

SETTLEMENT AGREEMENT AND RELEASE

This SETTLEMENT AGREEMENT AND RELEASE (hereinafter "Agreement") is entered into between the STATE OF CALIFORNIA AIR RESOURCES BOARD (hereinafter "ARB"), 1001 "I" Street, Sacramento, California 95814, and LOS ANGELES DEPARTMENT OF WATER AND POWER (hereinafter "LADWP"), 111 N. Hope Street, Room 1050, Los Angeles, CA 90012.

I. RECITALS

- (1) California Health and Safety Code (*H&SC*) Section 44011.6 established the Heavy Duty Vehicle Inspection Program (HDVIP). It authorizes ARB to inspect on-road heavy-duty vehicles for excessive smoke emissions and engine tampering and to issue citations, accordingly. The program also requires the vehicle owner to repair its engines that exceed the prescribed ARB smoke opacity standards, perform post-repair opacity tests, and submit proof of repairs and any assessed penalties under the Regulations of the Heavy-Duty Smoke Inspection Program, Chapter 3.5, Sections 2180-2188, Title 13, California Code of Regulations (CCR).
- (2) *H&SC* Section 43701 provides that ARB shall adopt regulations that require owners or operators of heavy-duty diesel motor vehicles to perform regular inspections of their vehicles for excess smoke emissions.
- (3) Title 13, CCR sections 2190 et seq. were adopted under the authority of *H&SC* section 43701 and, with limited exceptions which are not applicable here, apply to all heavy-duty diesel powered vehicles with gross vehicle weight ratings greater than 6,000 pounds which operate on the streets or highways within the State of California.
- (4) Title 13, CCR sections 2190 et seq. authorize the Periodic Smoke Inspection Program (PSIP) which requires the owners and operators of California based vehicle fleets of two or more heavy duty diesel motor vehicles with gross vehicle weight ratings greater than 6,000 pounds which operate on the streets or highways within the State of California to conduct annual smoke opacity inspections of their vehicles that are four years older than the model year of the vehicle's engine.
- (5) Title 13, CCR section 2192(a) requires inter alia that the owner of the vehicle "[t]est the vehicle for excessive smoke emissions periodically according to the inspection intervals specified in section 2193(a), (b), and (c)", "[m]easure the smoke emissions for each test...", "[r]ecord the smoke test opacity levels and other required test information as specified in section 2194..." and "[k]eep the records specified in section 2194 for two years after the date of inspection."
- (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 (\$1,000.00) or not to exceed ten thousand dollars (\$10,000.00) respectively, for each day in which the violation occurs.

- (7) Title 13, CCR sections 2022 and 2022.1 authorizes the Public Agencies and Utilities (PAU) Regulation, which applies to any municipality or utility that owns, leases, or operates on-road diesel-fueled heavy-duty vehicles with a 1960 model-year or newer medium heavy-duty or heavy heavy-duty engine certified to greater than 0.01 grams per brake horsepower-hour (g/bhp-hr) and has a manufacturer's gross vehicle weight rating greater than 14,000 pounds. Compliance requires BACT installation on each applicable vehicle in its fleet as required by the implementation schedule.
- (8) Under authority of Health and Safety Code section 39600 and 39601, title 13, CCR section 2020 and 2022 et seq. requires Public Agency and Utility fleet owners to use best available control technology on applicable on-road diesel-fueled heavy-duty vehicles. Applicable vehicles have a manufacturers gross vehicle rating greater than 14,000 pounds with a 1960 to 2006 model-year medium heavy-duty or heavy heavy-duty engine or 2007 model-year engine or newer certified to greater than 0.01 grams per brake horsepower-hour particulate emission standard. Records of the installed diesel emission control strategies and corresponding compliance plans must be accessible at the terminal. Each public agency and utility fleet vehicle must have affixed to the driver's side doorjamb, or another readily accessible location known to the driver, a legible and durable label with complete and accurate information filled in.
- (9) ARB contends LADWP failed to install Best Available Control Technology to vehicles in its fleet according to the implementation schedule outlined in title 13, CCR section 2022 et seq.
- (10) Title 13, CCR section 2183 (b) states, "No heavy-duty gasoline-powered vehicle shall operate in California with tampered or defective emission control components."
- (11) Title 13, CCR section 2185 (a) (3) (B) states, "After the first year from the effective date of the amended regulation, February 15, 2007, the owner shall receive a citation assessing the owner a \$300 penalty."
- (12) ARB contends LADWP failed to provide evidence that their heavy-duty gasoline-powered vehicles had legible emission control labels (ECL) attached to the engines, which is in violation of CCR, title 13, section 2183, et seq.
- (13) LADWP is willing to enter into this Agreement solely for the purpose of settlement and resolution of this matter with ARB. ARB accepts this Agreement in termination of this matter. Accordingly, the parties agree to resolve this matter completely by means of this Agreement, without the need for formal litigation, and therefore agree as follows:

II. TERMS & RELEASE

In consideration of ARB not filing a legal action against LADWP for the violations alleged above, ARB and LADWP agree as follows:

(1) Upon execution of this Agreement, LADWP shall pay a civil penalty of **\$54,900.00**. Payment shall be made in check form as described below and the payments shall be submitted no later than December 10, 2012:

- **\$ 41,175.00** made out to **California Air Pollution Control Fund**
- **\$ 13,725.00** made out to **Peralta Community College District**

All payments and documents shall be sent to the attention of:

Mr. Sidney Lau, Air Resources Engineer
Air Resources Board, Enforcement Division
9480 Telstar Avenue, Suite 4
El Monte, CA 91731

- (2) LADWP shall not violate Health and Safety Code Sections 43701 et seq. and 44011.6, et seq., Title 13, CCR, Sections 2180 et seq., 2190 et seq., and 2485 et seq.
- (3) LADWP shall comply with one or both of the following options to attend the CCDET II class (Diesel Exhaust After Treatment and Maintenance), described on the ARB's webpage <http://www.arb.ca.gov/enf/hdvip/ccdet/ccdet.htm>. This class is conducted by various California Community Colleges and instructs attendees on California's emission regulations and the proper care and maintenance of exhaust after treatment systems (EATS).
- (a) LADWP shall have the fleet maintenance manager (or equivalent) and all staff responsible for maintenance of EATS attend the CCDET II class. Proof of CCDET II completion shall be provided to ARB within twelve months of the date of this Agreement and also be maintained in each applicable employee's file for the term of his or her employment.
- (b) In case LADWP uses a contractor for the maintenance of EATS, in addition to having the fleet maintenance manager (or equivalent) attend the CCDET II course, LADWP shall obtain proof that the contractor's staff maintaining the EATS device(s) completed the CCDET II course within the last four years. This proof of the CCDET II completion shall be provided by LADWP to the ARB within six months of the date of this settlement and be maintained with the EATS installation and maintenance records.
- (4) LADWP shall complete Low NOx Software Upgrades (reflash) on all applicable heavy duty diesel engines operating in California no later than 90 days after an engine requiring reflash to comply with ARB emission standards is identified or included in its fleet, and return proof to Mr. Sidney Lau, ARB, Enforcement Division, 9480 Telstar Avenue, Suite 4, El Monte, CA 91731.

- (5) Each heavy-duty gasoline-powered vehicle in LADWP's fleet shall comply with the emission control label (ECL) requirements set forth in the CCR, Title 13, Section 2183(b), within 90 days of this agreement.
- (6) Each PAU vehicle shall maintain compliance with the label requirements set forth in title 13, CCR section 2022.1(f)(3).
- (7) LADWP must retrofit, with best available control technology as specified in CCR, Title 13, and Section 2022.1, the remaining non-compliant group 1 and 2 PAU vehicles listed in LADWP's spreadsheet, dated October 12, 2012, by December 31, 2012.
- (8) LADWP must retire their remaining group 1 and 2 PAU vehicles by December 31, 2012 to meet the requirements specified in title 13 CCR section 2022.1(d)(4): Compliance Extension for an Engine Near Retirement. LADWP will keep the records of the retirement and update the compliance plan accordingly.
- (9) LADWP shall submit an updated compliance plan demonstrating compliance with the PAU Rule to Mr. Sidney Lau, ARB, Enforcement Division, 9480 Telstar Ave Suite 4, El Monte, CA 91731 or electronically at slau@arb.ca.gov by January 31, 2013.
- (10) LADWP shall instruct all employees who operate diesel fueled commercial vehicles to comply with the idling regulations set forth in CCR, Title 13, Section 2485, within 45 days of this Agreement.
- (11) LADWP shall comply with all requirements found in Title 13, CCR section 2449 et seq.
- (12) This Agreement shall apply to and be binding upon LADWP, and its officers, directors, receivers, trustees, employees, successors and assignees, subsidiary and parent corporations and upon ARB and any successor agency that may have responsibility for and jurisdiction over the subject matter of this Agreement.
- (13) This Agreement constitutes the entire agreement and understanding between ARB and LADWP, concerning the subject matter hereof, and supersedes and replaces all prior negotiations and agreements between ARB and LADWP, concerning the subject matter hereof.
- (14) 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.
- (15) 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.

- (16) 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.
- (17) 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.
- (18) Now, therefore, in consideration of the payment by LADWP, in the amount of fifty four thousand and nine hundred dollars (\$54,900.00), ARB hereby releases LADWP and its principals, officers, directors, agents, subsidiaries, predecessors, and successors from any and all claims that ARB may have based on the facts and allegations described in recital paragraphs (1) – (12) above. The undersigned represent that they have the authority to enter into this Agreement.
- (19) 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 penalty amount was determined, including a per unit or per vehicle penalty.

Penalties must be set at levels sufficient to discourage violations. The penalties in this matter were determined in consideration of all relevant circumstances, including the eight factors specified in Health and Safety Code sections 42403 and 43024.

Public Agency and Utility Rule Violations

The per vehicle penalty for the Public Agency and Utility Rule violations involved in this case is a maximum of \$1,000 per vehicle per day for strict liability violations or \$10,000 per vehicle per day for negligent or intentional violations. The penalty obtained for the Public Agency and Utility Rule violations for failing to install best available control technology by the implementation deadline in this case is \$49,500.00 for 99 violations, or \$500.00 per vehicle per violation. The penalty was discounted based on the fact that the violator made diligent efforts to comply and to cooperate with the investigation.

ECL Violations

The per vehicle penalty for the labeling violations involved in this case is a maximum of \$300 per vehicle per violation. The penalty obtained for the ECL violations involved in this case is \$5,400.00 for 18 vehicles, or \$300.00 per violation.

The provision of law the penalty is being assessed under and why that provision is most appropriate for that violation.

Public Agency and Utility Violations

The penalty provision being applied for the Public Agencies and Utilities Rule (title 13 CCR section 2022 et seq.) violations is Health and Safety Code section 39674. The Public Agency and Utility Rule is a Toxic Air Contaminant Control Measure adopted pursuant to authority contained in Health and Safety Code Sections 39660 et seq. and because LADWP failed to use best available control technology on 99 vehicles by the implementation deadline as required by the Public Agency and Utility Rule during the years of 2009, 2010 and 2011 over an unspecified number of days.

ECL Violations

The penalty provision being applied for the ECL Program violations is Title 13, CCR section 2185 (a) (2) (A) because LADWP failed to provide evidence that 18 of their vehicles had a legible emission control label (ECL) attached to the engine as required by Title 13, CCR section 2183 (b).

Is 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 opacity or level of g/hp-hr. However, since the hours of operation of the non-compliant units involved and their individual emission rate are not known, it is not practicable to quantify the excess emissions.

- (20) LADWP acknowledges that ARB has complied with SB 1402 in prosecuting and settling this case. Specifically, ARB has considered all relevant facts, including those listed at HSC section 43024, has explained the manner in which the penalty amount was calculated, has identified the provision of law under which the penalty is being assessed and has considered and determined that this penalty is being assessed under a provision of law that prohibits the emission of pollutants at a specified level.
- (21) Penalties were 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, and the potential costs and risk associated with litigating these particular violations. Penalties in future cases might be smaller or larger on a per unit/vehicle basis.
- (22) The penalty was based on confidential settlement communications between ARB and LADWP that ARB does not retain in the ordinary course of business either. The penalty is the product of an arms length negotiation between ARB and LADWP and reflects ARB's assessment of the relative strength of its case against LADWP, the desire to avoid the uncertainty, burden and expense of litigation, obtain swift compliance with the law and remove any unfair advantage that LADWP may have secured from its actions.

California Air Resources Board

By: *Ellen M. Peter*

Name: Ellen M. Peter

Title: Chief Counsel

Date: 12/17/2012

Los Angeles Department of Water and Power

By: *Ronald O. Nichols*

Name: Ronald O. Nichols

Title: General Manager

Date: 11/28/12

APPROVED AS TO FORM AND LEGALITY
CARMEN A. TRUTANICH, CITY ATTORNEY

NOV 08 2012

BY: *Michelle Lyman*
MICHELLE LYMAN
DEPUTY CITY ATTORNEY

