

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
Washington, D.C.

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| In the Matter of: |) | |
| JAMES H. MALOY, INC. |) | File No. AED/MSEB - 4817 |
| Respondent. |) | SETTLEMENT AGREEMENT |

THIS AGREEMENT is made and entered into by and between the United States Environmental Protection Agency (hereinafter "EPA") and James H. Maloy, Inc., Albany, New York (hereinafter the "Respondent").

A. Preliminary Statement

1. On July 6, 1998, a Notice of Violation was issued to the Respondent alleging that the Respondent violated section 211 of the Clean Air Act ("the Act"), 42 U.S.C. § 7545, and the regulations promulgated thereunder at 40 C.F.R. Part 80. The Notice stated that on or before December 15, 1997, diesel fuel which was dispensed at Respondent's wholesale purchaser-consumer facility (located at 421 Albany Shaker Road, Albany, New York) for use in motor vehicles had a sulfur content of greater than 0.05% by weight, in violation of 40 C.F.R. § 80.29(a). The Notice also stated that the Respondent, as the diesel fuel wholesale purchaser-consumer, was liable for this violation pursuant to 40 C.F.R. § 80.30(f). The Notice stated further that Respondent introduced or caused or allowed the introduction of

diesel fuel into a motor vehicle which it knew or should have known contained a sulfur concentration in excess of 0.05% by weight.

2. After considering the gravity of the alleged violation, the size of Respondent's business, and the Respondent's history of compliance under the fuels regulations, the EPA proposed in the Notice a civil penalty of One Thousand Five Hundred Dollars (\$1,500) (hereinafter "the proposed penalty").

3. The EPA and the Respondent desire to settle this matter according to the mutual covenants and agreements contained herein. The consideration is acknowledged to be adequate, and the EPA and the Respondent agree as set forth herein.

B. Terms of Agreement

1. The EPA and the Respondent agree that the settlement of this matter is in the public interest and that this Agreement is the most appropriate means of resolving the matter.

2. The EPA and the Respondent stipulate and agree to the following facts. It is further agreed that these stipulations are applicable to this Agreement and any proceeding arising out of this Agreement or the subject matter of this Agreement:

a. At all relevant times, the Respondent was a wholesale purchaser-consumer within the meaning of 40 C.F.R. § 80.2 and/or a person within the meaning of section 302(e) of the Clean Air Act 42 U.S.C. § 7602(e).

b. On December 15, 1997, inspectors for the EPA inspected the James H. Maloy, Inc. facility located at 421 Albany Shaker Road, Albany, New York. During the inspection, the inspectors took a sample of diesel fuel from the propulsion tank of one motor vehicle(s) at the Respondent's facility and forwarded the sample to the EPA laboratory for analysis to determine its sulfur content. As a result of that analysis, the EPA determined that the diesel fuel contained in the propulsion tank had a sulfur content that was in excess of the amount allowed under 40 C.F.R. § 80.29 and section 211(g) of the Clean Air Act.

c. Upon notification of the diesel sulfur violation, Respondent took immediate steps to bring the diesel fuel in the propulsion tanks of its vehicles into compliance with the Clean Air Act (hereinafter "the Act"). In addition, Respondent implemented a policy to prevent future violations from occurring.

d. Jurisdiction to settle this matter exists pursuant to § 211 of the Act, 42 U.S.C. § 7545, 40 C.F.R. Part 80, and other provisions of law.

3. After considering the gravity of the violation, the Respondent's history of compliance with the fuels regulations, the circumstances of this case, the Respondent's ability to continue in business, the terms of this Agreement, and other facts presented by the Respondent, the EPA has determined to conditionally remit and mitigate the proposed civil penalty to Nine Hundred Dollars (\$900) pending successful completion of the terms of this Agreement. The Respondent agrees to pay Nine Hundred Dollars (\$900). The due date shall be thirty (30) days from the date the Agreement is signed by the EPA. In accordance with section 3717 of the Debt Collection Act of 1982, 31 U.S.C. § 3717, if the debt is not paid within thirty days following the

due date, interest will accrue from the due date through the date of actual payment. Interest will be computed in accordance with section 3717(a) of the Debt Collection Act. A late payment handling charge of \$20.00 will also be imposed if the amount due is not paid by the due date, with an additional charge of \$10.00 for each thirty-day period. The Respondent agrees to pay the amount due by cashier's check or certified check payable to the "United States of America" and mailed to:

U.S. Environmental Protection Agency
Washington Accounting Operations
P.O. Box 360277M
Pittsburgh, Pennsylvania 15251
ATTN: AED/MSEB - 4817

A copy of the check shall be forwarded simultaneously to Judith E. Graham at the following address:

U.S. Environmental Protection Agency
Western Field Office
12345 West Alameda Parkway, Suite 214
Denver, CO 80228

4. Timely performance is essential to this Agreement. Upon failure to timely perform pursuant to paragraphs B(3) or B(4) of this Agreement, or upon default of or failure to comply with any terms of this Agreement by the Respondent, the entire proposed civil penalty of One Thousand Five Hundred Dollars (\$1,500) shall be immediately due and owing. The parties agree that upon such default or failure to comply, the EPA may refer this matter to the United States Attorney General for collection pursuant to § 211(d) of the Act, 42 U.S.C. § 7545(d); commence an action to enforce this Agreement or to recover the civil penalty pursuant to § 211 of the Act; or pursue any other remedies available to it. The Respondent specifically agrees that in the event of such

default or failure to comply, the EPA may proceed in an action based on the original claim of violation of § 211 of the Act, 42 U.S.C. § 7545, and the Respondent expressly waives its right to assert that such action is barred by 28 U.S.C. § 2462, other statutes of limitation, or other provisions limiting actions as a result of the passage of time.

5. This Agreement becomes effective upon the date signed by the EPA, at which time a copy will be returned to the Respondent.

6. The Respondent hereby represents that the individual or individuals executing this Agreement on behalf of the Respondent are authorized to do so and that such execution is intended and is sufficient to bind the Respondent, its officers, agents, directors, owners, heirs, assigns, and successors.

7. The Respondent waives its rights, if any, to a hearing, trial or any other proceeding on any issue of fact or law relating to matters consented to herein.

8. The terms of this Agreement are contractual and are not mere recitals. If any provision or provisions of this Agreement are held to be invalid, illegal or unenforceable, the remaining provisions shall not in any way be affected or impaired thereby.

9. The validity, enforceability and construction of all matters pertaining to this Agreement shall be determined in accordance with applicable federal law.

10. Upon completion of the terms of this Agreement, this matter shall be deemed terminated and resolved. Nothing herein

shall limit the right of the EPA to proceed against the Respondent in the event of default or noncompliance with this Agreement; for violations of § 211 of the Act, 42 U.S.C. § 7545, which are not the subject matter of this Agreement; or for other violations of law.

The following agree to the terms of this Agreement:

James H. Maloy, Inc.

by: John E. Maloy Jr. Date: 7/21/98
~~James E. Maloy, President~~ John E. Maloy Jr. V.P.
James H. Maloy, Inc.

United States
Environmental Protection Agency

by: Richard Buckheit Date: 9/24/98
Bruce C. Buckheit, Director
Air Enforcement Division