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 **PHOENIX COATINGS, INC.**, (hereinafter "PHOENIX"), located at 19893 Berenda Blvd., Madera CA. 93638.

I. RECITALS

(1) California Health and Safety Code (HSC) 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 a post-repair opacity test, 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) HSC 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) CCR, title 13, sections 2190 *et seq.* was adopted under the authority of HSC 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 that operate on the streets or highways within the State of California.

(4) CCR, title 13, 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 that 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) CCR, title 13, 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) HSC section 43016 states, "Any person who violates any provision of this part, or any order, rule, or regulation of the state board adopted pursuant to this part, and for which violation there is not provided in this part any other specific civil penalty or fine, shall be subject to a civil penalty of not to exceed five hundred dollars ($500.00) per vehicle."

(7) ARB considers testing, measuring, recording, and recordkeeping to be critical components in reducing excessive smoke emissions from these heavy-duty vehicles.

(8) ARB contends PHOENIX failed to test, measure, record, and maintain records of smoke emissions from its fleet of heavy-duty diesel vehicles for the year 2010 in violation of CCR, title 13, sections 2190 *et seq.*

(9) PHOENIX 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 PHOENIX for the violations alleged above, ARB and PHOENIX agree as follows:

(1) Upon execution of this Agreement, PHOENIX shall pay a civil penalty of two thousand dollars ($2,000.00). Payment shall be made in check form as described below and the payments will be made no later than February 15, 2012.

SETTLEMENT AGREEMENT AND RELEASE ARB AND PHOENIX:

- **$1,500.00** made out to **California Air Pollution Control Fund**
- **$500.00** made out to **Peralta Community College District**

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

Ms. Andrea Juarez, Air Pollution Specialist
Air Resources Board, Enforcement Division
9480 Telstar Ave., Suite 4
El Monte, CA. 91731

(2) PHOENIX shall not violate HSC sections 43701 *et seq.* and 44011.6 *et seq.,* and CCR, title 13, sections 2180 *et seq.*, 2190 *et seq.,* and 2485 *et seq.*

(3) PHOENIX shall comply with one or both of the following options to attend the California Council on Diesel Education and Technology (CCDET) class, as described on the ARB webpage at http://www.arb.ca.gov/enf/hdvip/hdvip.htm. This class is conducted by various California Community Colleges and instructs attendees on compliance with the PSIP and the HDVIP.

(a) PHOENIX shall have at least one staff member responsible for compliance with the PSIP and the HDVIP attend the CCDET class. Proof of CCDET completion shall be provided to ARB within one year of the date of this Agreement and shall be maintained in each applicable employee's file for the term of his or her employment, or as provided by PHOENIX rules, regulations, codes, or ordinances, whichever is longer.

(b) If PHOENIX uses a contractor to perform the annual smoke opacity testing required under the PSIP, PHOENIX shall obtain proof that the contractor's staff conducting the smoke opacity tests completed the CCDET course within the past four years. This proof of CCDET completion shall be provided to ARB with PSIP records as required by this Settlement Agreement and shall be maintained with the annual PSIP records.

(4) PHOENIX 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 Compliance emission regulations and the proper care and maintenance of Verified Diesel Emission Control Strategies (VDECS).

(a) PHOENIX shall have at least one staff member responsible for maintenance of VDECS attend the CCDET II class. Proof of CCDET II completion shall be provided to ARB within one year of the date of this Agreement and shall also be maintained in each applicable employee's file for the term of his or her employment, or as provided by PHOENIX, rules, regulations, codes, or ordinance, whichever is longer.

(b) In case PHOENIX uses a contractor for the maintenance of VDECS, PHOENIX shall obtain proof that the contractor's staff maintaining the VDECS completed the CCDET II course within the last four years. This proof of the CCDET II completion shall be provided by PHOENIX to the ARB within one year of the date of this settlement and shall also be maintained with VDECS maintenance records.

(5) PHOENIX shall submit copies of all PSIP compliance records for years 2012 and 2013 to the ARB by January 31 of the following year. Copies shall be addressed to the attention of Ms. Andrea Juarez at the California Air Resources Board,

Enforcement Division, 9480 Telstar Ave., Suite 4, El Monte, CA 91731. The ARB reserves the right to visit any PHOENIX fleet location at any time to conduct compliance audits for the HDVIP and PSIP, or any other applicable ARB program.

(6) PHOENIX shall complete Low NOx Software Upgrades (reflash) on all applicable heavy-duty diesel engines operating in California and report to the ARB within 45 days of this agreement.

(7) Each 1974 or newer diesel powered heavy-duty vehicle in the PHOENIX fleet shall comply with the emission control label (ECL) requirements set forth in the CCR, title 13, section 2183(c) within 45 days of this agreement.

(8) PHOENIX shall instruct all employees who operate diesel-fueled vehicles to comply with the idling regulations set forth in CCR, title 13, section 2485, within 45 days of this Agreement.

(9) This Agreement shall apply to and be binding upon PHOENIX, 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.

(10) This Agreement constitutes the entire agreement and understanding between ARB and PHOENIX, concerning the subject matter hereof, and supersedes and replaces all prior negotiations and agreements between ARB and PHOENIX, concerning the subject matter hereof.

(11) 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.

(12) 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.

(13) 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.

(14) 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.

(15) **Senate Bill 1402**

Senate Bill 1402 (Dutton, Chapter 413, statutes of 2010) requires the ARB to provide information on the basis for the penalties it seeks (see HSC 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 HSC sections 42403 and 43024.

- PSIP Violations

  The per vehicle penalty for the PSIP violations involved in this case is a maximum of $500 per vehicle per violation. The penalty obtained for the PSIP violations involved in this case is $2,000.00 for 4 vehicles, or $500.00 per vehicle per violation.

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

- PSIP Violations

  The penalty provision being applied to the PSIP violations is HSC section 43016 because PHOENIX failed to test, measure, record, and maintain records of smoke emissions from its fleet of heavy duty diesel vehicles for the year 2010 in violation of the PSIP regulation in CCR, title13, sections 2190 *et seq.*, for 4 vehicles. Since the PSIP regulation was adopted pursuant to authority granted in Part 5 of Division 26 of the Health and Safety Code and since there is no specific penalty or fine provided for PSIP violations in Part 5, HSC section 43016 is the applicable penalty provision.

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 PSIP 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.

(16) PHOENIX 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 of pollutants at a specific level.

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.

(17) Penalties in future cases might be smaller or larger on a per unit/vehicle basis.

(18) The penalty was based on confidential settlement communications between ARB and PHOENIX 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 PHOENIX and reflects ARB's assessment of the relative strength of its case against PHOENIX, the desire to avoid the uncertainty, burden and expense of litigation, obtain swift compliance with the law and remove any unfair advantage that PHOENIX may have secured from its actions.

(19) Now, therefore, in consideration of the payment by PHOENIX, in the amount of two thousand dollars ($2,000.00), ARB hereby releases PHOENIX 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) through (8) above. The undersigned represent that they have the authority to enter into this Agreement.

California Air Resources Board		**Phoenix Coatings, Inc.**	
By:		By:	
Name:	James Ryden	Name:	Tom Burk
Title:	Chief, Enforcement Division	Title:	President
Date:	2/29/12	Date:	2-15-12