General Assembly is in session, be held for legislative approval, the monies “shall not be accepted until approved by the Joint Fiscal Committee or the Legislature.”

Thus, even if ANR has delegated authority to act as lead agency and to accept Trust monies, any acceptance and disbursement of Trust monies would be subject to prior approval by the Joint Fiscal Committee or by the General Assembly if the General Assembly is in session, if a member of JFC requests that the monies be subject to prior approval.

⁵⁹Section 5 does not use the word “proposed.” However, because of the contents of Section 5, it is apparent that at the stage of an agency’s submission to the Governor, and the Governor’s notice to JFC, the acceptance is proposed and not final.

⁶⁰Section 5 refers to the Governor’s sending a copy of “the approval or rejection” of a grant, etc. Reference to a “rejection” is omitted in this part of the discussion.

⁶¹Section 5 refers to request that the “grant” be placed on JFC’s agenda or held for legislative approval, but the context of the statute makes clear that JFC’s right to seek approval process also would apply to the other items for which notification to the Governor and by the Governor apply, i.e., also to a “gift, loan, or any sum of money or thing of value.”