

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 The Van Dyke Corporation, (hereinafter "Van Dyke") 6797 Adobe Road, Twentynine Palms, CA 92277

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 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) 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."

SETTLEMENT AGREEMENT AND RELEASE

ARB and Van Dyke

Page 2 of 8

- (6) 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."
- (7) The ARB considers testing, measuring, recording, and recordkeeping to be critical components in reducing excessive smoke emissions from these heavy-duty vehicles.
- (8) ARB contends Van Dyke failed to test, measure, record, and maintain records of smoke emissions from its fleet of heavy duty diesel vehicles for 2008 and 2009 in violation of Title 13, CCR Sections 2190 et seq.
- (9) In order to resolve these alleged violations, Van Dyke 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.
- (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, the ARB and Van Dyke agree as follows:

II. TERMS AND RELEASE

In consideration of the ARB not filing a legal action against Van Dyke for the alleged violations referred to above, and Van Dyke payment of the fine set forth in Section 1, below, the ARB and Van Dyke agree as follows:

- (1) Upon execution of this Agreement, the sum of five thousand, two hundred and fifty dollars (\$5,250.00) shall be paid on behalf of Van Dyke, as follows:
 - \$3,937.50 to the **California Air Pollution Control Fund**
 - \$1,312.50 to the **Peralta Community College District** to fund diesel technology education programs at California Community Colleges.
 - The full amount shall be submitted in four payments and all payments shall be submitted in check form.

SETTLEMENT AGREEMENT AND RELEASE

ARB and Van Dyke

Page 3 of 8

- First payment is due at time of execution of the agreement and shall be made in form of a check payable to the **Peralta Community College District** in the amount of \$1,312.50.
- Payments 2, 3 and 4 are due at four, eight and twelve months after the date of the execution of the agreement respectively and shall be made in form of a check payable to the **California Air Pollution Control Fund** in the amounts of \$1,312.50 each.
- 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 Avenue, Suite 4
El Monte, CA 91731

- (2) **Effect of Untimely Payment.** If any payment is more than 15 days late, the entire remaining balance becomes immediately due and payable. In addition, if the Attorney General files a civil action to enforce this settlement agreement, Van Dyke shall pay all costs of investigating and prosecuting the action, including expert fees, reasonable attorney's fees, and costs.
- (3) It is agreed that if Van Dyke, including its subsidiary or parent company, at any time becomes insolvent, or makes an assignment for the benefit of creditors or similar action adversely involving Van Dyke, its subsidiary, or parent company, or a proceeding or petition under any bankruptcy, reorganization, arrangement of debt, insolvency, readjustment of debt, or receivership law or statute is filed by or against Van Dyke, its subsidiary, or parent company, or a trustee in bankruptcy, custodian, receiver or agent is appointed or authorized to take charge of any of Van Dyke, its subsidiary, or parent company's properties, or if any deposit account or other property of Van Dyke, its subsidiary, or parent company be attempted to be obtained or held by writ of execution, garnishment, attachment, condemnation, levy, forfeiture or other legal process, or Van Dyke, its subsidiary, or parent company takes any action to authorize any of the foregoing, the entire remaining balance becomes immediately due and payable without notice or demand.
- (4) 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 Van Dyke for violations of state environmental statutes, and these penalties are payable

to and for the benefit of ARB, a government unit. Therefore, it is agreed that these penalties imposed on Van Dyke by the ARB arising from the facts described in recital paragraphs (1) – (10) are non-dischargeable under 11 U.S.C. § 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.

- (5) Van Dyke shall not violate Title 13, CCR sections 2449 et seq., 2180 et seq., 2190 et seq., and 2485 et seq.
- (6) CCR, Title 13, section 2449 (b) states: "... vehicles that were designed to be driven on-road, have on-road engines, and still meet the original manufacturer's on-road engine emission certification standard are considered on-road and are specifically excluded from this regulation." Van Dyke must delete any vehicles registered in the Diesel Off-Road On-Line Reporting System (DOORS) that meet the above definition.
- (7) Van Dyke shall comply with all requirements found in Title 13, CCR section 2449 et seq.
- (8) Van Dyke 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/hdvp/hdvp.htm. These classes are conducted by various California Community Colleges and instruct 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. In case Van Dyke uses a contractor to perform the annual smoke opacity testing required under the PSIP, Van Dyke 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 Van Dyke to the ARB within one year of the date of this settlement and shall also be maintained with the annual PSIP records.
- (9) Van Dyke shall provide copies of all PSIP compliance records for 2011 and 2012 to the ARB by January 31 of the following year. Copies shall be addressed to the attention of: Mr. Christopher Patno, ARB Enforcement Division, 9480 Telstar Avenue, Suite 4, El Monte, CA 91731. The ARB reserves the right to visit any Van Dyke fleet location at any time to conduct compliance audits for the HDVIP and PSIP, or any other applicable ARB program, in accordance with ARB's ability to conduct such audits under the law.

SETTLEMENT AGREEMENT AND RELEASE

ARB and Van Dyke

Page 5 of 8

- (10) Van Dyke 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.
- (11) Each 1974 or newer diesel powered heavy-duty commercial vehicle in the Van Dyke fleet shall comply with the emission control label (ECL) requirements set forth in the CCR, Title 13, Section 2183 (c).
- (12) Van Dyke 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 the execution of this agreement.
- (13) Van Dyke shall instruct all employees who operate diesel fueled commercial off-road vehicles to comply with the idling regulations set forth in CCR, Title 13, Section 2449(d)(3).
- (14) This Agreement constitutes the entire agreement and understanding between ARB and Van Dyke concerning the subject matter hereof, and supersedes and replaces all prior negotiations and agreements between ARB and Van Dyke concerning the subject matter hereof.
- (15) 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.
- (16) 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.
- (17) 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.
- (18) 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.
- (19) 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 Health and Safety Code 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 per year. The penalty obtained for the PSIP violations involved in this case is \$5,250.50 for 21 violations over two years resulting in a per vehicle per year penalty of \$250.00. This penalty was reduced because this was an unintentional, first time violation and the violator took exceptional efforts to come into compliance and cooperate with the investigation, and the violator's financial hardship was taken into consideration.

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 Health and Safety Code section 43016 because Van Dyke 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 21 violations. 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, Health and Safety Code 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 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.

- (20) Van Dyke 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 HSC 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 vehicles involved and their individual emission rates are not known, it is not practical for ARB to quantify the excess emissions.
- (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 negotiation, and the potential costs and risk associated with litigating these particular violations. The penalty was discounted based on the fact that the PSIP violations were first time violations and the violator made unusually diligent efforts to comply and to cooperate with the investigation. The penalty was also discounted based on the violator's financial hardship. Penalties in future cases might be smaller or larger on a per unit basis.
- (22) The penalty in this case was based in part on confidential business information provided by Van Dyke 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 Van Dyke 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 Van Dyke, the desire to avoid the uncertainty, burden and expense of litigation, obtain swift compliance with the law and remove any unfair advantage that Van Dyke may have secured from its actions.
- (23) Now therefore, in consideration of the payment by Van Dyke, in the amount of five thousand, two hundred and fifty dollars (\$5,250.00), ARB hereby releases Van Dyke 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) – (8) above. The undersigned represent that they have the authority to enter into this Agreement.

SETTLEMENT AGREEMENT AND RELEASE

ARB and Van Dyke

Page 8 of 8

California Air Resources Board

By: 

Name: James Ryden

Title: Chief, Enforcement Division

Date: 8/30/11

The Van Dyke Corporation

By: 

Name: David Van Dyke

Title: President

Date: 8-23-2011