

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 Sud-Chemie Inc. (hereinafter "Sud-Chemie"), 32 Fremont Street, Needham, MA 02494.

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 to function properly. The Verification Procedure itself also places conditions on applicants and diesel emissions control strategies.
- (2) CCR, Title 13, Section 2702(i) Design Modifications. If an applicant modifies the design of a diesel emission control strategy that has already been verified or is under consideration for verification by the Executive Officer, the modified version must be evaluated under this Procedure. The applicant must provide a detailed description of the design modification along with an explanation of how the modification will change the operation and performance of the diesel emission control strategy. To support its claims, the applicant must submit additional test data, engineering justification and analysis, or any other information deemed necessary by the Executive Officer to address the differences between the modified and original designs.
- (3) CCR, Title 13, Section 2702(q) The Executive Officer may lower the verification level or revoke the verification status of a verified diesel emission control strategy family, a conditionally verified system, or a system with a conditional extension or suspend all review of pending verification applications if the Executive Officer determines that there are errors, omissions, inaccurate information, fraudulent submittals, or a deficiency of required submittals in the application for verification, supporting information, warranty report, or in-use compliance testing. Additionally, penalties may be assessed under Part 5, Division 26 of the Health and Safety Code. The Executive Officer may suspend the review of all other applications sent by an applicant if that applicant fails to submit warranty reports or other requested information. The Executive Officer may also seek remedial action against the applicant if it is determined that the verified diesel emission control strategy does not comply with the requirements or provisions of the EO.

- (4) If a Diesel Emission Control Strategy (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.
- (5) The ARB Enforcement Division staff, with the cooperation of Sud-Chemie, has documented certain violations of the Verification Procedure, Section 2702, subsections (i) and (q), with respect to Sud-Chemie's diesel emission control strategies in California that do not conform to the conditions specified in the Verification Procedure and the applicable EOs. In particular, these violations involve offering for sale and selling between 2008 and 2009 Sud-Chemie diesel emission control strategies in stationary emergency standby engines applications that do not conform to the conditions specified in the Verification Procedure and the applicable EOs for the following Diesel Emission Control Strategy Family Names: CA/SUD/2006/PM3/N00/ST/DPF01 and CA/SUD/2006/PM3+/N00/ST/DPF01.
- (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.
- (7) In order to resolve these violations, Sud-Chemie has taken, or agreed to take, the actions enumerated below under "RELEASE". 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-listed violations, and voluntarily agree to resolve this matter by means of this Agreement. Specifically, the ARB and Sud-Chemie agree as follows:

II. TERMS AND RELEASE

In consideration of the ARB not filing a legal action against Sud-Chemie for the violations referred to above, the ARB and Sud-Chemie agree as follows:

- (1) Upon execution of this Agreement, the sum of fifty-one thousand, seven hundred ninety two dollars (\$51,792.00) shall be paid on behalf of Sud-Chemie as follows:
 - \$38,844.00 to the California Air Pollution Control Fund.

- **\$12,948.00** to the **Peralta Community College District** to fund diesel technology education programs at California Community Colleges.

The payments must be made in the form of checks. The checks with the signed settlement agreement shall be sent to:

Mr. Christopher Patno, Air Resources Engineer
Air Resources Board, Enforcement Division
9480 Telstar Ave., Suite 4
El Monte, CA 91731

- (2) Sud-Chemie shall not violate the Verification Procedure (CCR, Title 13, Sections 2700 - 2710).
- (3) Sud-Chemie shall comply with the terms and conditions specified in the applicable EO, including but not limited to, the duty cycle temperature profile, are met prior to installing, selling, offering for sale, or advertising any Diesel Emission Control Strategy (DECS) device in California.
- (4) Sud-Chemie agrees to inspect and replace as necessary the following engine/device technology:
 - (a) EnviCat DPF units utilizing the magnesium nitrate precursor sold during 2008 through April 2009 for use with Model Year 2008 Caterpillar 3516C engines (Engine Family Name: 8CPXL78.1T2E).
 - (b) Inform the local air quality control and/or air quality management districts and end-users operating in California that the affected EnviCat DPFs regeneration temperatures are higher than the advertised verified filters regeneration temperatures and make commercially reasonable attempts to confirm in writing from the end-user that the non-verified filters are operating satisfactorily. Efforts shall be made to inform the end-user how to regenerate the affected filters properly.
 - (c) All information requested in subparts (a) – (b) shall be sent to the attention of: Mr. Kirk Rosenkranz, Air Resources Board, Stationary Source Division, P.O. Box 2815, Sacramento, CA 95812.
- (5) This Agreement constitutes the entire agreement and understanding between ARB and Sud-Chemie concerning the subject matter hereof, and supersedes and replaces all prior negotiations and agreements between ARB and Sud-Chemie concerning the subject matter hereof.

- (6) 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.
- (7) 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.
- (8) This Agreement shall be interpreted and enforced in accordance with the laws of the State of California's choice-of-law rules.
- (9) 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.
- (10) 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 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 §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 penalty in this case is \$51,792.00, for 32 non-compliant units for a per unit penalty of \$1,618.50 over an unspecified number of days of violation. This penalty was calculated by considering all factors specified in Health and Safety Code section 43024. This penalty also represents 50% of the cost of the device in violation and the fact that this is an innocent, first time violation and that Sud-Chemie has cooperated fully with the investigation.

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

The penalty provision being applied in this case is Health and Safety Code section 39674 because Sud-Chemie 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.

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 level. However, since the hours of operation of the non-compliant units involved and their individual emission rate are not known, it is not practical to quantify the excess emissions.

- (11) Sud-Chemie 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 Health and Safety Code section 43024, has explained the manner in which the penalty amount was calculated (including a per unit or per vehicle penalty, if appropriate), 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. However, since the hours of operation of the non-compliant units involved and their individual emission rates are not known, it is not practicable for ARB to quantify the excess emissions.
- (12) 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 negotiation, and the potential costs and risk associated with litigating these particular violations. The penalty reflects 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.
- (13) The penalty in this case was based in part on confidential business information provided by Sud-Chemie that is not retained by ARB in the ordinary course of business. The penalty in this case was also based on confidential settlement communications between ARB and Sud-Chemie that ARB does not retain in the ordinary course of business either. The penalty also reflects ARB's assessment of the relative strength of its case against Sud-Chemie, the desire to avoid the uncertainty, burden and expense of litigation, obtain swift compliance with the law and remove any unfair advantage that Sud-Chemie may have secured from its actions.

- (14) Now therefore, in consideration of the payment by Sud-Chemie, in the amount of fifty-one thousand, seven hundred ninety two dollars (\$51,792.00), ARB hereby releases Sud-Chemie and its principals, officers, agents, predecessors and successors from any and all claims that ARB may have based on the facts and allegations described in recital paragraphs (1) – (5) above. 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: 9/28/2011

Sud-Chemie Inc.

By: *Martin Morrill*

Name: Martin Morrill

Title: General Manager

Date: 9/14/11

Michael J.K. Pope

MICHAEL J.K. POPE

SENIOR SALES ENGINEER

09-14-11