

SETTLEMENT AGREEMENT AND RELEASE

This SETTLEMENT AGREEMENT AND RELEASE (hereinafter "Agreement"), dated as of March 19, 2012, is entered into between the STATE OF CALIFORNIA AIR RESOURCES BOARD (hereinafter "ARB") 1001 I Street, Sacramento, California 95814, and Cummins West, Inc. (hereinafter "CWI"), 14775 Wicks Blvd., San Leandro, CA 94577.

I. RECITALS

- (1) The Verification Procedure for In-Use Strategies to Control Emissions from Diesel Engines ("Verification Procedure," California Code of Regulations (CCR), Title 13, Sections 2700-2710) provides at section 2702 that if the Executive Officer of the ARB grants verification of a diesel emission control strategy, he or she will issue an Executive Order (EO) to the strategy's applicant identifying the verified emission reduction level and any conditions that must be met for the Diesel Emission Control Strategy (DECS) to function properly. The Verification Procedure itself also places conditions on applicants and diesel emissions control strategies.
- (2) The EO covering Cleaire Horizon Diesel Particulate Filter requires that:
 - The engine should be well maintained and not consume lubricating oil at a rate greater than that specified by the engine manufacturer.
 - Lube oil, or other oil, should not be mixed with the fuel.
- (3) California Vehicle Code (VC) Section 27156 provides that no person shall install, sell, offer for sale, or advertise any device, apparatus, or mechanism intended for use with, or as a part of, any required motor vehicle pollution control device or system which alters or modifies the original design or performance of any such motor vehicle pollution control device or system. An exemption from VC Section 27156 is required before any add-on or modified part can be sold in California. Aftermarket parts exemptions are regulated under CCR, Title 13, Sections 1900 et seq., 2030-2031, 2047-2048, 2200-2207 and 2220-2225 (Aftermarket Parts Regulations).
- (4) If a DECS or the application it is used in does not meet the conditions specified in the Verification Procedure or the applicable EO, it is a violation of the Verification Procedure, and the DECS is not verified for that application, rendering it an illegal, non-exempt add-on part. CWI asserts that it has fully complied with and not violated the Verification Procedure.
- (5) The ARB Enforcement Division staff, with the cooperation of CWI, has alleged certain violations of the Verification Procedure, the applicable EO, the

Aftermarket Parts Regulations and of VC Section 27156 with respect to Cleaire Horizon DECS in California that do not conform to the conditions specified in the Verification Procedure and the applicable EO. In particular, these alleged violations involve installing the Cleaire Horizon Diesel Particulate Filters on school buses owned by Southwest Transportation Agency without performing the required engine pre-installation assessment. CWI alleges that it fully complied with the applicable EO and denies that the alleged violations occurred.

- (6) Health and Safety Code, Sections 39674 (a) and (b) authorize civil penalties for the violation of the programs for the regulation of toxic air contaminants not to exceed one thousand dollars (\$1,000) or not to exceed ten thousand dollars (\$10,000) respectively, for each day in which the violation occurs. CWI alleges that no violation of the described programs occurred.
- (7) In order to resolve the dispute described herein, CWI has taken, or agreed to take, the actions enumerated below under "TERMS AND CONDITIONS." Further, the ARB accepts this Agreement in termination and settlement of this matter.
- (8) In consideration of the foregoing, and of the promises and facts set forth herein, the parties desire to settle and resolve all claims, disputes, and obligations relating to the above-alleged violations (the "Dispute"), and voluntarily agree to resolve this matter by means of this Agreement. Specifically, the ARB and CWI agree as follows:

II. TERMS AND CONDITIONS

In consideration of the ARB not filing a legal action against CWI for the alleged violations referred to above, the ARB and CWI agree as follows. Notwithstanding anything to contrary herein, CWI denies that it has violated any of the statutes and regulations set forth in subparagraphs (3) through (8).

- (1) Upon execution of this Agreement, the sum of sixty three thousand dollars (\$63,000) (the "Settlement Payment") shall be paid on behalf of CWI as follows:
 - \$47,250 to the **California Air Pollution Control Fund.**
 - \$15,750 to the **Peralta Community College District.**
 - Checks with the signed settlement agreement shall be sent to:

Mr. Tajinder Gill, Air Resources Engineer
Air Resources Board, Enforcement Division
9480 Telstar Ave., Suite 4

El Monte, CA 91731

- (2) If the Attorney General files a civil action to enforce this settlement agreement, CWI shall pay all costs of investigating and prosecuting the action, including expert fees, reasonable attorney's fees, and costs.
- (3) CWI shall not violate any provision of the VC Section 27156.
- (4) CWI shall not violate Aftermarket parts exemption procedures established in California Code of Regulations (CCR), Title 13, Sections 1900 et seq., 2030-2031, 2047-2048, 2200-2207 and 2220-2225.
- (5) CWI shall not violate the Verification Procedure (CCR, Title 13, Sections 2700-2710) or any EOs issued by ARB.
- (6) CWI shall ensure that the terms and conditions specified in the applicable EO are met prior to installing, selling, offering for sale, or advertising any DECS in California.
- (7) CWI shall not violate the system labeling requirements set forth in CCR, Title 13, Section 2706 (j).
- (8) CWI shall comply with the DECS warranty requirements set forth in the CCR, Title 13, Section 2707.
- (9) This Agreement constitutes the entire agreement and understanding between ARB and CWI concerning the subject matter hereof, and supersedes and replaces all prior negotiations and agreements between ARB and CWI concerning the subject matter hereof.
- (10) No agreement to modify, amend, extend, supersede, terminate, or discharge this Agreement, or any portion thereof, is valid or enforceable unless it is in writing and signed by all parties to this Agreement.
- (11) Severability. Each provision of this Agreement is severable, and in the event that any provision of this Agreement is held to be invalid or unenforceable, the remainder of this Agreement remains in full force and effect.
- (12) This Agreement shall be interpreted and enforced in accordance with the laws of the State of California, without regard to California's choice-of-law rules.
- (13) This Agreement is deemed to have been drafted equally by the Parties; it will not be interpreted for or against either party on the ground that said party drafted it.

- (14) This Settlement relates to disputed claims and does not constitute an admission of liability on the part of CWI, all liability having been denied, at all relevant times, and which continues to be denied. All Parties acknowledge and agree that the execution of this Settlement and the payments described above shall not be construed as an express or implied admission of misconduct, responsibility or liability of CWI and CWI expressly and specifically deny all such admissions. Each Party acknowledges and agrees that the Settlement has been entered into solely for the purpose of settling and compromising the Dispute and to avoid the expense of uncertainty of future litigation.
- (15) SB 1402 Statement

Senate Bill 1402 (Dutton, Chapter 413, statutes of 2010) requires the ARB to provide information on the basis for the penalties it seeks (*see Health and Safety Code section 39619.7*). This information, which is provided throughout this settlement agreement, is summarized here.

The manner in which the Settlement Payment was determined, including a per unit or per vehicle amount.

Penalties must be set at levels sufficient to discourage violations. The Settlement Payments in this matter were determined in consideration of all relevant circumstances, including the eight factors specified in §43024.

The per unit or per vehicle penalty in this case is a maximum of \$1,000 per unit per day for strict liability violations and \$10,000 per unit per day for negligent or intentional violations. The total Settlement Payment to be received from CWI is \$63,000, for 7 allegedly, non-compliant installations for a per unit amount of \$9,000 over an unspecified number of days of the alleged violation. This amount was calculated by considering all factors specified in Health and Safety Code section 43024, including the fact that this is an innocent, first time violation and that CWI has cooperated with the investigation.

The provision of law the penalty, which the Staff believes is applicable to the alleged violation, is being assessed under and why that provision is most appropriate for that alleged violation.

The penalty provision the Staff believes should be applied in this case is Health and Safety Code section 39674 based on the allegation, which CWI denies, that CWI failed to comply with the Air Toxic Control Measure for In-Use Strategies to Control Emissions from Diesel Engines, Title 13, California Code of Regulations sections 2700-2710, which was adopted under authority of Health and Safety Code section 39600, et seq.

Does the Staff allege that the penalty being assessed under a provision of law that prohibits the emission of pollution at a specified level, and, if so a quantification of excess emissions, if it is practicable to do so.

The provisions cited above do prohibit emissions above a specified level. However, since the hours of operation of the allegedly non-compliant units involved and their individual emission rates are not known, it is not practical to quantify the excess emissions.

- (16) CWI acknowledges that ARB has complied with SB 1402 in prosecuting or settling this case. Specifically, ARB has considered all relevant facts, including those listed at HSC section 43024, has explained the manner in which the Settlement Payment was calculated (including a per unit or per vehicle amount, if appropriate), has identified the provision of law under which the Settlement Payment is being assessed and has considered and determined that this Settlement Payment is being agreed to under a provision of law that prohibits the emission of pollutants at a specified level. However, since the hours of operation of the non-compliant units involved and their individual emission rates are not known, it is not practical for ARB to quantify the excess emissions.
- (17) The Settlement Payment was determined based on the unique circumstances of this matter, considered together with the need to remove any economic benefit from noncompliance, the goal of deterring future violations and obtaining swift compliance, the consideration of past penalties in similar cases negotiation, and the potential costs and risk associated with litigating these particular violations. The Settlement Payment reflects alleged violations extending over a number of days considered together with the complete circumstances of this case. Penalties in future cases might be smaller or larger on a per unit basis.
- (18) The Settlement Payment in this case was based in part on confidential business information provided by CWI that is not retained by ARB in the ordinary course of business. The Settlement Payment in this case was also based on confidential settlement communications between ARB and CWI that ARB does not retain in the ordinary course of business either. The Settlement Payment also reflects ARB's assessment of the relative strength of its case against CWI, the desire to avoid the uncertainty, burden and expense of litigation, obtain swift compliance with the law and remove any unfair advantage that CWI may have secured from its actions.
- (19) Now therefore, in consideration of the payment on behalf of CWI to the California Air Pollution Control Fund and the Peralta Community College District, the ARB hereby releases CWI and their principals, officers,

agents, predecessors and successors from any and all claims for past violations of the Verification Procedure, the applicable EO, the Aftermarket Parts Regulations, and VC Section 27156 alleged in recital paragraph 5. The undersigned represent that they have the authority to enter into this Agreement.

California Air Resources Board

By: *Ellen M. Peter*

Name: Ellen M. Peter

Title: Chief Counsel

Date: *3/26/2012*

Cummins West, Inc.

By: *Kevin Shanahan*

Name: *Kevin Shanahan*

Title: *CEO, PRESIDENT, OWNER*

Date: *March 19, 2012*