

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 ENSIGN UNITED STATES DRILLING (CALIFORNIA) INC. (hereinafter "Ensign"), 7001 Charity Avenue, Bakersfield, California 93308.

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 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) *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."

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- (6) The ARB considers testing, measuring, recording, and recordkeeping to be critical components in reducing excessive smoke emissions from these heavy-duty vehicles.
- (7) ARB contends Ensign failed to test, measure, record, and maintain records of smoke emissions from part of its fleet of heavy duty diesel vehicles for 2008 and 2009 in violation of Title 13, CCR, sections 2190 et seq.
- (8) *H&SC* 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."
- (9) *H&SC* sections 39650-39675 mandate the reduction of the emission of substances that have been determined to be toxic air contaminants (TACs). In 1998, following an exhaustive 10-year scientific assessment process, the Air Resources Board (ARB) identified particulate matter (PM) from diesel-fueled engines as a toxic air contaminant. In-use Off-road diesel vehicles (off-road vehicles) are powered by diesel fueled engines that emit toxic particulate matter. Off-road vehicles are controlled under section 2449 within chapter 9, article 4.8, Title 13 of the California Code of Regulations (CCR).
- (10) Title 13, CCR, section 2449 (b) states the regulation applies to any person, business, or government agency who owns or operates within California any diesel fueled or alternative diesel fueled off-road compression ignition vehicle engine with maximum power of 25 horsepower (hp) or greater that is used in a two-engine crane or to provide motive power in a workover rig or to provide motive power in any other motor vehicle that (1) cannot be registered and driven safely on-road or was not designed to be driven on-road, and (2) is not an implement of husbandry or recreational off-highway vehicle.
- (11) Title 13, CCR, section 2449 (g) sets forth the requirements for reporting all vehicles with engines subject to the regulation.
- (12) Title 13, CCR, section 2449 (f) (1) sets forth the requirements for labeling all vehicles with engines subject to the regulation with an ARB-issued equipment identification number (EIN).
- (13) The ARB Enforcement Division staff has documented that Ensign failed to report and label equipment prior to the April 1, 2009 deadline.

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- (14) *H&SC* 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.
- (15) ARB contends that if the facts described in recital paragraphs (1) – (14) were proven civil penalties could be imposed against Ensign, as provided in *H&SC* sections 43016 and 39674.
- (16) Ensign 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 Ensign, for the violations alleged above, ARB and Ensign agree as follows:

- (1) Upon execution of this Agreement, Ensign shall pay a civil penalty of \$19,125.00. Payment shall be made in the check form as described below:
 - \$14,343.75 to the **California Air Pollution Control Fund**.
 - \$4,781.25 to the **Peralta Community College District**.

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

Dr. Xiangyi Li, Ph.D., ARE
Air Resources Board
Enforcement Division
9480 Telstar Avenue Suite 4
El Monte, CA 91731

- (2) If the Attorney General files a civil action to enforce this settlement agreement, Ensign shall pay all costs of investigating and prosecuting the action, including expert fees, reasonable attorney's fees, and costs.
- (3) Ensign shall not violate *H&SC* sections 43701 et seq. and 44011.6 et seq., Title 13, CCR, sections 2180 et seq., 2190 et seq., and 2485 et seq.

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- (4) Ensign shall have all staff responsible for compliance with the PSIP and the HDVIP attend the California Council on Diesel Education and Technology (CCDET) I & II classes, as described on the ARB's webpage at www.arb.ca.gov/msprog/hdvip/hdvip.htm. These classes are conducted by various California Community Colleges and instructs attendees on compliance with the PSIP and the HDVIP. Proof of CCDET I & 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 Ensign, rules, regulations, codes, or ordinances, whichever is longer. In case Ensign uses a contractor to perform the annual smoke opacity testing required under the PSIP, Ensign shall obtain proof that the contractor's staff conducting the smoke opacity tests completed the CCDET I & II courses within the last four years. This proof of the CCDET I & II completion shall be provided by Ensign to the ARB within one year of the date of this settlement and shall also be maintained with the annual PSIP records.
- (5) Ensign shall provide copies of all PSIP compliance records for the 2010, 2011, 2012 and 2013 to the ARB by January 31 of the following year. Copies shall be addressed to the attention of Dr. Xiangyi Li, Ph.D., ARE, Air Resources Board, Enforcement Division, 9480 Telstar Avenue Suite 4, El Monte, CA 91731. The ARB reserves the right to visit any Ensign fleet location at any time to conduct compliance audits for the HDVIP and PSIP, or any other applicable ARB program.
- (6) Ensign shall complete Low NOx Software Upgrades (reflash) on all applicable heavy duty diesel engines operating in California and report back to the ARB, within 45 days of this agreement.
- (7) Each 1974 or newer diesel powered heavy-duty commercial vehicle in the Ensign fleet shall comply with the emission control label (ECL) requirements set forth in Title 13, CCR, section 2183 (c). Within 45 days of the execution of this agreement, Ensign shall submit the proof of compliance with the ECL requirements to: Dr. Xiangyi Li, Ph.D., ARE, Air Resources Board, Enforcement Division, 9480 Telstar Avenue Suite 4, El Monte, CA 91731.
- (8) Ensign shall instruct all employees who operate diesel fueled commercial vehicles to comply with the idling regulations set forth in Title 13, CCR, section 2485, within 45 days of this Agreement.
- (9) Ensign shall not violate the In-Use Off-Road Diesel Regulation, as codified in Title 13, CCR, section 2449. Ensign shall affix EINs to all the off-road vehicles in its fleet within 30 days of the execution of this agreement. Ensign shall submit the pictures of all their off-road vehicles with EINs to:

Dr. Xiangyi Li, Ph.D., ARE, Air Resources Board, Enforcement Division,
9480 Telstar Avenue Suite 4, El Monte, CA 91731.

- (10) No on-road or off-road vehicle or engine subject to the applicable regulation may idle for more than 5 consecutive minutes. The only time a vehicle can idle in excess of 5 consecutive minutes is if one of the exemptions listed in Title 13, CCR, section 2449(d)(3) or 2485 are in effect. Ensign shall submit a copy of their written off-road idling policy within 45 days of execution of this agreement.
- (11) This Agreement shall apply to and be binding upon Ensign, 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.
- (12) This Agreement constitutes the entire agreement and understanding between ARB and Ensign, concerning the subject matter hereof, and supersedes and replaces all prior negotiations and agreements between ARB and Ensign, concerning the subject matter hereof.
- (13) 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.
- (14) 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.
- (15) 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.
- (16) 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.
- (17) **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 *H&SC* 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 *H&SC* sections 42403 and 43024.

Off-Road Violations

The per unit penalty for the Off-Road 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 pursuant to *H&SC* section 39674. The penalty obtained for the Off-Road violations involved in this case is \$13,875.00 for 37 vehicles or \$375.00 per vehicle for an unspecified number of days.

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 \$5,250.00 for 9 vehicles and 14 violations over one or two years or \$375.00 per violation.

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

Off-Road Violations

The penalty provision being applied for the In-Use Off-Road Diesel Regulation (Title 13, CCR, section 2449 et seq.) violations (including labeling) is *H&SC* section 39674 because the In-Use Off-Road Diesel Regulation is a Toxic Air Contaminant Control Measure adopted pursuant to authority contained in *H&SC* sections 39650-39675 and because Ensign failed to register and label 37 vehicles prior to the April 1, 2009 deadline as required by the In-Use Off-Road Diesel Regulation.

PSIP Violations

The penalty provision being applied to the PSIP violations is *H&SC* section 43016 because Ensign failed to test, measure, record, and maintain records of smoke emissions from its fleet of heavy duty diesel vehicles for years 2008, and 2009 in violation of the PSIP regulation in Title 13, CCR sections 2190 et seq. for 9 vehicles and 14 violations. Since the PSIP regulation was adopted pursuant to authority granted in

Part 5 of Division 26 of the *H&SC* and since there is no specific penalty or fine provided for PSIP violations in Part 5, *H&SC* 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.

Off-Road Violations

The penalty is not being assessed under a provision of law that prohibits the emission of pollution at a specified level.

PSIP Violations

The provisions cited above do prohibit emissions above a specified percentage of opacity or level of g/hp-hr. However, since the hours of operation of the non-compliant vehicles involved and their individual emission rates are not known, it is not practicable to quantify the excess emissions.

- (18) Ensign 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 *H&SC* 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 the PSIP penalty is being assessed under a provision of law that prohibits the emission of pollutants at a specified level.
- (19) 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. The penalty was discounted based on the fact that the PSIP and Off-Road violations were first time violations and the violator made unusually diligent efforts to comply and to cooperate with the investigation. Penalties in future cases might be smaller or larger on a per unit basis.
- (20) The penalty was based on confidential settlement communications between ARB and Ensign 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 Ensign and reflects ARB's assessment of the relative strength of its case against Ensign, the desire to avoid the uncertainty, burden and expense of litigation, obtain swift compliance with

the law and remove any unfair advantage that Ensign may have secured from its actions.

- (21) Now, therefore, in consideration of the payment by Ensign, in the amount of nineteen thousand one hundred and twenty five dollars (\$19,125.00), ARB hereby releases Ensign 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) – (14) 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: 3/1/2011

**Ensign United States Drilling
(California) Inc.**

By: Larry M. Lorenz

Name: LARRY M. LORENZ

Title: Operations Manager

Date: 2-16-11