

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 AMERICAN GOLF CORPORATION (hereinafter "AMERICAN GOLF") 1001 Long Prairie Road, Suite 200, Flower Mound, Texas 75022.

I. RECITALS

- (1) California Health and Safety Code sections 39650-39675 (HSC §§ 39650-39675) mandate the reduction of the emission of substances that have been determined to be toxic air contaminants. In 1998, following an exhaustive 10-year scientific assessment process, ARB identified particulate matter from diesel-fueled engines as a toxic air contaminant. In-use off-road heavy duty diesel vehicles (off-road vehicles) are powered by diesel fueled engines that emit toxic particulate matter. Off-road vehicles are controlled under chapter 9, 13 CCR § 2449.
- (2) 13 CCR § 2449(b) states except as provided in § 2449(b)(2)(G), the Regulation for In-Use Off-Road Diesel-Fueled Fleets (Off-Road Regulation) applies to any person, business, or government agency who owns or operates within California any vehicles with a diesel-fueled or alternative diesel fueled off-road compression-ignition engine with maximum power (max hp) of 25 horsepower (hp) or greater provided that the vehicle cannot be registered and driven safely on-road or was not designed to be driven on-road, even if it has been modified so that it can be driven safely on-road.
- (3) 13 CCR § 2449(g) sets forth the requirements for reporting all vehicles with engines subject to the Off-Road Regulation.
- (4) 13 CCR § 2449(g)(2)(B) states, "If any information reported per section 2449(g)(1) has changed since either the initial or last annual report filed with ARB, the fleet owner must, in its next annual report identify such changes. Such changes include vehicles removed from the fleet, vehicles added to the fleet through purchase or by bringing into California, vehicles newly designated as permanent or year-by-year low-use or specialty vehicles, repowers, Verified Diesel Emission Control Strategies (VDECS) installed, and VDECS removed. If there are no changes, the fleet shall indicate that there have been no changes since the last report."
- (5) 13 CCR § 2449(g)(4) states, "Any person selling a vehicle with an engine subject to this regulation in California must notify ARB within 30 days from the date the vehicle was sold. If the reporting date under section 2449(g)(2) occurs within 30 days of the vehicle being sold, the annual reporting may serve as the notification to ARB that the vehicle was sold."

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- (6) 13 CCR § 2449(f)(1) states that if a vehicle is purchased by a fleet and already has an Equipment Identification Number (EIN), "the fleet owner has 30 days from the date of purchase or the date the vehicle enters California to inform ARB of the purchase."
- (7) ARB Enforcement Division, has documented that AMERICAN GOLF failed to report changes in its off-road fleet per the reporting requirements set forth in the 13 CCR § 2449(g) and (f).
- (8) 13 CCR § 2449(d)(6) prohibits large or medium fleets operating off-road vehicles in California from adding Tier 0 and Tier 1 engines, as of January 1, 2013.
- (9) ARB Enforcement Division, has documented that AMERICAN GOLF added Tier 0 and Tier 1 engines after January 1, 2013.
- (10) Failure to report changes of off-road vehicles and adding prohibited vehicles after the deadline are violations of state law resulting in penalties. HSC § 39674 authorizes civil or administrative penalties not to exceed one thousand dollars (\$1,000) or ten thousand dollars (\$10,000) for each day that the violation occurs.
- (11) In order to resolve these alleged violations, AMERICAN GOLF 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 AMERICAN GOLF agree as follows:

II. TERMS AND RELEASE

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

- (1) Upon execution of this Agreement, the sum of thirteen thousand three hundred fifty dollars (\$13,350.00) shall be paid on behalf of AMERICAN GOLF no later than February 15, 2016, as follows:
 - \$10,013.00 payable to the **Air Pollution Control Fund**
 - \$3,337.00 payable to the **Peralta Colleges Foundation**

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 send the payment along with the attached "Settlement Agreement Payment Transmittal Form" (Attachment A) to:

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

- (2) If the Attorney General files a civil action to enforce this settlement agreement, AMERICAN GOLF shall pay all costs of investigating and prosecuting the action, including expert fees, reasonable attorney's costs, and costs.
- (3) 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 AMERICAN GOLF 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 AMERICAN GOLF 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, 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.
- (4) AMERICAN GOLF shall not violate HSC §§ 43701 *et seq.*, 44011.6 *et seq.*, and 13 CCR §§ 2180 *et seq.*, 2190 *et seq.*, and 2485 *et seq.*
- (5) AMERICAN GOLF 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.
- (6) AMERICAN GOLF shall not violate the Truck and Bus regulation as codified in 13 CCR § 2025.

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- (7) AMERICAN GOLF shall comply with the requirements for off-road vehicles set forth in 13 CCR § 2449.
- (8) This Agreement shall apply to and be binding upon AMERICAN GOLF, 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.
- (9) This Agreement constitutes the entire agreement and understanding between ARB and AMERICAN GOLF concerning the subject matter hereof, and supersedes and replaces all prior negotiations and agreements between ARB and AMERICAN GOLF concerning the subject matter hereof.
- (10) 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.
- (11) 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.
- (12) 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.
- (13) 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.
- (14) 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.

Off-Road Vehicle Violations

The per vehicle penalty for the off-road vehicle 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 reporting violations for off-road vehicles in this case is \$11,850.00 or \$150.00 per vehicle for 79 vehicles. The penalty for adding prohibited off-road vehicles in this case is \$1,500.00 or \$300.00 per vehicle for 5 vehicles.

The penalty was discounted due to financial hardship and 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

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

Off-Road Vehicle Violations

The penalty provision being applied for the Off-Road Regulation (13 CCR § 2449) violations is HSC § 39674 because the Off-Road Regulation is an Airborne Toxic Control Measure adopted pursuant to authority contained in HSC §§ 39002 et seq., 39650-39675 and because AMERICAN GOLF failed to report changes in its off-road fleet and added prohibited Tier 0 and Tier 1 engines after January 1, 2014.

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 Vehicle Violations

The provisions cited above for reporting violations do not currently prohibit emissions above a specified level of g/hp-hr.

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

- (15) AMERICAN GOLF 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

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penalty is being assessed under a provision of law that prohibits the emission of pollutants at a specified level.

- (16) 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.
- (17) The penalty was based on confidential settlement communications between ARB and AMERICAN GOLF that ARB does not retain in the ordinary course of business. The penalty is the product of an arms length negotiation between ARB and AMERICAN GOLF and reflects ARB's assessment of the relative strength of its case against AMERICAN GOLF, the desire to avoid the uncertainty, burden and expense of litigation, obtain swift compliance with the law and remove any unfair advantage that AMERICAN GOLF may have secured from its actions.
- (18) Now therefore, in consideration of the payment on behalf of AMERICAN GOLF to the Air Pollution Control Fund and the Peralta Colleges Foundation, ARB hereby releases AMERICAN GOLF 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: 2/5/16

American Golf Corporation

Signature: 

Print Name: David Waymire

Title: Regional Agronomist

Date: January 25, 2016