

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 TDW Construction Inc. (hereinafter "TDW"), 101 Greenville Road, Livermore, California 94551.

I. RECITALS

- (1) California Health and Safety Code section 39650-39675 (HSC §§ 39650-39675) mandate the reduction of the emissions of substances that have been determined to be toxic air contaminants. In 1998, following an exhaustive ten-year scientific assessment process, ARB identified particulate matter (PM) from diesel-fueled engines as a toxic air contaminant. In-use on-road diesel vehicles are powered by diesel fueled engines that emit toxic PM. On-road vehicles are controlled under the Truck and Bus regulation, as codified in 13 CCR § 2025.
- (2) 13 CCR § 2025(e)(1)(B) states: "Starting January 1, 2012, for all vehicles with GVWR greater than 26,000 lbs, excluding school buses, fleets must meet the requirements of 13 CCR § 2025(g), or fleets that report may instead comply with the phase-in option of 13 CCR § 2025(i)."
- (3) TDW has elected to meet the requirements of the Engine Model Year Compliance Schedule provided for in 13 CCR § 2025(g).
- (4) 13 CCR § 2025(g) requires that owners of diesel vehicles with a GVWR greater than 26,000 lbs. (heavier vehicles) meet PM Best Available Control Technology (BACT) requirements for all 1996 through 1999 model year engines by January 1, 2012, all 2000 through 2004 model year engines by January 1, 2013, and all 2005 and 2006 model year engines by January 1, 2014, and upgrade to a 2010 model year emissions equivalent engine for all 1993 and older model year engines by January 1, 2015, and all 1994 and 1995 model year engines by January 1, 2016.
- (5) ARB has documented that TDW failed to meet PM BACT requirements for one vehicle with a 1996 model year engines by January 1, 2012 and one vehicle with a 2001 model year engines by January 1, 2013.
- (6) 13 CCR § 2025(r) sets forth the requirements for reporting all vehicles with engines subject to the regulation if the owner of a fleet has elected to utilize the compliance options of the low-use vehicle provision of 13 CCR § 2025(p)(4).
- (7) 13 CCR § 2025(e)(8) states: "All information specified in 13 CCR § 2025(r) must be reported to the Executive Officer."
- (8) TDW has elected to utilize the compliance options/credits/provisions of section 13 CCR § 2025(p)(4).

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- (9) ARB has documented that TDW failed to report all vehicles with engines subject to the regulation for which the fleet owner has elected to utilize the compliance options of 13 CCR § 2025(p)(4).
- (10) Failure to comply with the requirements of 13 CCR § 2025 is a violation of state law resulting in penalties. HSC §§ 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 ten thousand dollars (\$10,000), respectively, for each day in which the violation occurs.
- (11) In order to resolve these alleged violations, TDW has taken, or agreed to take, the actions enumerated below under "RELEASE". Further, ARB accepts this Agreement in termination and settlement of this matter.
- (12) 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, ARB and TDW agree as follows:

II. TERMS AND RELEASE

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

- (1) Upon execution of this Agreement, TDW shall pay a civil penalty of eight thousand two hundred fifty dollars (8,250.00.00). Payment shall be made in four payments as described below, beginning on **February 12, 2018**.

| Payment Due Date | In the Amount of and Payable to: |
|-------------------------|---|
| February 12, 2018 | \$2,250.00 the Air Pollution Control Fund |
| March 9, 2018 | \$2,000.00 the Air Pollution Control Fund |
| April 9, 2018 | \$2,000.00 the Air Pollution Control Fund |
| May 9, 2018 | \$2,000.00 the Air Pollution Control Fund |

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

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

Please submit each payment by the applicable payment due date along with the corresponding "Settlement Agreement Payment Transmittal Form" (Attachment A) to:

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

- (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, TDW 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 TDW, 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 TDW, 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 TDW, its subsidiary, or parent company, or a trustee in bankruptcy, custodian, receiver or agent is appointed or authorized to take charge of any of TDW's, its subsidiary, or parent company's properties, or if any deposit account or other property of TDW, 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 TDW, 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 TDW for violations of state environmental statutes, and these penalties are payable to and for the benefit of ARB, a governmental unit. Therefore, it is agreed that these penalties imposed on TDW by ARB arising from the facts described in recital paragraphs (1) through (10) 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,**

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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) TDW shall not violate HSC §§ 43701 *et seq.*, 44011.6 *et seq.*, and 13 CCR §§ 2180 *et seq.*, 2190 *et seq.*, and 2485 *et seq.*
- (6) TDW shall remain in compliance with the ECL regulation as codified in 13 CCR § 2183.
- (7) TDW 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.
- (8) TDW shall not violate the Truck and Bus regulation as codified in 13 CCR § 2025.
- (9) TDW shall submit proof of compliance with the Truck and Bus regulation (as codified in 13 CCR § 2025), within 45 days of the execution of this Agreement, to **Mr. Nelson Van, Air Pollution Specialist, California Air Resources Board, Enforcement Division, P.O. Box 2815, Sacramento, California 95812.**
- (10) TDW shall submit mileage documentation for the years 2018 and 2019 to ARB by January 31 of the following year for the following vehicles:
2FDLF47M3NCA71765, 1FDLF47F6VEB37074, 1FDLF47F8VEB40140,
2FDLF47M2NCA84328, 1FDLF47F8VEB84736, 2FDLF47MXMCA74046 to demonstrate fleet remains in compliance with 13 CCR § 2025(p)(4). Copies shall be addressed to the attention of Mr. Nelson Van at the California Air Resources Board, Enforcement Division, P.O. Box 2815, Sacramento, California 95812. TDW shall continue to report all information specified in 13 CCR § 2025(r) to the Executive Officer.
- (11) This Agreement shall apply to and be binding upon TDW, 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 TDW concerning the subject matter hereof, and supersedes and replaces all prior negotiations and agreements between ARB and TDW 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.

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- (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) Senate Bill 1402 (Dutton, Chapter 413; statutes of 2010) requires ARB 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.

Truck and Bus Violations

The per unit penalty for the Truck and Bus 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.

The penalty obtained for the Truck and Bus violations involved in this case for failure to meet the requirements of the Engine Model Year Compliance Schedule for heavier vehicles is \$6,000.00 or \$3,000.00 per vehicle:

- \$3,000 for one vehicle with a 1996 model year engine
- \$3,000.00 for one vehicle with a 2001 model year engine

The penalty obtained for the Truck and Bus violations involved in this case for failure to report all required information for all vehicles in the fleet as required by 13 CCR § 2025(p)(4) is \$2,250.00 or \$375.00 per vehicle per violation for 6 vehicles.

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.

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

Truck and Bus Violations

The penalty provision being applied for the Truck and Bus regulation (13 CCR § 2025) violations in this case is HSC § 39674 because the Truck and Bus regulation is an Airborne Toxic Control Measure adopted pursuant to authority contained in HSC §§ 39002 et seq., 39650-39675 and because TDW failed to bring their diesel fleet into compliance by the deadlines set forth in 13 CCR § 2025(g) and because TDW failed to report all required information for all vehicles in the fleet for which they have elected to utilize compliance options/credits/provisions as required in 13 CCR § 2025(r).

- **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.**

Truck and Bus Violations

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

- (18) TDW acknowledges that ARB has complied with Senate Bill 1402 in prosecuting or settling this case. Specifically, ARB 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 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. 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 TDW that ARB does not retain in the ordinary course of business. The penalty is the product of an arms length negotiation between ARB and TDW and

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reflects ARB's assessment of the relative strength of its case against TDW, the desire to avoid the uncertainty, burden and expense of litigation, obtain swift compliance with the law and remove any unfair advantage that TDW may have secured from its actions.

- (21) Now therefore, in consideration of the payment on behalf of TDW to the Air Pollution Control Fund, ARB hereby releases TDW and their principals, officers, agents, predecessors and successors from any and all claims, ARB may have or have in the future based on the circumstances described in paragraphs (1) through (10) of the Recitals. The undersigned represent that they have the authority to enter into this Agreement.

California Air Resources Board

Signature: 

Print Name: Dr. Todd P Sax

Title: Chief, Enforcement Division

Date: 1/26/18

TDW Construction Inc.

Signature: 

Print Name: Edmundo D. ALIATE

Title: C.F.O

Date: JAN. 18, 2018