

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA,)
)
 Plaintiff,) Civil Action No. 98-01495-HHK
)
 v.)
)
 MACK TRUCKS, INC.,)
)
 Defendant.)
 _____)

**AGREEMENT REGARDING ALLEGED
NON-COMPLIANCE WITH CONSENT DECREE**

**AGREEMENT REGARDING ALLEGED NON-COMPLIANCE
WITH CONSENT DECREE**

WHEREAS,

A. The United States, on behalf of the U.S. Environmental Protection Agency (“EPA”), and Mack Trucks, Inc. (“Mack”) (collectively, the “Parties”) are parties to a Consent Decree entered by the United States District Court for the District of Columbia, on July 1, 1999 (“Consent Decree”), and Mack and the California Air Resources Board (“CARB”) are parties to a California Settlement Agreement entered October 31, 1998 (“1998 Settlement Agreement”), as amended;

B. The United States contends that Mack violated Section IX (Low NO_x Rebuild Program) of the Consent Decree in that Mack implemented a service data-file change that could have prevented up to 5,786 engines that were eligible for Low NO_x rebuild kits under Mack’s Low NO_x Rebuild Program from being recognized as such. The omitted engines were included in the program starting in or around August 2005;

C. The Parties have engaged in good faith, arms-length negotiations to address the United States’ contentions of non-compliance, and, as a result of their negotiations, have consented to the Agreement (“Agreement”) set forth herein;

D. Mack and CARB are simultaneously entering into a separate Agreement addressing the issues addressed herein.

NOW, THEREFORE, without trial, litigation, or adjudication of any issue of fact or law, and without this Agreement constituting an admission by any Party with respect to the matters described above, it is AGREED between the Parties as follows:

I. APPLICABILITY

1. This Agreement applies to and is binding upon the United States and upon Mack, its employees, contractors, agents, successors, and assigns. Unless approved by the Parties in writing, any change in Mack’s ownership or corporate status shall in no way alter Mack’s responsibilities under this Agreement. In any action to enforce this Agreement, Mack shall not raise as a defense the failure of its officers, directors, agents, servants, contractors, or employees or their successors to take actions necessary to comply with the provisions hereof.

2. Mack shall provide information regarding relevant requirements of this Agreement to all officers, employees, and agents whose duties might reasonably include compliance with any provision of this Agreement, as well as to any contractor retained to perform work required under this Agreement. Mack shall require as a term of any such contract performance of the work in conformity with the terms of this Agreement.

II. DEFINITIONS

Unless specifically defined in this Section or elsewhere in this Agreement, terms used herein shall have the meanings referred to or set forth in Section II (Definitions) of the Consent Decree. The following definitions shall apply for purposes of this Agreement:

“Effective Date” means the date upon which the United States provides written notice to Mack and the Court that the public comment period has closed and that comments received, if any, do not require modification of or the United States’ withdrawal from this Agreement.

“Engines Improperly Excluded from Low NO_x Program” means those 5,786 engines that should have been included in the Low NO_x Program but may not have been recognized as eligible for the program due to their containing one of the software codes listed in Mack’s Revised Low NO_x Rebuild Plan, Attachment 2 (May 5, 2006).

“Phase 1 Incentivized Program” means the program initiated by Mack on September 1, 2005, and designed to induce owners of Engines Improperly Excluded from Low NO_x Program to bring their engines in for reflash.

“Phase 2 Incentivized Program” means any program initiated by Mack on or after January 1, 2008 to induce owners to bring engines in for reflash, but that is separate from the Phase I Incentivized Program and includes, as an element of design, a restriction preventing engine owners from receiving the incentive if they seek a reflash at the time of rebuild, and is not restricted to Engines Improperly Excluded from Low NO_x Program.

“Reflash” means the reprogramming of an engine’s computer to replace the existing set of computer instructions with the set of computer instructions designed by Mack to conform with the Low Rebuild requirements in Section IX. B of the Consent Decree.

III. REMEDIAL MEASURES

3. Under the Phase I and Phase II Incentivized Programs, Mack shall reflash 1,200 engines by December 31, 2008.

4. In the event that Mack has not reflashed a minimum of 445 engines by December 31, 2008, Mack shall:

a. submit to EPA and CARB by January 31, 2009, a written plan as to how it will either reflash the remaining engines by July 1, 2009 or otherwise obtain the equivalent tons of NO_x; and

b. If the plan includes continuation of incentive measures to obtain additional reflashes, continue to implement those proposed incentive measures until either such time as 445 engines have been reflashed, or July 1, 2009, whichever occurs first; and

c. implement the plan submitted pursuant to (a), as approved or modified by EPA (after consultation with CARB).

5. In the event that Mack has not reflashed a minimum of 445 engines or otherwise obtained the equivalent tons of NO_x by July 1, 2009, it may terminate any existing incentive program, and shall immediately purchase NO_x credits for the remaining balance and submit to EPA and CARB proof of such purchase by September 1, 2009.

6. For purposes of determining the number of engines reflashed under the Phase 1 Incentive Program, Mack shall discount the total number of reflashes achieved in accordance with the formula contained in Attachment 1. Reflashes achieved under any Phase 2 Incentivized Program shall not be discounted.

7. Mack shall establish and maintain records to enable the Parties to monitor the implementation of the campaign, including but not limited to: the quarterly and cumulative number of engines that have been reflashed. Mack shall provide these records to EPA and CARB upon request.

IV. REPORTING

8. After the Effective Date of this Settlement Agreement, Mack shall include in its written quarterly progress reports pursuant to Paragraph 105 of the Consent Decree the quarterly and cumulative number of engines that have been reflashed pursuant to Section III of this Agreement. Unless the parties agree in writing otherwise, this reporting obligation will terminate upon the submission of the earlier of the quarterly progress report that demonstrates that at least 1,200 engines have been reflashed pursuant to Section III of this Agreement, or the quarterly progress report for the quarter in which Mack certifies that all remedial measures required by Section III have been completed and all accrued stipulated penalties pursuant to Section VI have been paid.

V. AGREED PENALTY UNDER CONSENT DECREE

9. Mack shall pay a total penalty amount of \$300,000 to the United States and to the California Air Resources Board (CARB). Within thirty days of the Effective Date of this Agreement, Mack shall pay the penalty amount due under this Agreement to the United States in the amount of \$240,000. Payment shall be made by Electronic Funds Transfer by 4:00 p.m. Eastern Standard Time on the due date to the Department of Justice lockbox bank in accordance with specific instructions to be provided to Mack upon the Effective Date and shall reference Department of Justice Case No. 90-5-2-1-2251, the civil action number of this matter, and this Paragraph of the Agreement. Mack shall transmit notice of such payments to the United States in accordance with Paragraph 111 of the Consent Decree. Mack shall not deduct the payment required by this Paragraph in calculating its federal income tax.

VI. ADDITIONAL STIPULATED PENALTIES UNDER THIS AGREEMENT

10. If Mack fails to reflash 1,200 engines as required by Paragraph 3, it shall pay to

the United States a stipulated penalty of \$200 per engine for each engine less than 1,200 reflashed; and it shall pay to CARB a stipulated penalty of \$50 for each engine less than 1,200 reflashed.

11. If Mack fails to pay the penalty set forth in Paragraph 9 by the deadline, it shall pay to the United States a stipulated penalty of \$800 per day for each day the payment is late; and it shall pay to CARB a stipulated penalty of \$200 per day for each day the payment is late.

VII. EFFECT OF AGREEMENT

12. Upon completion by Mack of all its obligations under this Agreement, this Agreement resolves the United States' potential claims for stipulated, administrative, and civil penalties and other relief enforcing the Consent Decree with respect to the Engines Improperly Excluded from Low NO_x Program.

13. This Agreement does not pertain to any matter other than that expressly specified in Paragraph 12. Nothing in this Agreement shall relieve Mack of its obligation to comply with applicable Federal, State and local laws and regulations, and this Agreement does not resolve the liability, if any, of any person or entity for any civil claims or claims for stipulated penalties other than the claim referred to in Paragraph 12, or for any criminal claims.

14. This Agreement does not limit, enlarge, or affect the rights of any Party to the Consent Decree as against any third parties. Nothing in this Agreement shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this Agreement.

VIII. GENERAL PROVISIONS

15. The provisions of Section XV (Force Majeure) of the Consent Decree shall apply to any Force Majeure event asserted by Mack in connection with this Agreement. Any dispute arising under this Agreement shall be resolved in accordance with Section XVI (Dispute Resolution) of the Consent Decree. This Agreement is entered into in furtherance of the objectives of the Consent Decree. Mack shall allow access, provide access to information, and retain documents relating to the implementation of this Agreement in accordance with Sections XVIII (Right of Entry) and XIX (Access to Information and Retention of Documents) of the Consent Decree.

16. The records required by this Agreement, including those required by Paragraph 7, shall be retained by Mack in accordance with the record retention requirements of Section XIX (Access to Information and Retention of Documents) of the Consent Decree.

17. There shall be no modification of this Agreement without written agreement of the Parties.

18. This Agreement contains the entire agreement between the United States and Mack with respect to the subject matter hereof. The Parties acknowledge that there are no

representations, agreements, or understandings relating to the settlement other than those expressly contained in this Agreement.

19. The Assistant Attorney General of the Environment and Natural Resources Division of the Department of Justice and the undersigned representative of Mack each certify that he or she is fully authorized to enter into the terms and conditions of this Agreement and to execute and legally bind the Party he or she represents.

20. The United States intends to file a "Notice of Agreement Regarding Alleged Non-compliance with Consent Decree" with the Court advising it of the issues addressed herein and the Parties' agreement. Following the filing of the Notice, the United States will publish notice of this Agreement in the Federal Register and the Agreement shall be subject to a public comment period of not less than 30 days. The United States may withdraw or withhold its consent to this Agreement if comments received disclose facts or considerations indicating that this Agreement is inappropriate, improper, or inadequate. After the conclusion of the comment period, the United States will advise Mack and the Court whether it continues to consent to this Agreement.

21. The United States and Mack agree that the provisions of paragraph 151 of the Consent Decree apply to this Agreement.

22. The United States and Mack agree that Mack may file a claim of business confidentiality in accordance with 40 CFR Part 2, subpart B with respect to any information required to be submitted to EPA under this Agreement.

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ATTACHMENT 1

1. Survey: To determine the number of engines under the Phase 1 Incentive Program that count toward the total number of reflashes required under Paragraph 3 of the Agreement, Mack shall conduct a survey of dealers who have conducted reflashes under this program. The survey will audit at least 50 randomly selected engines. For each engine, Mack will determine whether the engine was rebuilt at the time of reflash.

In conducting the survey, Mack will generate a computer list of serial numbers for all engines reflashed under the Phase 1 Incentivized Program as of September 30, 2007. From this list, Mack will randomly select at least 50 engine serial numbers. For each engine selected, Mack will (a) contact the dealer who performed the Low NOx Reflash; and (b) obtain from that dealer a written statement regarding whether the engine underwent an engine rebuild concurrently with (or within one week) of installation of the Low NOx Reflash. Mack will request this information in writing from a dealer, citing the engine serial number. Where Mack is unable to obtain this information from a dealer, Mack will substitute the engine in question with the next engine identified on the randomized list of serial numbers.

2. Phase 1 Discount: To determine the quantity of engines to be discounted (subtracted) from the Phase I Incentivized Program, Mack will: (a) Divide the total number of engines determined in the survey sample to have been reflashed at the time of or within one week of engine rebuild by the total number of engines in the survey (i.e. at least 50); (b) Multiply the number of engines reflashed under the Phase I Incentivized Program upon its completion by the quotient calculated in (a).

Example: Survey size = 50
Number of engines reflashed at time of rebuild within survey sample = 5
Total number of engines reflashed under Phase 1 = 800

Step 1: $5/50 = 0.1$

Step 2: $800 \times 0.1 = 80$ = Number of Phase 1 engines to be discounted