

## SETTLEMENT AGREEMENT AND RELEASE

This SETTLEMENT AGREEMENT AND RELEASE (hereinafter "Agreement") is entered into between the STATE OF CALIFORNIA AIR RESOURCES BOARD (hereinafter "CARB") 1001 I Street, Sacramento, California 95814, and THE CONCO COMPANIES (hereinafter "CONCO"), 5141 Commercial Circle, Concord, CA 94520.

### I. RECITALS

- (1) California Health and Safety Code section 44011.6 (HSC § 44011.6) established the Heavy-Duty Vehicle Inspection Program (HDVIP). It authorizes CARB 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 CARB smoke opacity standards, perform a post-repair opacity test, and submit proof of repairs and any assessed penalties under the regulations of the HDVIP, chapter 3.5, California Code of Regulations, title 13, sections 2180-2188 (13 CCR §§ 2180-2188).
- (2) HSC § 43701 provides that CARB shall adopt regulations that require owners or operators of heavy-duty diesel motor vehicles to perform regular inspections of their vehicles for excessive smoke emissions.
- (3) 13 CCR § 2190 *et seq.* were adopted under the authority of HSC § 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) 13 CCR § 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 equipped with engines that are four years old or older.
- (5) 13 CCR § 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 § 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 there is not provided in this part any other specific civil penalty or fine, shall

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be subject to a civil penalty of not to exceed five hundred dollars (\$500) per vehicle."

- (7) CARB considers testing, measuring, recording, and recordkeeping to be critical components in reducing excessive smoke emissions from these heavy-duty vehicles.
- (8) CARB contends CONCO failed to test, measure, record, and maintain records of smoke emissions for its fleet of heavy-duty diesel vehicles for year 2016 in violation of 13 CCR § 2190 *et seq.*
- (9) In order to resolve these alleged violations, CONCO has taken, or agreed to take, the actions enumerated below under "RELEASE". Further, CARB accepts this Agreement in termination and settlement of this matter.
- (10) 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, CARB and CONCO agree as follows:

**II. TERMS AND RELEASE**

In consideration of CARB not filing a legal action against CONCO for the alleged violations referred to above, and CONCO's payment of the penalties set forth in Section 1 below, CARB and CONCO agree as follows:

- (1) Upon execution of this Agreement, the sum of amount dollars (\$7,000) shall be paid on behalf of CONCO no later than May 28, 2018 as follows:
  - \$3,500 payable to the **Air Pollution Control Fund**
  - \$3,500 payable to the **Placer County Air Pollution Control District (APCD)**, with the following notation in the memo line of the check: "**For the Placer County Community Based Supplemental Environmental Project (SEP)**"

**Please send the signed Settlement Agreement and any future mailings or documents required per the terms of this Settlement Agreement to:**

**Mr. Ryman Simangan  
Air Pollution Specialist  
California Air Resources Board  
Enforcement Division  
P.O. Box 2815  
Sacramento, California 95812**

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**For payments made to the Placer County ACPD please send payment by December 1, 2017 along with the corresponding Attachment A2(a) – “Settlement Agreement Payment Transmittal Form” shall be submitted to:**

**Placer County Air Pollution Control District  
For: Placer County Community Based SEP  
110 Maple Street  
Auburn, CA 95603**

In addition, a copy of each payment check made to Placer County APCD shall be mailed to:

**Mr. Ryman Simangan  
Air Pollution Specialist  
California Air Resources Board  
Enforcement Division  
P.O. Box 2815  
Sacramento, California 95812**

**For payments made to the Air Pollution Control Fund, please send the payment along with the attached “Settlement Agreement Payment Transmittal Form” (Attachment A2(b)) to:**

**California Air Resources Board  
Accounting Office  
P.O. Box 1436  
Sacramento, California 95812-1436**

- (2) CONCO has agreed to undertake a SEP as described in Attachment B – “*SUPPLEMENTAL ENVIRONMENTAL PROJECT AGREEMENT – PLACER COUNTY COMMUNITY BASED SEP*”, (“SEP Agreement”), to offset a portion of the penalty, consistent with CARB's SEP Policy. Pursuant to this Agreement, CONCO shall make payments according to the schedule above in (1).
- (3) CONCO has agreed that by funding the PLACER COUNTY COMMUNITY BASED SEP, they will not receive any direct or indirect financial benefit, and that whenever it publicizes a SEP or the results of the SEP, it will state in a prominent manner that the project is being undertaken as part of the settlement of an enforcement action.
- (4) Upon agreeing to the terms set forth in the SEP Agreement, and funding the PLACER COUNTY COMMUNITY BASED SEP, CONCO is released of all

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liabilities as they relate to the PLACER COUNTY COMMUNITY BASED SEP as reflected in this underlying Settlement Agreement.

- (5) In the event the SEP is not fully implemented in accordance with the terms of the SEP Agreement, CARB (as the third party beneficiary) shall be entitled to recover the full amount of the SEP from the SEP implementer, less any amount waived based on the timely and successful completion of any previously agreed upon interim milestone(s), to be deposited into Air Pollution Control Fund. Accordingly, CONCO shall assign any and all rights against the SEP implementer to CARB.
- (6) If the Attorney General files a civil action to enforce this settlement agreement, CONCO shall pay all costs of investigating and prosecuting the action, including expert fees, reasonable attorney's costs, and costs.
- (7) It is further agreed that the penalties described in "Terms and Release", paragraph 1 are punitive in nature, rather than compensatory. Furthermore, the penalty is intended to deter and punish CONCO violations of state environmental statutes, and these penalties are payable to and for the benefit of CARB, a governmental unit. Therefore, it is agreed that these penalties imposed on CONCO CARB arising from the facts described in recital paragraphs (1) through (9) are non-dischargeable under 11 United States Code § 523 (a)(7), which provides an exception from discharge for any debt to the extent such debt is for a fine, penalty or forfeiture payable to and for benefit of governmental unit, and is not compensation for actual pecuniary loss, other than certain types of tax penalties.
- (8) CONCO shall not violate HSC §§ 43701 *et seq.*, 44011.6 *et seq.*, and 13 CCR §§ 2180 *et seq.*, 2190 *et seq.*, and 2485 *et seq.*
- (9) As is typically required, CONCO shall submit copies of all PSIP compliance records for the two years (2017 and 2018) after the close of the audit to CARB by January 31 of the following year. CARB acknowledges that CONCO has already submitted copies of all PSIP compliance records for year 2017 and has therefore complied with that requirement. CONCO must still submit copies of all PSIP compliance records for year 2018 to CARB by January 31 of the following year. **Copies shall be addressed to the attention of Mr. Ryman Simangan at the California Air Resources Board, Enforcement Division, P.O. Box 2815, Sacramento, California 95812.** CARB reserves the right to visit any CONCO fleet location at any time to conduct compliance audits for the HDVIP and PSIP, or any other applicable CARB program.
- (10) CONCO shall complete Low NOx Software Upgrades (reflash) on all applicable heavy-duty diesel engines operating in California and report to CARB within 45 days of this agreement.

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- (11) CONCO shall remain in compliance with the ECL regulation as codified in 13 CCR § 2183.
- (12) CONCO shall instruct all employees who operate diesel-fueled vehicles to comply with the idling regulations set forth in 13 CCR § 2485, within 45 days of this Agreement.
- (13) CONCO shall not violate the Truck and Bus regulation as codified in 13 CCR § 2025.
- (14) This Agreement shall apply to and be binding upon CONCO, and its officers, directors, receivers, trustees, employees, successors and assignees, subsidiary and parent corporations and upon CARB and any successor agency that may have responsibility for and jurisdiction over the subject matter of this Agreement.
- (15) This Agreement constitutes the entire agreement and understanding between CARB and CONCO concerning the subject matter hereof, and supersedes and replaces all prior negotiations and agreements between CARB and CONCO concerning the subject matter hereof.
- (16) 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.
- (17) 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.
- (18) 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.
- (19) 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.
- (20) Senate Bill 1402 (Dutton, Chapter 413, statutes of 2010) requires CARB to provide information on the basis for the penalties it seeks (HSC § 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 §§ 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 per year. The penalty obtained for the PSIP violations involved in this case is \$7,000 for 28 violations involving 28 vehicles, or \$250 per vehicle per violation.

The penalty was discounted based on the fact that this was a first time violation and the violator made diligent efforts to comply and to cooperate with the investigation.

**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 § 43016 because CONCO failed to test, measure, record, and maintain records of smoke emissions from its fleet of heavy-duty diesel vehicles for the year 2016 in violation of the PSIP regulation in 13 CCR § 2190 *et seq.*, for 28 vehicles. Since the PSIP regulation was adopted pursuant to authority granted in Part 5 of Division 26 of the HSC and since there is no specific penalty or fine provided for PSIP violations in Part 5, HSC § 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.**

PSIP Violations

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 noncompliant units involved and their individual emission rates are not known, it is not practicable to quantify the excess emissions.

- (21) CONCO acknowledges that CARB has complied with Senate Bill 1402 in prosecuting or settling this case. Specifically, CARB has considered all relevant facts, including those listed at HSC § 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

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penalty is being assessed under a provision of law that prohibits the emission of pollutants at a specified level.

- (22) 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 basis.
- (23) The penalty was based on confidential settlement communications between CARB and CONCO that CARB does not retain in the ordinary course of business. The penalty is the product of an arms length negotiation between CARB and CONCO and reflects CARB's assessment of the relative strength of its case against CONCO, the desire to avoid the uncertainty, burden and expense of litigation, obtain swift compliance with the law and remove any unfair advantage that CONCO may have secured from its actions.
- (24) Now therefore, in consideration of the payment on behalf of CONCO to the Air Pollution Control Fund and the Placer County Air Pollution Control District, CARB hereby releases CONCO and their principals, officers, agents, predecessors and successors from any and all claims, CARB may have or have in the future based on the circumstances described in paragraphs (1) through (9) of the Recitals. The undersigned represent that they have the authority to enter into this Agreement.

**California Air Resources Board**

Signature: Heather R. Quinn

Print Name: FOR  
Dr. Todd P. Sax

Title: Chief, Enforcement Division

Date: 7/24/18

**THE CONCO COMPANIES**

Signature: [Signature]

Print Name: Joe Sestovic

Title: Vice President

Date: 4/30/18