No. 14-___

IN THE

Supreme Court of the United States

VOLVO POWERTRAIN CORPORATION,

Petitioner,

v.

UNITED STATES OF AMERICA,
CALIFORNIA AIR RESOURCES BOARD,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Congress enacted the Clean Air Act in 1970 "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." 42 U.S.C. § 7401(b)(1). In furtherance of this statutory objective, the Clean Air Act grants EPA enforcement authority to impose penalties for "the sale, or the offering for sale, or the introduction, or delivery for introduction, into commerce, or (in the case of any person, except as provided by regulation of the Administrator), the importation into the United States" of engines that violate federal emissions standards. 42 U.S.C. §§ 7522(a)(1); 7524(a). EPA has acknowledged that there is nothing in the Clean Air Act that grants EPA authority to impose penalties for engines that are not sold in or imported into the United States.

The questions presented are:

1. Whether EPA exceeds its regulatory authority under the Clean Air Act by imposing more than $62 million in penalties for foreign engine emissions based on a consent decree that limits EPA's enforcement power to the territorial reach of the Act.

2. Whether a court violates its obligation to ensure that a consent decree furthers the objectives of the statute being enforced by construing consent decree provisions contrary to incorporated statutory language.

PARTIES AND RULE 29.6 STATEMENT

The Respondent United States of America was a plaintiff-appellee below. The Respondent California Air Resources Board was an intervenor-plaintiff-appellee below. The Petitioner Volvo Powertrain Corporation, a Swedish company formally known as Volvo Powertrain AB, is a wholly-owned subsidiary of AB Volvo. AB Volvo is a publicly traded company listed on the Stockholm exchange. No other publicly held corporation owns 10% or more of Volvo Powertrain Corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Volvo Powertrain Corporation ("Powertrain"), respectfully petitions for a writ of certiorari to review the judgment in this case of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the D.C. Circuit is reprinted in the Appendix ("App.") at 1a-29a. The district court's decision is reprinted at App. 30a-57a.

JURISDICTION

The D.C. Circuit rendered its decision on July 18, 2014. App. 1a. The D.C. Circuit denied rehearing and rehearing en banc on September 24, 2014. App. 58a-59a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

The United States originally invoked the jurisdiction of the district court in the enforcement action resulting in the consent decree at issue in this case pursuant to Sections 203, 204, and 205 of the Clean Air Act, 42 U.S.C. §§ 7522, 7523, and 7524, and 28 U.S.C. §§ 1331, 1345, and 1355. App. 161a.

RELEVANT STATUTORY PROVISIONS

The relevant portions of statutory provisions of the Clean Air Act, 42 U.S.C. §§ 7522(a)(1); 7524(a) are reproduced at App. 60a-61a.

INTRODUCTION

This Petition presents a straightforward question: "Can EPA impose penalties under the Clean Air Act for foreign engine emissions by way of a consent decree that expressly ties EPA's enforcement authority to the

territorial limits of the Act?" EPA has acknowledged that the Clean Air Act ("CAA") does not grant it such extraterritorial authority. The CAA limits EPA's enforcement authority over engine emissions to engines introduced into the commerce of the United States. *See* 42 U.S.C. § 7522(a)(1). Nonetheless, EPA imposed more than $62 million in penalties against the Petitioner for 7,262 engines produced in Sweden for an independent foreign affiliate and sold outside of the United States.

The D.C. Circuit affirmed EPA's enforcement action without any mention of the territorial limits on EPA's enforcement authority under the CAA. The panel held that there was no issue of extraterritoriality because the foreign affiliate had asked EPA to issue certificates of conformity for the engine families to which the engines belonged, which *permitted* the foreign affiliate to import those engines into the United States. However, as EPA itself explained in briefing in another case, EPA's authority to penalize a manufacturer for emission standards violations under the CAA requires that the engines are *in fact* imported into the United States: "EPA's regulatory interest and jurisdiction only extend to engines that are or will be introduced in commerce in the U.S., and EPA cannot require an engine manufacturer to comply with the emissions, certification, labeling, and other requirements of 40 C.F.R. Part 89 for engines that are not or will not be introduced into U.S. commerce."[1] EPA has

[1] Brief of Respondent U.S. Environmental Protection Agency, *Indep. Equip. Dealers Ass'n v. E.P.A.*, 372 F.3d 420 (D.C. Cir. 2004) (No. 03-1020), 2003 WL 23003369, at *38-39 ("2003 EPA Brief").

offered no evidence that any of the 7,262 engines at issue were introduced into U.S. commerce.

EPA has acknowledged that "nothing in the CAA gives EPA authority to enforce requirements of domestic law against engines produced overseas for sale overseas."[2] But that is exactly what EPA did in this case. While EPA took its enforcement action pursuant to emission standards imposed by a consent decree (the "Decree"), the foreign company that designed and sold the engines overseas was not party to the Decree, and the Decree makes no mention of emissions from foreign engines. To the contrary, Paragraph 62 of the Decree expressly ties EPA's enforcement authority over nonroad engine emissions to "prohibited acts" under the CAA, a statutory term that is limited to engines sold in or imported into the United States. App. 104a; 42 U.S.C. § 7522(a). Particularly in light of the widespread use of consent decrees to resolve EPA enforcement actions, the D.C. Circuit's presumption *in favor of* extraterritorial application of Clean Air Act consent decrees would empower a shadow regulatory regime by which EPA could effectively govern emissions throughout the world, without congressional authorization or meaningful judicial oversight.

EPA's contention that it can penalize Petitioner for foreign emissions from foreign-sold engines is a "power grab" that is as significant and unprecedented as EPA's recently-rejected argument that it could require small emitters to obtain PSD or Title V permits based on emissions of greenhouse gases. *See Util. Air Regulatory Grp. v. E.P.A.*, 134 S. Ct. 2427 (2014) ("*UARG*"). Indeed, the overreach is more significant

[2] 2003 EPA Brief, at *2.

here because it presumes extraterritorial powers that are completely alien to the CAA's stated purpose to protect the air resources of the United States—as opposed to regulating air quality in foreign nations. As the Court stated in *UARG*, "it would be patently unreasonable—not to say outrageous—for EPA to insist on seizing expansive power that it admits the statute was not designed to grant." 134 S. Ct. at 2444. But while the Court viewed EPA's position in the greenhouse gases case as "a singular situation," *id.*, EPA's enforcement action here—imposing penalties for foreign engine emissions that it acknowledges are not covered by the CAA—speaks to a broader pattern of regulatory overreach that demands the Court's attention.

By upholding EPA's extraterritorial "power grab" to regulate foreign emissions by consent decree, the D.C. Circuit has paved the road for "an enormous and transformative expansion of EPA's regulatory authority without clear congressional authorization." *Id*. At the same time, the panel opinion invites reciprocal intrusions into the United States by other countries, who may be emboldened to pursue similar machinations to extend their regulatory reach to conduct occurring solely within this country. The Court should grant the Petition and reverse.

STATEMENT OF THE CASE

I. Background

Congress enacted the Clean Air Act in 1970 "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." 42 U.S.C. § 7401(b)(1). In 1977, Congress amended the CAA to impose emission standards for heavy-duty

diesel engines ("HDDEs") and nonroad compression ignition engines ("nonroad engines") to reduce the emissions of carbon monoxide, hydrocarbons, and oxides of nitrogen (NOx) in the United States. *See Natural Res. Def. Council v. Thomas*, 805 F.2d 410, 414-15 (D.C. Cir. 1986) (discussing amendment); 42 U.S.C. § 7547. The CAA requires EPA to issue a certificate of conformity ("certificate") to HDDEs and nonroad engines that satisfy these emission standards. 42 U.S.C. § 7525(a).

The CAA's enforcement provisions are tied to the sale or importation of engines into the United States. Pursuant to 42 U.S.C. § 7522(a)(1), "the sale, or the offering for sale, or the introduction, or delivery for introduction, into commerce, or . . . the importation into the United States" of an engine not covered by a valid certificate is a "prohibited act." Any person who engages in the prohibited act of selling or importing nonconforming engines into the United States is subject to per-engine civil penalties. *See* 42 U.S.C § 7524(a) (citing § 7522(a)). Notably, the CAA does not authorize EPA to impose penalties on manufacturers who secure certificates subsequently found invalid *unless* the engines are sold in or imported into the United States. As EPA has stated: "There is nothing in the CAA that suggests that EPA has authority over engines that are not imported into the United States."[3] Rather, the exclusive remedy under the CAA in such circumstances is suspension or revocation of the certificate. *See* 42 U.S.C. § 7525(b)(2)(A). "Any suspension or revocation of a certificate of conformity shall extend no further than to forbid the introduction

[3] 2003 EPA Brief, at *40 (citing *E.E.O.C. v. Arabian Am. Oil Co.,* 499 U.S. 244, 248 (1991) (general presumption against extraterritorial application of federal statutes)).

into commerce of engines previously covered by the certificate." 40 C.F.R. § 89.126(e).

In 1997, EPA filed suit against every major manufacturer of HDDEs sold in the United States, including Volvo Powertrain's predecessor, Volvo Truck Corporation. The allegations in EPA's complaint against the manufacturers closely paralleled its domestic enforcement authority over "prohibited act[s]." *See* App. 161a ("Volvo has sold, offered for sale or delivered for introduction into commerce new motor engines in the United States . . . ."). EPA alleged that the manufacturers used "defeat devices" to minimize emissions under EPA test conditions, while maximizing fuel efficiency and increasing emissions during on-highway truck operation. App. 2a. Although there was evidence that EPA had been aware of and acquiesced in the use of these devices in emission testing, EPA had enormous leverage over the manufacturers because of the requirement for annual certification of engines.[4] Following a year of negotiations, the manufacturers agreed to enter into a consent decree and "thus avoid[], without admitting liability, the possibility that their existing engines would fail to receive EPA certification, a circumstance that would have caused an immediate shutdown of their assembly lines."[5]

Among other things, the Decree required manufacturers to meet more stringent "pull-ahead" emission standards for nonroad engines—*i.e.*, standards

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[4] *See* Andrew P. Morriss et al., *Regulating By Litigation: The EPA's Regulation of Heavy-Duty Diesel Engines*, 56 Admin. L. Rev. 403, 483-88, 509 (2004).

[5] *United States v. Caterpillar, Inc.*, 227 F. Supp. 2d 73, 77-78 (D.D.C. 2002).

that otherwise would not go into effect under the CAA until two years later—to offset the alleged excess emissions in the United States from HDDEs that had been approved through the use of the defeat devices. App. 103a; *see also* App. 167a (explaining EPA calculations behind pull-ahead requirement). Because Volvo Truck Corporation manufactured HDDEs but not nonroad engines for sale in the United States, the Decree further required Volvo Truck to agree to obtain the intervention of its domestic affiliate, Volvo Construction Equipment (which was involved in the U.S. market), for the purpose of enforcing the Decree's nonroad engine pull-ahead requirements. App. 72a. Prior to the district court's entry of the Decree, EPA and Volvo Truck jointly consented to Volvo Construction Equipment's motion to intervene. App. 169a. The motion to intervene explained that Volvo Construction Equipment "is the Volvo Group company that sells these [nonroad] engines in the United States." App. 170a.

EPA's authority to enforce the pull-ahead emissions requirements under the Decree is expressly tied to its domestic enforcement authority to penalize prohibited acts under 42 U.S.C. §§ 7522(a) and 7524(a). Paragraph 62 of the Decree states: "EPA may exercise any authority under its regulations found at 40 C.F.R. Part 89 or under the Act, including . . . *taking enforcement action against prohibited acts* that would be applicable if the [pull-ahead requirements] were emission standards and procedures adopted under Section 213 of the Act." App. 104a (emphasis added).[6] And Paragraph 63 of the Decree makes clear that "[e]xcept as specified, this Decree does not modify, change, or

[6] Section 213 of the CAA, codified at 42 U.S.C. § 7547, addresses emission standards for nonroad engines.

limit in any way the rights and obligations of the Parties under the Act and EPA's regulations with respect to the control of emissions for Nonroad CI Engines." App. 104a. As EPA explained in its brief in support of entry of the Decree, "the Consent Decrees provide that [the pull-ahead] limits in the Consent Decrees have the same effect as emission limits under the Act and the regulations." App. 166a. The Decree does not contain any language stating that EPA would have enforcement authority over foreign emissions.

In 2002, Powertrain assumed Volvo Truck's responsibilities under the Decree. App. 7a-8a. In late 2006, the auditor assigned to oversee the Decree submitted his final audit, reporting that "all Compliance Auditing tasks defined in the Consent Decree … have been fulfilled." App. 174a.

On July 3, 2008, however, EPA issued a formal demand letter, alleging that Powertrain had violated the Decree because of actions taken by another company, Penta, a foreign affiliate of Powertrain. App. 176a. For Model Year 2005, Penta had sought certificates of conformity for 13 engine families covering 8,354 Penta nonroad engines produced at Powertrain's Skövde factory in Sweden. Penta was not a signatory to the Decree, and its engines were not manufactured to meet the pull-ahead requirements for the Decree-signatory companies. The Penta engines satisfied EPA's regular emission standards for nonroad engines under the CAA, and EPA issued certificates of conformity for these engines in January 2005, despite knowing that the engines did not meet the pull-ahead standards. App. 179a.

More than three years later, EPA concluded that the engines should not have been certified because they were covered under Paragraph 110 of the

Decree. Paragraph 110—labeled a "non-circumvention provision"—was inserted in the Decree near the end of negotiations in response to concerns that one of the other signatories to the Decree might attempt to circumvent the pull-ahead requirements by selling its factories to a third party. App. 182a. Paragraph 110 states in full:

> All HDDEs and Nonroad CI Engines manufactured at any facility owned or operated by [Powertrain] on or after January 1, 1998, for which a Certificate of Conformity is sought, must meet all applicable requirements of this Decree, regardless of whether [Powertrain] still owned, owns, operated, or operates that facility at the time the engine is manufactured.

App. 127a-128a. There was no sale in this case. Penta had used Powertrain's Skövde factory for the manufacture of its nonroad engines prior to the Decree, and it continued to do so after the Decree. Nonetheless, EPA took the enforcement position that Penta's requests for engine-family certifications brought all covered engines within Paragraph 110 and triggered the Decree's stipulated penalties provision because the engines had been manufactured at a Powertrain facility—even though they were never owned by and never sold for the benefit of Powertrain.

EPA demanded stipulated penalties for 8,354 Penta nonroad engines manufactured in Sweden, 7,262 of which had been sold outside the United States. App. 176a; 178a.[7]

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[7] 1,092 of the Penta nonroad engines were imported into the United States. Those engines are not at issue in this Petition.

II. The Decisions Below

Powertrain challenged EPA's enforcement action under the Decree's dispute resolution provisions. Paragraph 132 of the Decree required the parties to engage first in informal negotiations. App. 147a. The parties were unable to resolve their dispute informally, and Powertrain filed a motion for judicial review. Among other things, Powertrain argued that EPA's enforcement action should be rejected because (1) the CAA does not provide EPA with authority to seek penalties for nonroad engines that are not imported or otherwise introduced into U.S. commerce and (2) the Decree did not expand EPA's enforcement authority over nonroad engines beyond the territorial limits of the CAA. App 183a-187a.

In ruling in favor of EPA, the district court did not address the territorial limits of the CAA or make any mention of the key provisions of 42 U.S.C. §§ 7522(a) and 7524(a). Instead, the district court held that "[r]egardless of whether the EPA could have regulated engines produced for sale abroad, the requirements of Paragraph 110 plainly apply to all non-road engines 'for which a Certificate of Conformity is sought.' That provision does not require actual importation, nor does any other provision of the decree." App. 47a. In other words, in the absence—in the district court's view—of any language specifying whether the Decree should be given extraterritorial effect, the district court presumed that it should. But this is completely backwards. This Court repeatedly has instructed that there is a "presumption *against* extraterritorial application" of U.S. laws.[8] Under this canon, "[w]hen

[8] *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664 (2013) (emphasis added).

a statute gives no clear indication of an extra-territorial application, it has none."[9] Because Paragraph 110 of the Decree does not give any indication that it would be applied extraterritorially, the district court was required to hold that it does not.

The district court agreed that the stipulated penalty provisions in the Decree were not applicable to the Penta engines, noting that those provisions "on their face apply whenever Volvo Powertrain—but not any other corporation—'seeks certificates of conformity . . . .'" App. 42a. The district court held, however, that it had equitable discretion to award penalties in circumstances not addressed by the Decree. App. 48a-52a. The district court then upheld EPA's demand for penalties in the same per engine amount that would have applied under the Decree's stipulated penalty provisions, which was the same amount that had been imposed in a separate case against a signatory to an identical decree that had knowingly manufactured and sold engines in the United States that did not meet the pull-ahead requirement. App. 51a-52a.

The D.C. Circuit likewise sidestepped the presumption against extraterritoriality. The panel held that "because a manufacturer brings itself within the jurisdiction of the United States when it affirmatively *asks* EPA to issue certificates of conformity, there is no issue of extraterritoriality here." App. 21a. (emphasis in original). But the regulations cited by the panel for this jurisdictional claim focused solely on a foreign manufacturer's record keeping obligations, not on emissions from engines sold outside the United States.

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[9] *Id*. (quoting *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 255 (2010)). The presumption reflects that "United States law governs domestically but does not rule the world." *Id*.

App. 20a. The panel acknowledged that the regulations governing whether a manufacturer had committed a "prohibited act" that would authorize EPA to seek penalties for engine emissions "apply only to engines *in fact* imported into the United States." App. 20a (emphasis in original). The panel made no mention of 42 U.S.C. §§ 7522(a) and 7524(a) and made no mention either of Paragraph 62 of the Decree, which expressly ties EPA's authority to "tak[e] enforcement action against prohibited acts" to the territorial limits in the CAA. App 104a.

The panel upheld EPA's enforcement action in full, including more than $62 million in penalties for 7,262 Penta nonroad diesel engines that were manufactured and sold outside the United States. The panel agreed with the district court that the Decree's stipulated penalty provisions did not cover the Penta engines, but affirmed that court's exercise of equitable discretion in support of EPA's monetary demand. App. 23a-24a. The panel held that the district court was not required in exercising this discretion to consider the statutory factors enumerated in the penalty provisions of the CAA, 42 U.S.C. § 7524(c). App. 27a.

Powertrain unsuccessfully petitioned for rehearing and rehearing en banc. App. 58a-59a. This Petition followed.

REASONS FOR GRANTING THE PETITION

The Petition rests upon a congressional limitation on EPA's authority under the Clean Air Act that is not disputed: EPA may not seek penalties under the CAA for engines not meeting the CAA's emission standards unless those engines are sold in or imported into the United States. *See* 42 U.S.C. §§ 7522(a) and 7524(a); *see also* 2003 EPA Brief, at *2. The Court should grant the Petition because EPA's assertion of extraterritorial enforcement power in this case is irreconcilable with Court precedent and opens the door to a broad expansion of EPA's regulatory powers beyond Congress's intent. The Petition also should be granted so that the Court can resolve confusion among the circuits about the courts' obligation to consider underlying statutory language in construing consent decrees entered in resolution of regulatory enforcement actions alleging statutory violations.

I. THE PETITION SHOULD BE GRANTED TO ADDRESS EPA'S EXERCISE OF ENFORCEMENT AUTHORITY OVER NONROAD ENGINE EMISSIONS OUTSIDE THE UNITED STATES, WHICH EPA CONCEDES ARE BEYOND THE REACH OF THE CLEAN AIR ACT.

This Petition does not challenge the penalties imposed by the courts below regarding 1,092 foreign-made engines that were imported into the United States. Instead, the Petition challenges the more than $62 million in penalties imposed for 7,262 engines that were never offered for sale, sold, or imported within the boundaries of this country. These penalties are contrary to law and EPA's grant of authority from Congress because neither the Clean Air Act nor the Decree confers authority for EPA to enforce U.S.

emissions standards over engines that never entered the United States. Such an overreach parallels other recent regulatory excesses by EPA, as well as an alarming expansion of the administrative state about which members of this Court have expressed serious concerns.

A. Neither the Clean Air Act nor the Consent Decree Authorizes Extra-territorial Enforcement of EPA's Regulations.

The question whether EPA has exceeded its enforcement authority hinges upon an analysis of the text of the Decree, which, by its terms, is derived from the agreement of the parties arising from a dispute over alleged violations of the Clean Air Act. In this analysis, two principles are of controlling importance. First, aside from a single exception that is irrelevant to this case, the CAA is limited to matters concerning the domestic air quality of the United States and does not address extraterritorial concerns. Second, because the Decree expressly confers no greater enforcement authority to the EPA than it is granted under the CAA, the EPA's powers under the Decree cannot be applied extraterritorially to engines that did not enter the United States.

1. The Clean Air Act does not authorize extraterritorial enforcement under the circumstances of this case.

EPA cannot point to any support in the CAA for its assertion of extraterritorial enforcement authority over foreign, nonroad engine emissions. Rather, it is a longstanding principle of U.S. law that "legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction

of the United States." *E.E.O.C. v. Arabian Am. Oil Co*., 499 U.S. 244, 248 (1991). The principle is based upon a canon of statutory interpretation known as the "presumption against extraterritorial application." Under this canon, "[w]hen a statute gives no clear indication of an extraterritorial application, it has none." *Kiobel*, 133 S. Ct. at 1664.

The presumption reflects that "United States law governs domestically but does not rule the world." *Id*. (quoting *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 454 (2007)). The presumption serves to protect against "unintended clashes between our laws and those of other nations which could result in international discord." *Id.* It ensures that the judiciary "does not erroneously adopt an interpretation of U.S. law that carries foreign policy consequences not clearly intended by the political branches." *Id.* And it applies in "all cases," thereby "preserving a stable background against which Congress can legislate with predictable effects." *Morrison*, 561 U.S. at 261.

To rebut the presumption, the statute must evince a "clear indication of extraterritoriality." *Kiobel*, 133 S. Ct. at 1665; *Morrison*, 561 U.S. at 265. Here, the CAA permits extraterritorial application only in a *single* situation not relevant to this matter. *See* 42 U.S.C. § 7415(a)-(b) (authorizing Administrator to act to mitigate, and to mandate state action to mitigate, air pollution problems in a foreign nation caused by domestic U.S. emissions). Congress's failure to authorize other extraterritorial interventions necessarily precludes other foreign incursions, such as controlling foreign emissions. *See United States v. Wells Fargo Bank*, 485 U.S. 351, 357 (1988) (defining the

interpretive canon of *expressio unius est exclusio alterius* as "the expression of one is the exclusion of others").

Aside from this irrelevant exception, all of EPA's authority under the CAA is directed at controlling *domestic* air pollution. Acting within that authority, EPA certainly can regulate non-conforming engines that are imported into the United States. This is because the sale, offering for sale, or importing of such engines into the United States is a "prohibited act" expressly specified in the CAA. *See* 42 U.S.C. § 7522(a)(1).

What the EPA *cannot* do, however, is extend its regulatory reach *extraterritorially* to mandate compliance with EPA's emission standards by engines that do not enter the United States domestic market. Nor can the EPA assert extraterritorial authority over foreign engine emissions merely because the foreign manufacturer sought certificates of conformity for such engines. This is because the CAA does not impose penalties on manufacturers who secure certificates subsequently found invalid *unless the engines are sold or imported into the United States*. *See* 42 U.S.C. § 7524(a) (tying per-engine penalties to commission of prohibited acts under § 7522(a)(1)). As EPA itself has stated: "There is nothing in the CAA that suggests that EPA has authority over engines that are not imported into the United States."[10] Rather, the exclusive remedy under the CAA in such circumstances is suspension or revocation of the certificate. *See* 42 U.S.C. § 7525(b)(2)(A).[11]

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[10] 2003 EPA Brief, at *40 (citing *E.E.O.C.*, 499 U.S. at 248) (general presumption against extraterritorial application of federal statutes)).

[11] The 1977 amendments to the CAA also "instituted 'nonconformance penalties' (NCPs), whereby a manufacturer [of

2. The Consent Decree does not authorize extraterritorial enforcement because it is expressly limited to EPA's powers under the Clean Air Act.

Because the CAA confers no extraterritorial authority on EPA under the circumstances of this case, it is extraordinarily significant—indeed dispositive—that the Decree contains no language stating that the Petitioner *agreed* to EPA's exercise of extraterritorial enforcement power. Such an agreement is conspicuously absent from the Decree. Instead, EPA's authority to enforce the pull-ahead emissions requirements under the Decree *is expressly limited to its domestic enforcement authority under the CAA*. Paragraph 62 of the Decree states:

> EPA may exercise any authority under its regulations found at 40 C.F.R. Part 89 or under the Act, including . . . taking enforcement action against *prohibited acts* that would be applicable if the [pull-ahead requirements] were emission standards and

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an HDDE or nonroad engine] can pay a tax on its engines that fail to meet emissions standards, rather than pull those engines off the market." *Thomas*, 805 F.2d at 416; *see also* 42 U.S.C. § 7525(g). NCPs likewise are tied to the sale or importation of engines into the United States. *See* U.S. Environmental Protection Agency, *Regulatory Announcement: Non-Conformance Penalties for Heavy-Duty Diesel Engines*, at 1 (Aug. 2002) ("Non-conformance penalties (NCPs) are monetary penalties that allow a vehicle or engine manufacturer to sell engines that do not meet emission standards."), *available at* http://nepis.epa.gov/Exe/ ZyPDF.cgi/P10006GM.PDF?Dockey=P10006GM.PDF.

> procedures adopted under Section 213 of the Act.

App. 104a (emphasis added). The term "prohibited acts" in the Decree mirrors the language of 42 U.S.C. § 7522(a) and requires the sale or importation of a nonconforming engine into the United States. Moreover, Paragraph 63 of the Decree makes clear that "[e]xcept as specified, this Decree does not modify, change, or limit in any way the rights and obligations of the Parties under the Act and EPA's regulations with respect to the control of emissions for Nonroad CI Engines." App. 104a.

Indeed, in its motion in support of entry of the Decree, EPA made clear that the Decree was not intended to impose emission standards on foreign-sold nonroad engines. EPA explained that "[a] settlement agreement which seeks to enforce a statute must be consistent with the public objectives sought to be attained by Congress," and EPA defended the Decree as "further[ing] the Congressional goals embodied in the Clean Air Act" "to protect and enhance the quality of the Nation's air resources . . . ." App. 167a; *see also* App. 166a ("Our primary goal in this matter is to protect the environment and the health and safety of the American people . . . .").

The lower courts nonetheless upheld EPA's assertion of extraterritorial enforcement power based upon Paragraph 110 of the Decree, labeled a "non-circumvention provision." Paragraph 110 states that "*all* . . . Nonroad CI Engines manufactured at any facility owned or operated by [Powertrain] on or after January 1, 1998, for which a Certificate of Conformity is sought, must meet all requirements of this Decree . . . ." App. 127a-128a (emphasis added). The district court reasoned that because the term "all" was

not qualified by any language requiring "actual importation," it must be understood to extend the scope of the Decree to nonroad engines produced for sale abroad. App. 47a-48a. And the D.C. Circuit reasoned that because Powertrain's foreign-affiliated company, Penta, had sought certificates of conformity for its foreign-sold engines, the engines fell within the scope of Paragraph 110's requirements for "all" nonroad engines and, accordingly, "there is no issue of extraterritoriality here." App. 14a-16a; 21a.

But this Court has squarely rejected such reasoning. In *Kiobel*, the Court explained that "[i]t is well established that generic terms like 'any' or 'every' do not rebut the presumption against extraterritoriality." 133 S. Ct. at 1665. The word "all" as used in Paragraph 110 does not carry any greater weight—particularly because nothing else in the paragraph or the Decree gives a "clear indication" that the penalties associated with non-conformities can be imposed for engines that remain outside the United States. *See Kiobel*, 133 S. Ct. at 1664. Indeed, Paragraph 110 says nothing at all about enforcement and does not dispense with the express requirement, set forth in Paragraph 62, that Powertrain must commit a "prohibited act," that is, *sell or import nonconforming engines into the United States*, before EPA's enforcement authority is triggered.

Moreover, the lower courts' broad reading of "all . . . Nonroad CI Engines" in Paragraph 110 cannot be squared with the fact that Paragraph 60 of the Decree—the operative paragraph setting forth the pull-ahead requirement—likewise covers "[a]ll Nonroad CI Engines." App. 103a. Paragraph 60 says nothing about certificates of conformity. Accordingly, the D.C. Circuit's focus on Penta's request for

certificates of conformity to avoid the issue of extraterritoriality under Paragraph 110 is a red herring. If the phrase "all nonroad engines" (in both Paragraphs 60 and 110) is read to encompass engines sold abroad, then the Decree's pull-ahead requirement has no territorial limitation, whether a certificate is sought or not.

Likewise, the lower courts disregarded the fact that similar all-encompassing language appears in the Clean Air Act and implementing regulations themselves. For example, 42 U.S.C. § 7521(k) addresses the regulation of evaporative emissions of hydrocarbons "from *all* gasoline-fueled motor vehicles." 42 U.S.C. § 7521(k) (emphasis added). And 40 C.F.R. § 89.1(a) explains that the regulations set forth in Part 89 for the control of emissions from nonroad engines "applies for *all* compression-ignition nonroad engines." 40 C.F.R. § 89.1(a) (emphasis added); *see also*, *e.g.*, 40 C.F.R. § 1039.1 (similarly providing that the regulations in Part 1039 "apply for *all* new, compression-ignition nonroad engines") (emphasis added). Thus, the lower courts' interpretive reasoning would transform the CAA into an international mandate by which the United States (and EPA) would govern air emissions throughout the world. This is the very type of reasoning that the "presumption against extraterritoriality" guards against.

B. EPA's Overreach Here Parallels Its Unreasonable Interpretations of Its Authority in *Utility Air Regulatory Group v. Environmental Protection Agency*.

While extraordinary in its extraterritorial scope, this is not the first time EPA has overreached its

authority under the CAA. Most recently, this Court condemned EPA's greenhouse gas regulations because they paved the road for "an enormous and transformative expansion of EPA's regulatory authority without clear congressional authorization." *UARG*, 134 S. Ct. at 2444. When the excessively broad authority EPA claimed over the national economy in *UARG* is compared to the expansive international authority EPA claims in this case, the striking similarities reveal yet another arrogation of power beyond anything conferred under the CAA.

In *UARG*, EPA conceded that its proposed expansion of regulatory authority was inconsistent with the CAA's text, structure, and design. *Id*. at 2242. EPA nevertheless argued that it could simply rewrite the CAA to achieve its desired purpose—which was nothing less than "extravagant statutory power over the national economy while at the same time strenuously asserting that the authority claimed would render the statute 'unrecognizable to the Congress that designed' it." *Id*. at 2244. Here, EPA likewise conceded, by way of briefing in another case, that "nothing in the CAA gives EPA authority to enforce requirements of domestic law against engines produced overseas for sale overseas,"[12] but it insists that the Decree should be read so as to extend EPA's enforcement authority to engines that were never offered, sold, or imported into the United States.

Here, as in *UARG*, EPA's interpretation is "unreasonable because it would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization." 134 S. Ct. at 2444. Indeed, the

[12] 2003 EPA Brief, at *2.

authority claimed in this case goes *beyond* the power EPA attempted to grasp in *UARG*, which sought to regulate a "significant portion of the American economy." *Id*. Here, EPA claims the power to assert its enforcement authority globally based solely upon the seeking of certificates for non-conforming engines that were never marketed in America—a presumed power that breaks the bonds of the CAA's textual limitations to reach engine emissions that lie wholly within the jurisdiction of foreign sovereigns.[13]

Here, as in *UARG*, "[w]hen an agency claims to discover in a long-extant statute an unheralded power," 134 S. Ct. at 2444, to regulate a significant portion of the global economy, this Court should properly "greet its announcement with a measure of skepticism." *Id*. Under such circumstances, the Court "expect[s] Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'" *Id*. (quoting *F.D.A. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 147 (2000)). And as in *UARG*, the Court here faces a "singular situation"—an agency laying claim to "extravagant statutory power" that it has previously refused to recognize in precisely the same context. *Id*. Because

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[13] To date, at least, EPA has acknowledged the territorial limits of its enforcement authority with regard to greenhouse gas emissions. In its Final Rule regarding greenhouse gas endangerment, EPA concedes that the CAA does not permit extraterritorial regulation of emissions outside the United States: "Under CAA section 202(a), any exercise of regulatory authority following from this endangerment finding would be for new motor vehicles either manufactured in the United States or imported into the United States. There would be no extra-territorial exercise of jurisdiction." Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496; 66,521 (Dec. 15, 2009).

nothing in the CAA compels EPA's interpretation, it is "patently unreasonable—not to say outrageous—for EPA to insist on seizing expansive power that it admits the statute is not designed to grant." *Id*.

The many parallels between EPA's overreaching in *UARG* and in this case are too striking to be coincidental. They reflect an ambitious attitude that, even if well-intended, must be constrained and curtailed to maintain the "separation of powers" enshrined in the Constitution. As the Court concluded in *UARG*, allowing administrative agencies to rewrite existing laws "would deal a severe blow to the Constitution's separation of powers." *Id*. at 2446. The power to execute the laws "necessarily includes both authority and responsibility to resolve some questions left open by Congress that arise during the law's administration. But it does not include a power to revise clear statutory terms," *id*., in a "manner inconsistent with an unambiguous statute." *Id.* (quoting *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 462 (2002)).

C. EPA's Overreach is Symptomatic of an Inadequately Constrained Administrative State.

Beyond *UARG*, members of this Court have expressed serious concerns regarding the expanding power of regulatory agencies and the problems associated with administrative indifference to unsubstantiated expansion of administrative authority. *See City of Arlington v. F.C.C.*, 133 S. Ct. 1863, 1879 (2013) (Roberts, C.J., dissenting) ("It would be a bit much to describe the result as 'the very definition of tyranny,' but the danger posed by the growing power of the administrative state cannot be dismissed."); *Talk Am., Inc. v. Michigan Bell Tel. Co.*, 131 S. Ct.

2254, 2266 (2011) (Scalia, J., concurring) (noting that the FCC "has repeatedly been rebuked in its attempts to expand the statute beyond its text, and has repeatedly sought new means to the same ends"); *see also Sackett v. E.P.A.*, 132 S. Ct. 1367, 1374 (2012) (Scalia, J., for the Court) (rejecting agency argument that would "enable the strong-arming of regulated parties into 'voluntary compliance' without the opportunity for judicial review").

Members of the Court also have expressed concern that, as a practical matter, agencies often enjoy a "significant degree of independence" despite the President's constitutional supervisory authority. *City of Arlington*, 133 S. Ct. at 1878; *see also* Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2250 (2001) (noting that "presidential control did not show itself in all, or even all important, regulation," and that "no President (or his executive office staff) could, and presumably none would wish to, supervise so broad a swath of regulatory activity" making presidential administration "more an aspiration than an achievement").

Both problems addressed above, when considered alongside the overreaching expansion of administrative authority addressed in *UARG* and in the present case, raise serious questions about whether the executive and the legislative branches are willing to constrain the growth and power of the administrative state. Therefore, since it is "emphatically the province and duty of the judicial department to say what the law is," *Marbury v. Madison*, 5 U.S. 137, 177-78 (1803), only the Court can ensure that the other branches of government are constrained within their appropriate boundaries. Indeed, unless the Court acts to ensure the powers of the federal government remain

separate and limited, the "balance of powers" that protects our liberty cannot be maintained. It is necessary and appropriate, therefore, for the Court to review the D.C. Circuit's decision and, thereafter, to constrain the administrative state within its proper constitutional sphere.

II. THE PETITION SHOULD BE GRANTED TO RESOLVE CIRCUIT COURT CONFUSION OVER THE JUDICIAL TREATMENT OF REGULATORY CONSENT DECREES, WHEREBY EPA EXERCISES THE MAJORITY OF ITS CLEAN AIR ACT ENFORCEMENT AUTHORITY.

The vast majority of enforcement actions by federal agencies against public companies and other major institutions end in settlements, not contested proceedings. *See* Richard M. Cooper, *The Need for Oversight of Agency Policies for Settling Enforcement Actions*, 59 Admin. L. Rev. 835, 835 (2007). In particular, a study of EPA enforcement of federal environmental statutes found that EPA resolves 70 percent of all enforcement actions by consent decree. *See* Kristi M. Smith, *Who's Suing Whom?: A Comparison of Government and Citizen Suit Environmental Enforcement Actions Brought Under EPA-Administered Statutes, 1995-2000*, 29 Colum. J. Envtl. L. 359, 387 (2004). Courts accordingly cannot provide effective oversight of regulatory enforcement authority without clear guidance on how to address circumstances, as in the present case, where regulators exercise their authority—or exceed their authority—through the enforcement of a consent decree.[14]

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[14] As one scholar has noted, "the typical subjects of administrative law scholarship, rulemaking and adjudication,

As reflected in the rulings below, the Court has not provided such clear guidance. Rather, the Court's prior rulings on consent decrees have fluctuated between two paradigms: (1) the consent decree as a private contract and (2) the consent decree as a judicial act. The Court has characterized consent decrees as "hybrid" instruments that "'have attributes both of contracts and of judicial decrees,' a dual character that has resulted in different treatment for different purposes." *Local No. 93, Int'l Ass'n of Firefighters, AFL-CIO C.L.C. v. City of Cleveland*, 478 U.S. 501, 519 (1986) (citing *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 237 n.10 (1975)). But the Court has provided scant guidance on which "purposes" should give rise to which "treatment," and the decision regarding which paradigm to follow in a given dispute can point courts in different directions. *See* Thomas M. Mengler, *Consent Decree Paradigms: Models Without Meaning*, 29 B.C. L. Rev. 291, 293 (1988) (noting that "the paradigms used in tandem have no explanatory value for the Court at all").

Viewed as a contract, the Court has held that "it is the agreement of the parties, rather than the force of the law upon which the complaint was originally based, that creates the obligations embodied in the

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represent only a small fraction of agency activity. This distortion in emphasis is not surprising given the well understood fact that most agency activity inevitably occurs behind the scenes and beyond the reach of the Administrative Procedure Act (APA)." Lars Noah, *Administrative Arm-Twisting in the Shadow of Congressional Delegations of Authority*, 1997 Wis. L. Rev. 873, 874 (1997); *see also id.* at 891-95 (addressing consent decrees in enforcement proceedings); Lars Noah, *Governance by the Backdoor: Administrative Law(lessness?) at the FDA*, 93 Neb. L. Rev. 89 (2014) (to same effect).

consent decree." *Int'l Ass'n of Firefighters*, 478 U.S. at 522. Because "the parties' consent animates the legal force of a consent decree," the Court has explained that "a federal court is not necessarily barred from entering a consent decree merely because the decree provides broader relief than the court would have awarded after a trial." *Id*. at 525.

Reflecting their nature as judicial decrees, however, the Court has held that a court's "authority to adopt a consent decree comes only from the statute which the decree is intended to enforce." *Sys. Fed'n No. 91, Ry. Emp. Dep't AFL-CIO v. Wright*, 364 U.S. 642, 651 (1961). The Court has explained that consent decrees "must further the objectives of the law upon which the complaint was based." *Frew ex. rel. Frew v. Hawkins*, 540 U.S. 431, 436 (2004) (citing *Int'l Ass'n of Firefighters*, 478 U.S. at 525). And the Court has cautioned that consent decrees may not be approved if the parties "agree to take action that conflicts with or violates the statute upon which the complaint is based." *Int'l Ass'n of Firefighters*, 478 U.S. at 526; *see also Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 576 n.9 (1984) ("a district court cannot enter a disputed modification of a consent decree . . . if the resulting order is inconsistent with [the] statute [being enforced]").

The potential confusion created by this hybrid treatment of consent decrees is evident as well in the rules governing judicial interpretation of their provisions. In *United States v. Armour & Co.*, the Court held that a consent decree should be interpreted "within its four corners" and not by reference to any purpose of the parties or of underlying statutes. 402 U.S. 673, 682 (1971). The basic import of the Court's holding in this and earlier cases was that

"since consent decrees and orders have many of the attributes of ordinary contracts, they should be construed basically as contracts, without reference to the legislation the Government originally sought to enforce but never proved applicable through litigation." *ITT Continental Baking Co.*, 420 U.S. at 236-37 (discussing *Armour & Co.*). Four years later, however, the Court apparently shifted ground, holding that a consent decree entered pursuant to an enforcement action brought under the federal antitrust statute should be interpreted in light of the statutory language. *See ITT Continental Baking*, 420 U.S. at 240 ("We need not go beyond the Clayton Act itself to conclude that 'acquisition' as used in § 7 of the Act [and as used in the consent decree] means holding as well as obtaining assets."). The Court has never expressly resolved these inconsistent holdings, and this uncertain jurisprudence has led courts in opposite directions. *See* Mengler, *Consent Decree Paradigms*, at 305 (noting that subsequent "lower court decisions cover the landscape" and blaming the lack of clarity in the Court's consent decree decisions for "unprincipled activism" in the courts); *see also* Lloyd C. Anderson, *Interpretation of Consent Decrees and Microsoft v. United States I: Making Law in the Shadow of Negotiation*, 1 U. Pitt. Tech. L & Pol'y 1 (2000) (noting view that the Court's rulings on construction of consent decrees "left mass confusion in its wake" and offering author's proposals on the use of the underlying statutes as an aid to construing consent decrees).

Some courts continue to cite to the pre-*ITT Continental Baking* rule, precluding consideration of the underlying statutes in interpreting consent decrees. *See Sierra Club v. Meiburg*, 296 F.3d 1021, 1031 (11th Cir. 2002) (reversing district court for interpreting EPA consent decree so as to be compatible

with Clean Water Act); *Paralyzed Veterans of Am., Inc. v. Washington Metro. Area Transit Auth.*, 894 F.2d 458, 461 (D.C. Cir. 1990) ("the Supreme Court has taken the view that consent decrees 'should be construed basically as contracts without reference to the legislation the [plaintiffs] originally sought to enforce'") (quoting *ITT Continental Baking*, 420 U.S. at 236-37). In its briefing below before the D.C. Circuit, EPA relied upon this same reasoning in arguing that penalties should be imposed against Petitioner under the Decree without reference to 42 U.S.C. § 7524(c)(2). *See* Br. of Plaintiff-Appellee, *United States v. Volvo Powertrain Corp.*, 758 F.3d 330 (D.C. Cir. 2014) (No. 12-5234), 2013 WL 2446137, at *70.

Other courts, however, read *ITT Continental Baking* as a directive to look, as an interpretive guide, to the statute under which the action giving rise to the consent decree was brought. *See McDowell v. Philadelphia Housing Auth.*, 423 F.3d 233, 239 (3rd Cir. 2005) ("the Supreme Court has indicated that relevant statutes and regulations may sometimes be used to shed light on the terms of a consent decree"); *United States v. Louisville and Jefferson Cnty. Metro. Sewer Dist.*, 983 F.2d 1070, at *5 (6th Cir. 1993) ("A consent decree should be construed against the background of the statute under which the action was brought."); *City of Las Vegas v. Clark Cnty.*, 755 F.2d 697, 702 (9th Cir. 1984) ("This decree should be construed against a backdrop of the [Clean Water Act], since Las Vegas originally brought the action to enforce that statute."); *United States v. Am. Cyanamid Co.*, 719 F.2d 558, 563-65 (2d Cir. 1983) (concluding that language in a consent decree "derives meaning specifically from the Clayton Act").

And yet other courts have rejected the contract paradigm altogether, holding that a consent decree may reach no further than the underlying statutory objective. For example, in *Biodiversity Associates v. Cables*, the Tenth Circuit read this Court's holding in *Wright* as directing lower courts to focus on the purpose of the statute being enforced:

> [A] settlement agreement or consent decree designed to enforce statutory directives is not merely a private contract. It implicates the courts, and it is the statute—and "only incidentally the parties"—to which the courts owe their allegiance. The primary function of a settlement or consent decree, like that of a litigated judgment, is to enforce the congressional will as reflected in the statute.

357 F.3d 1152, 1169 (10th Cir. 2004).

The lower courts' endorsement of EPA's extra-territorial enforcement of the Decree in this case is a reflection of the disarray that has been left in the wake of the Court's unclear guidance. Indeed, absent a myopic interpretation of the Decree "without reference to the legislation the Government originally sought to enforce," *ITT Continental Baking Co.*, 420 U.S. at 236-37, the lower courts almost certainly would have reached a different result.

There can be no argument that EPA's extra-territorial enforcement action here is an "enforce[ment of] congressional will as reflected in the statute." *Biodiversity Assoc.*, 357 F.3d at 1169. Congress enacted the Clean Air Act to protect and enhance the quality of *this country*'s air resources, not the air resources of other countries. *See* 42 U.S.C. § 7401(b)(1). The imposition of penalties for foreign

emissions from 7,262 nonroad engines sold abroad does nothing to further this congressional objective.

Nor could the lower courts have affirmed more than $62 million in penalties against Petitioner if they had read the Decree against the backdrop of the CAA. The Decree's nonroad engine enforcement provisions in Paragraph 62 provide that EPA may take "enforcement action against prohibited acts," App. 104a, and 42 U.S.C. § 7522(a) defines "prohibited acts" as requiring the introduction of the nonroad engines into the United States. Yet, neither court below even addressed this overlapping language. The lower court rulings thus stand in sharp contrast to *ITT Continental Baking*, where the Court explained why the term "acquisition" in that consent decree must be read consistently with the same term in the Clayton Act: "We must assume that the parties here used the words with the specialized meaning they have in the antitrust field, since they were composing a legal document in settlement of an antitrust complaint." 420 U.S. at 240.

Because of the lack of clear guidance from the Court on the proper rules of construction for consent decrees, the lower courts here opened the door for EPA to exercise broad extraterritorial authority over foreign-engine emissions that EPA readily acknowledges is outside its statutory grant. EPA marched through that open door in this case and—if the D.C. Circuit's ruling is not reversed—EPA will be emboldened to take similar steps beyond its congressional authority in the numerous other cases in which it resolves enforcement actions by consent decree.

CONCLUSION

For the foregoing reasons, the Petition should be granted.

Respectfully submitted,

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December 23, 2014

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-5234

UNITED STATES OF AMERICA,

Appellee

v.

VOLVO POWERTRAIN CORPORATION,

Appellant

CALIFORNIA AIR RESOURCES BOARD,

Appellee

Argued December 11, 2013

Decided July 18, 2014

Appeal from the United States District Court
for the District of Columbia
(No. 1:98-cv-02547)

Aaron M. Streett argued the cause for appellant. With him on the briefs were *Lauren Tanner*, *William H. Jeffress, Jr.*, and *William M. Bumpers*.

Russell S. Frye was on the brief for *amici curiae* the National Association of Manufacturers, et al. in support of appellant.

Brian C. Toth, Attorney, U.S. Department of Justice, argued the cause for appellee the United States. With him on the brief was *Lori Jonas*, Attorney.

Kamala D. Harris, Attorney General, Office of the Attorney General for the State of California, *Robert W. Byrne*, Senior Assistant Attorney General, and *Nicholas Stern*, Deputy Attorney General, were on the brief for appellee California Air Resources Board.

Before: GRIFFITH and SRINIVASAN, *Circuit Judges*, and SENTELLE, *Senior Circuit Judge.*

Opinion for the Court filed by *Circuit Judge* SRINIVASAN.

SRINIVASAN, *Circuit Judge*: Under the Clean Air Act, manufacturers of new motor vehicle engines need to obtain certificates of conformity from the Environmental Protection Agency before selling their engines in the United States. To obtain the certificates, manufacturers must verify that their engines comply with EPA emissions standards. In 1998, EPA alleged that several major engine manufacturers had violated federal law by equipping certain engines with "defeat devices" designed to suppress emissions during EPA tests even though emissions exceeded the legal limit in normal operating conditions. The manufacturers settled the allegations, and each entered into similarly worded consent decrees with the federal government.

The consent decrees required the manufacturers to satisfy future EPA emissions standards ahead of schedule. In particular, the decrees provided that certain model year 2005 engines for which the manufacturers sought certificates of conformity would meet model year 2006 limits on emissions of oxides of nitrogen (NOx). The decrees' requirements apply to engines "manufactured at any facility owned or operated by" the settling companies.

Volvo Powertrain Corporation, a wholly owned subsidiary of the Swedish conglomerate AB Volvo, is one of the companies subject to such a decree. Volvo Powertrain owns and operates a facility in Skövde, Sweden, where it and other Volvo subsidiaries manufacture engines. Another wholly owned Volvo subsidiary, AB Volvo Penta, sought certificates of conformity from EPA for 8,354 model year 2005 engines manufactured at the Skövde facility. Those engines did not comply with EPA's model year 2006 NOx emissions standard.

Volvo Powertrain now argues that the consent decree has no application to the Volvo Penta engines even though, under the language of the decree, the engines were manufactured at a "facility owned or operated by" a settling company. The district court disagreed, and it held Volvo Powertrain liable for the failure of the 2005 engines to satisfy the 2006 emissions standard. As a remedy, the court ordered Volvo Powertrain to pay approximately $72 million, an amount calculated in accordance with the consent decree's schedule of stipulated penalties for violations of the decree's requirements.

We agree with the district court that the consent decree applies to the 8,354 Volvo Penta engines manufactured at the Volvo Powertrain plant. Although Volvo Penta, not Volvo Powertrain, sought the certificates of conformity in question, we read the terms of the consent decree to impose liability on Volvo Powertrain for its affiliate's engines manufactured at its facility. We also conclude that the district court committed no abuse of discretion when it ordered Volvo Powertrain to pay approximately $72 million as

a remedy for the violations of the decree. We therefore affirm the judgment of the district court.

I.

A.

The Clean Air Act requires the EPA Administrator to prescribe standards for emissions of air pollutants from new motor vehicles and motor vehicle engines if the emissions "cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." Clean Air Act § 202(a)(1), 42 U.S.C. § 7521(a)(1). A manufacturer who desires to sell new motor vehicle engines in the United States must conduct tests to show that the engines meet emissions standards prescribed under section 202. *See id*. § 206(a)(1), 42 U.S.C. § 7525(a)(1); *see also* 40 C.F.R. § 89.119(a)-(b). If the engine meets EPA standards, the agency issues a "certificate of conformity" allowing the manufacturer to sell the engines in the United States for up to one year. See Clean Air Act § 206(a)(1), 42 U.S.C. § 7525(a)(1). It is unlawful to sell new motor vehicle engines in the United States or to import new engines into the country without a certificate of conformity. *See id.* § 203(a)(1), 42 U.S.C. § 7522(a)(1).

The Clean Air Act also allows the State of California to adopt and enforce emissions standards for new motor vehicles and motor vehicle engines if California determines that its standards "will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards." *Id.* § 209(b)(1), 42 U.S.C. § 7543(b)(1); *see also Chamber of Commerce of the U.S. v. EPA*, 642 F.3d 192, 196 (D.C. Cir. 2011). A vehicle or engine generally cannot be sold in California

or imported into the state until the California Air Resources Board certifies compliance with state emissions standards. *See* Cal. Health & Safety Code §§ 43151-43153 (Deering 2014). Certificates issued by the California Air Resources Board are called "executive orders."

The pollutants subject to emissions limits under the Clean Air Act and California law include oxides of nitrogen, or NO_x. See Clean Air Act § 202(a)(3)(A)(i), 42 U.S.C. § 7521(a)(3)(A)(i); 40 C.F.R. § 89.112; Cal. Code Regs. tit. 13, § 2423. NO_x emissions contribute to the formation of fine particulate matter, also known as PM2.5, as well as ground-level ozone, a primary component of smog. *See North Carolina v. EPA*, 531 F.3d 896, 903 (D.C. Cir. 2008). Elevated levels of fine particulate matter have been linked to "adverse human health consequences such as premature death, lung and cardiovascular disease, and asthma." *Catawba Cnty. v. EPA*, 571 F.3d 20, 26 (D.C. Cir. 2009). And "even at very low levels," inhalation of ozone "can cause serious health problems by damaging lung tissue and sensitizing lungs to other irritants." *Ass'n of Irritated Residents v. EPA*, 686 F.3d 668, 671 n.1 (9th Cir. 2012).

In 1998, the United States brought enforcement actions in federal district court against seven major engine manufacturers, alleging that they had been using "defeat devices" to meet EPA standards for NO_x emissions. The devices enabled the engines to meet EPA emissions standards in laboratory testing even though the engines produced NO_x emissions far above the applicable limit in ordinary use. *See Crete Carrier Corp. v. EPA*, 363 F.3d 490, 491 (D.C. Cir. 2004). The manufacturers collectively negotiated settlement

terms with the federal government. Most of the manufacturers agreed to be bound by similarly worded consent decrees so that none would gain a competitive advantage by negotiating a better deal. The manufacturers did not admit to using defeat devices, but they agreed to pay civil penalties exceeding $80 million collectively.

To offset excess NO_x emissions caused by the alleged violations, the manufacturers also agreed to comply with certain EPA emissions standards earlier than EPA regulations otherwise required. Most significantly for purposes of this case, the manufacturers agreed that their nonroad compression-ignition (or diesel) engines with 300 to 750 horsepower would comply with EPA's model year 2006 emissions standards one year ahead of schedule, starting with model year 2005. The parties refer to that provision of the consent decree as the "nonroad pull-ahead" requirement. The manufacturers agreed to pay stipulated penalties to the United States under an established formula if they certified nonroad compression-ignition engines for model year 2005 that failed to comply with the nonroad pull-ahead requirement.

Volvo Truck Corporation (Volvo Truck, or VTC), a wholly owned subsidiary of AB Volvo, was one of the manufacturers covered by the standard form consent decree. Its decree states that all heavy-duty diesel and nonroad compression-ignition engines "manufactured at any facility owned or operated by VTC on or after January 1, 1998, for which a Certificate of Conformity is sought, must meet all applicable requirements of this Decree, regardless of whether VTC still owned, owns, operated, or operates that facility at the time the engine is manufactured." Consent Decree ¶ 110.

Another wholly owned subsidiary of AB Volvo, Volvo Construction Equipment Components AB, filed a motion to intervene in the case. Volvo Construction stated that it "is the Volvo Group company that sells [nonroad] engines in the United States" and that it sought to intervene "[t]o ensure that the proper Volvo Group company is subject to the jurisdiction of the Court for purposes of the Consent Decree requirements applicable to Nonroad CI Engines." Mot. to Intervene at 2 (June 11, 1999). The district court granted Volvo Construction's motion to intervene, and, on July 1, 1999, approved the consent decree.

Volvo Truck and Volvo Construction entered into a similarly worded settlement agreement with the California Air Resources Board. Like the consent decree with EPA, the settlement agreement with the California Air Resources Board includes a nonroad pull-ahead requirement, a schedule for stipulated penalties, and a provision confirming that the agreement applies to all heavy-duty diesel and nonroad compression-ignition engines "manufactured at any facility owned or operated by" Volvo Truck. The settlement agreement with the California Air Resources Board was not incorporated into a consent decree. *See Smyth ex rel. Smyth v. Rivero*, 282 F.3d 268, 280-81 (4th Cir. 2002) (consent decree is enforceable as order of the court, whereas settlement agreement generally is not).

B.

At the time of the consent decree, Volvo Powertrain Corporation, a subsidiary of Volvo Truck, owned a facility in Skövde, Sweden. Volvo Truck produced engines at the site. In 2001, as part of a corporate

reorganization, Volvo Powertrain ceased to be a subsidiary of Volvo Truck and became a direct subsidiary of AB Volvo. In 2002, Volvo Powertrain informed the district court and the California Air Resources Board that it would assume Volvo Truck's responsibilities under the consent decree and settlement agreement.

Although Volvo Powertrain owns the Skövde facility, another wholly owned subsidiary of AB Volvo, AB Volvo Penta, also manufactures engines there. Volvo Penta has produced nonroad engines at Skövde since before 1995 and has obtained certificates of conformity from EPA (and executive orders from the California Air Resources Board) for those engines every year since 1997. In late 2004, Volvo Penta sought certificates of conformity from EPA and executive orders from the California Air Resources Board for 8,354 model year 2005 nonroad compression-ignition engines produced at Skövde. Volvo Penta did not certify that those engines comply with the model year 2006 emissions standards, as would be required if the nonroad pull-ahead provision applied to the engines.

In an October 2004 e-mail, a California Air Resources Board official asked a Volvo Penta certification engineer if Volvo Penta is part of Volvo Construction and, "[i]f so," whether Volvo Penta is "aware of the provisions of the consent decree." The certification engineer responded that "Volvo Penta is an independent company and we are not a part of the consent decree." According to a Volvo Penta executive's affidavit, no one on the certification staffs of EPA or the California Air Resources Board advised Volvo Penta that the 8,354 engines were subject to the

nonroad pull-ahead requirement. EPA issued certificates of conformity covering the engines, and the California Air Resources Board issued corresponding executive orders.

In September 2005, a tip from Caterpillar Inc., a competing engine manufacturer subject to a similarly worded consent decree, prompted federal officials to seek additional information about Volvo Penta's model year 2005 engines. Volvo Powertrain acknowledged that the model year 2005 Volvo Penta engines failed to comply with the nonroad pull-ahead requirement, but asserted that those engines "are not subject to" the consent decree. Federal officials maintained that the decree by its terms encompassed the Volvo Penta engines because they were "manufactured at [a] facility owned or operated by" Volvo Powertrain. In July 2008, the United States sent a demand letter to Volvo Powertrain seeking $72,006,337 in stipulated penalties and interest. Volvo Powertrain invoked the consent decree's dispute resolution mechanism, which provides for the district court to adjudicate disputes between the parties if informal negotiations fail. The California Air Resources Board intervened in the action to enforce parallel provisions of the settlement agreement.

In April 2012, the district court concluded that all 8,354 Volvo Penta engines in question are subject to the nonroad pull-ahead requirement in the consent decree and settlement agreement. But the court also concluded that the stipulated penalty provisions in the consent decree and the settlement agreement "do not clearly apply" when Volvo Penta, rather than Volvo Powertrain, certifies the noncompliant engines. *United States v. Volvo Powertrain Corp.*, 854 F. Supp.

2d 60, 65, 75 (D.D.C. 2012). The court explained that, if the consent decree were an "ordinary contract," the court would find the stipulated penalty provision to be ambiguous and "would proceed to examine extrinsic evidence of the parties' intent." *Id*. at 72. But because the agreement between Volvo Truck and EPA had been embodied in a consent decree, the court held that it had discretion to "fashion an equitable remedy for the violation that it has found." *Id*. It then looked for "guidance" to the formula established by the stipulated penalty provision. *Id*. at 73. The court calculated that Volvo Powertrain would owe $65,759,212 in stipulated penalties under that formula, plus $6,247,125 in interest, for a total of $72,006,337. The court ordered Volvo Powertrain to pay that amount to the United States. The court decided to conduct further proceedings to determine Volvo Powertrain's liability to the State of California. *Id*. at 75.

After the district court's decision, the parties jointly stipulated that their intent throughout had been that any award for violations of the consent decree and settlement agreement would be divided such that the United States would receive 80% and the California Air Resources Board would receive 20%. The parties further agreed that the interest award should be revised downward to $5,866,428, bringing the total amount of the judgment to $71,625,640. In June 2012, the district court entered final judgment against Volvo Powertrain in line with the parties' proposal. Volvo Powertrain appeals.

II.

Because the district court's judgment against Volvo Powertrain was based on violations of the consent

decree with the United States, and because the parties stipulated that further proceedings to determine Volvo Powertrain's liability to the California Air Resources Board are "unnecessary," we review the district court's construction of the consent decree but not of the settlement agreement. Our review is de novo. *See Nix v. Billington*, 448 F.3d 411, 414 (D.C. Cir. 2006).

A.

As an initial matter, Volvo Powertrain contends that the district court should have interpreted and enforced the consent decree according to the standards governing a motion to find a party in contempt for violating a consent decree's provisions. "A party seeking to hold another in contempt faces a heavy burden, needing to show by 'clear and convincing evidence' that the alleged contemnor has violated a 'clear and unambiguous' provision of the consent decree." *United States v. Microsoft Corp.*, 147 F.3d 935, 940 (D.C. Cir. 1998) (quoting *Armstrong v. Exec. Office of the President*, 1 F.3d 1274, 1289 (D.C. Cir. 1993)). We decline to apply those standards here. As for the "clear and convincing evidence" aspect of that framework, Volvo Powertrain affirmatively waived the argument in the district court and the standard would have no discernible effect on our disposition in any event. As for the requirement to show that the language of the decree is "clear and unambiguous," Volvo Powertrain forfeited the argument by failing to raise it in the district court.

Volvo Powertrain directs us only to two points in the record at which it even remotely referenced contempt principles. First, in its brief to the district court, Volvo Powertrain cited *Stewart v. O'Neill*, 225 F. Supp. 2d 6

(D.D.C. 2002), for the proposition that "a movant seeking enforcement of a court order through civil contempt must prove 'a violation of the Court's Order by clear and convincing evidence.'" Mem. in Supp. of Mot. for Judicial Review 13, ECF No. 40 (alteration omitted) (quoting *Stewart*, 225 F. Supp. 2d at 10). Second, at a motions hearing in the district court in January 2012, counsel for Volvo Powertrain stated:

> [T]here are a couple of principles, Your Honor, on which the parties do agree. One is that in interpreting a consent decree the Court applies ordinary principles of contract interpretation. The second on which we agree is that the government has the burden. You will see mentioned in our brief that we contend that it is clear and convincing evidence that's required. The government says that's not true, it's preponderance. Frankly, when you're not really finding facts, I'm not sure there's much difference, and we're satisfied with the preponderance standard.

Insofar as its district court brief invoked the rule that violations of a consent decree must be proven by "clear and convincing evidence," Volvo Powertrain waived that argument at the January 2012 hearing by embracing a preponderance standard. *See Barone v. Williams*, 199 F.2d 189, 191 (D.C. Cir. 1952). In any event, as Volvo Powertrain's counsel explained, the evidentiary standard makes little difference in this case because there is no dispute that the 8,354 engines certified by Volvo Penta were manufactured at Powertrain's facility in Skövde, Sweden, or that those engines failed to comply with the nonroad pull-

ahead requirement. As for any argument that liability should be limited to violations of "clear and unambiguous" provisions of the consent decree, it is likewise unclear whether that standard would make any difference: we find below that the nonroad pull-ahead requirement unambiguously applies to the Volvo Penta engines at issue. Volvo Powertrain, at any rate, made no mention in the district court of the "clear and unambiguous" standard and gives us no reason to disregard our ordinary practice of refusing to "entertain an argument made for the first time on appeal." *Meijer, Inc. v. Biovail Corp*., 533 F.3d 857, 867 (D.C. Cir. 2008).

Volvo Powertrain contends that contempt standards should govern regardless of whether it raised the issue in the district court, but the two decisions on which it relies fail to support that proposition. In *Reynolds v. Roberts*, 207 F.3d 1288 (11th Cir. 2000), the district court acted sua sponte in enforcing the consent decree and the appellants had only a limited opportunity to present their objections. *Id*. at 1296-97 & n.13. Volvo Powertrain, by contrast, had a full opportunity in the district court to argue in favor of applying the contempt framework. And in *Reynolds v. McInnes*, 338 F.3d 1201 (11th Cir. 2003), the court reaffirmed the "general principle of appellate review" that "an appellate court will not consider issues not presented to the trial court," *id*. at 1209 (internal quotation marks omitted), and declined to consider whether the district court should have applied contempt principles because the argument "was not raised in the district court," *id*. at 1204. We adhere to the same practice here.

B.

Having rejected Volvo Powertrain's argument to apply the contempt framework, we review the district court's interpretation of the decree according to general principles of contract law. *See Segar v. Mukasey*, 508 F.3d 16, 21 (D.C. Cir. 2007) (consent decree is "essentially a contract," and "construction of a consent decree is essentially a matter of contract law") (internal quotation marks omitted). "[U]ltimately the question for the lower court, when it interprets a consent decree incorporating a settlement agreement, is what a reasonable person in the position of the parties would have thought the language meant." *Richardson v. Edwards*, 127 F.3d 97, 101 (D.C. Cir. 1997).

Here, the key language appears in paragraph 110 of the consent decree. That paragraph states that "[a]ll" nonroad compression-ignition engines "manufactured at any facility owned or operated by VTC on or after January 1, 1998, for which a Certificate of Conformity is sought, must meet all applicable requirements of this Decree, regardless of whether VTC still owned, owns, operated, or operates that facility at the time the engine is manufactured." One of the "requirements" of "this Decree" is the nonroad pull-ahead. *See* Consent Decree ¶ 60. Volvo Powertrain is the successor to Volvo Truck under the decree, and the 8,354 Volvo Penta engines in question were manufactured at a "facility owned [and] operated by" Volvo Powertrain. Thus, when a "Certificate of Conformity [was] sought" for each of those engines, the engines were required to "meet all applicable requirements of [the] Decree," including the nonroad pull-ahead.

Volvo Powertrain's contentions to the contrary are unavailing. Volvo Powertrain argues that paragraph 110 intends only to ensure that, if a manufacturer were to sell one of its factories, the acquiring company would inherit the manufacturer's obligations under the consent decree. Under that reading, paragraph 110 would take effect *only* if Volvo Powertrain no longer owns or operates one of its former facilities. But paragraph 110 by its terms applies to all engines manufactured at a Volvo Powertrain facility "*regardless* of whether" Volvo Powertrain still owns or operates the facility. Volvo Powertrain's interpretation ignores the import and plain meaning of the word "regardless." Volvo Powertrain also contends that paragraph 110 mandates *only* that engines manufactured at its facilities comply with the "applicable requirements" of the consent decree, and the nonroad pull-ahead provision on its face does not apply to engines manufactured by Volvo Penta. *See* Consent Decree ¶ 60 ("Nonroad CI Engines *manufactured by VTC or its affiliate, [Volvo Construction]*, on or after January 1, 2005" are subject to model year 2006 requirements) (emphasis added). That is, Volvo Powertrain reads the phrase "applicable requirements" in paragraph 110 to refer only to any requirements that *already apply* to the engines in question by virtue of another provision of the consent decree, i.e., if paragraph 110 never existed. We reject that reading because it would render the operative terms of paragraph 110 entirely superfluous. *See Rumpke of Ind., Inc. v. Cummins Engine Co.*, 107 F.3d 1235, 1243 (7th Cir. 1997) (consent decrees, like contracts, should be interpreted so that no provisions are superfluous).

The district court therefore correctly concluded that paragraph 110 "means what it says": all nonroad compression-ignition engines manufactured at Volvo Powertrain facilities for which certificates of conformity are sought must meet the requirements of the consent decree, including the nonroad pull-ahead. *Volvo Powertrain*, 854 F. Supp. 2d at 66. Volvo Powertrain contends that paragraph 110, if read in that fashion, would amount to "an elephant in the mousehole." Appellant's Br. 32; cf. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) ("Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."). We disagree. For one thing, paragraph 110 is not a "vague" provision: it broadly applies on its face to "all" nonroad engines "manufactured at any" Volvo Powertrain facility. Nor do we think it "implausible" that the parties would have intended to apply the consent decree's applicable requirements to the Volvo Penta engines at issue. *Cf. Whitman*, 531 U.S. at 468 (applying the elephants-in-mouseholes principle where it is "implausible" that Congress would delegate vast powers through such "modest words"). Indeed, Volvo Powertrain's interpretation is the more implausible one. It would leave a sizable loophole in the consent decree, allowing Volvo to manufacture nonroad compression-ignition engines at the Skövde facility entirely without regard to the decree's requirements as long as some wholly owned Volvo subsidiary other than Volvo Powertrain or Volvo Construction could identify itself as the manufacturer. EPA presumably would have sought to avoid that result, and did so through paragraph 110.

C.

Volvo Powertrain argues that the circumstances surrounding the negotiation of the decree and the parties' post-decree actions support the conclusion that the nonroad pull-ahead requirement is inapplicable to the 8,354 Volvo Penta engines. In interpreting a consent decree, however, "a court may not look to extrinsic evidence of the parties' subjective intent unless the document itself is ambiguous." *Segar*, 508 F.3d at 22; *see also Microsoft*, 147 F.3d at 945 n.7. Because we believe that the nonroad pull-ahead requirement unambiguously applies to the Volvo Penta engines, we have no occasion to consider the circumstances surrounding the decree's negotiation or the parties' post-decree actions. Those considerations, in any event, would not alter our understanding of the decree's provisions.

Volvo Powertrain says that officials with EPA and the California Air Resources Board "knew that Penta manufactured nonroad engines at the time of the negotiations, but they nevertheless omitted Penta from the Decree." Appellant's Br. 35. In Volvo Powertrain's view, the fact that the United States asked Volvo Construction—but not Volvo Penta—to intervene in the enforcement action "speaks volumes about the meaning of the Decree." *Id.* at 36. We are unpersuaded. In 1998, Volvo Penta sought certificates of conformity for only 150 nonroad engines manufactured at the Skövde facility, fewer than 100 of which were imported into the United States. Volvo Construction, by contrast, sold more than 2,300 nonroad engines in the United States that year. Volvo Powertrain points to no evidence indicating that the federal negotiators involved with drafting the consent

decree knew of the Volvo Penta engines. By contrast, Volvo officials presumably *did* know of the Volvo Penta engines, but evidently made no effort to exclude those engines from a provision whose terms encompass them. Indeed, Volvo Construction's motion to intervene, filed by Volvo Truck's attorneys, represented that Volvo Construction "is *the* Volvo Group company that sells these engines in the United States." Mot. to Intervene at 2 (emphasis added). Volvo Powertrain asserts that the misleading language in the motion was initially drafted by a lawyer for the United States. But if so, that would only further undercut any suggestion that the government officials who negotiated the consent decree knew that Volvo Penta manufactured nonroad engines for the U.S. market and intended to exclude Volvo Penta from the decree's scope.

As for the parties' post-decree actions, Volvo Powertrain emphasizes that its sister company Volvo Penta "openly applied" for certificates of conformity under EPA's general regulations for model year 2005 vehicles rather than under the consent decree's nonroad pull-ahead requirement. Appellant's Br. 37. Volvo Powertrain supplies an affidavit from a Volvo Penta executive stating that Volvo Penta would have acted differently if it believed that the consent decree applied to its engines. And Volvo Powertrain notes that both EPA and the California Air Resources Board "certified the very Penta engine families for which they now seek penalties." *Id*. But even assuming Volvo executives believed they were complying with the consent decree, and even if certain EPA officials knew of Volvo Penta's conduct, the United States could still assert violations of the consent decree. *See United*

States v. Huebner, 752 F.2d 1235, 1245 (7th Cir. 1985) (federal government not estopped from seeking enforcement of consent decree despite evidence that some federal officials were "cognizant" of defendants' conduct and failed to inform the defendants that they were violating the decree); *cf. Heckler v. Cmty. Health Servs.*, 467 U.S. 51, 63 (1984) ("general rule" is "that those who deal with the Government are expected to know the law and may not rely on the conduct of Government agents contrary to law"). And as the EPA official responsible for managing the agency's engine certification program explains in an affidavit, EPA issues certificates of conformity after determining that the applicant has submitted the required information and that the emissions performance data included in the application is consistent with the regulatory standard for the engine type, size, and model year. A certificate of conformity does *not* reflect a conclusion that the engine satisfies other applicable requirements, such as those imposed by consent decrees and settlement agreements. Rather, EPA relies on applicants to include the information necessary to meet all applicable requirements and to assure the information's accuracy.

D.

Although Volvo Powertrain principally contends that none of the 8,354 Volvo Penta engines falls within the terms of the consent decree, it argues in the alternative that it should—at most—face liability only for engines actually imported into the United States and used in a non-stationary capacity. The consent decree defines nonroad compression-ignition engine to "mean[] a compression-ignition engine subject to the regulations in 40 C.F.R. Part 89." Consent Decree ¶ 3.

The 8,354 engines in question undisputedly qualify as "compression-ignition engines." The only question is whether those engines qualify as "subject to the regulations in 40 C.F.R. Part 89" regardless of ultimate importation into the United States or ultimate use in a non-stationary capacity. We conclude they do.

While a certificate of conformity *permits* importing an engine into the United States, certain provisions of Part 89 apply only to engines *in fact* imported into the United States. *See*, *e.g*., 40 C.F.R. § 89.1003(a)(1)(ii) ("importation into the United States of any new nonroad engine" is prohibited "unless such engine is covered by a certificate of conformity"). But other regulations in Part 89 apply to all engines for which a manufacturer seeks a certificate of conformity, regardless of whether the engines ultimately are sold into the United States. *See, e.g., id*. § 89.115(d) (required content of application for certificate of conformity); *id*. § 89.117 (procedures for selecting test fleet for certificate of conformity application). Still other provisions of Part 89 apply to all engines for which a manufacturer *obtains* a certificate of conformity—again, without regard to whether the engines are imported into the United States. *See, e.g., id*. § 89.123(a) (manufacturer must notify EPA of changes to certain information for engines covered by certificate of conformity); *id.* § 89.124(b) (emission test data must be retained for one year after certificate of conformity is issued). The Volvo Penta engines thus would be "subject to the regulations in 40 C.F.R. Part 89" even if they remained outside the United States. Volvo Powertrain seeks to rely on the canon of statutory interpretation under which federal laws are

presumed "'to apply only within the territorial jurisdiction of the United States.'" *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (quoting *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949)). But because a manufacturer brings itself within the jurisdiction of the United States when it affirmatively *asks* EPA to issue certificates of conformity, there is no issue of extraterritoriality here.

We are likewise unpersuaded by Volvo Powertrain's argument that an engine ultimately put to final use in a stationary capacity is not "subject to the regulations in 40 C.F.R. Part 89." Part 89 states that it "applies for all compression-ignition nonroad engines," 40 C.F.R. § 89.1(a), and the certificates of conformity sought by Volvo Penta allowed its engines to be used in the United States in non-stationary applications. It is true that the definition of "nonroad engine" excludes engines that "remain[] or will remain at a location for more than 12 consecutive months." *Id*. § 89.2. But as we have explained, certain Part 89 provisions apply to engines at the time of seeking a certificate of conformity, regardless of the engines' eventual use. *See, e.g., id.* §§ 89.115(d), 89.117. Moreover, EPA's regulatory scheme enables manufacturers to identify their engines as either mobile or stationary. *See, e.g.,* U.S. Envt'l Prot. Agency, *Technical Highlights: Emission Regulations for Stationary and Mobile Engines* 2 (Sept. 2002). Indeed, even after Volvo Penta chose to identify its engines as nonroad engines for purposes of obtaining certificates of conformity, it had an additional opportunity to designate some of the engines as stationary when importing them into the United States, but did not do so. *See* EPA Form 3520-21, Engine Declaration Form (OMB No. 2060-0320)

(allowing importers to check a box in order to designate engines as stationary). Volvo Powertrain's understanding of the consent decree also would raise serious workability concerns, calling for constant and long-term monitoring of each engine to identify its use as stationary or non-stationary. But when asked by EPA in 2008 for information concerning the current whereabouts of the 8,354 Volvo Penta engines, Volvo Powertrain estimated that it and other Volvo entities would have that sort of information for less than 10% of their engines. For those reasons, the engines in question qualify as "nonroad engines" subject to the consent decree regardless of their eventual use in a stationary or non-stationary application.

III.

Having concluded that the consent decree's nonroad pull-ahead requirement applies to the 8,354 Volvo Penta engines, we turn to the district court's choice of remedy. The parties agree that our review of the remedy is for abuse of discretion. *See, e.g., Shy v. Navistar Int'l Corp.*, 701 F.3d 523, 532-33 (6th Cir. 2012); *Stone v. City & Cnty. of San Francisco*, 968 F.2d 850, 861 (9th Cir. 1992). We note that, under our precedent, "it is unclear whether such deferential review is appropriate" when—as here—"the trial judge's decision was based on an interpretation of orders drafted by a different judge." *Nix*, 448 F.3d at 414. But we need not resolve that issue in light of the parties' agreement on the standard of review.

A.

Volvo Powertrain argues that the monetary penalties allowed under the consent decree are confined to those set forth in the stipulated penalty

provision. That provision states, with respect to the nonroad pull-ahead requirement, that if Volvo Truck (or its successor, Volvo Powertrain) "seeks certificates of conformity for any affected HDDEs [(Heavy-Duty Diesel Engines)], but cannot certify compliance with . . . the Nonroad CI Engine standard pull-ahead requirements," then penalties "shall be calculated in accordance with the . . . procedures, equations, and values found in 40 CFR Part 86, Subpart L." Consent Decree ¶ 116(a). Volvo Powertrain contends that the stipulated penalty provision does not apply when an entity not specifically named in its terms, such as Volvo Penta, "seeks certificates of conformity."

As the district court observed, however, the "poorly drafted" stipulated penalty provision, if read literally, amounts to "nonsense." *Volvo Powertrain*, 854 F. Supp. 2d at 72. The provision's terms apply only to heavy-duty diesel engines. But heavy-duty diesel engines are *on-road* engines, *see* 40 C.F.R. § 86.082-2, and thus by definition could *never* be subject to the nonroad pull-ahead requirement. If the district court could only impose monetary penalties where the stipulated penalty provision squarely applied, the court would be barred from imposing any monetary penalties even if Volvo Powertrain itself sought a certificate of conformity for model year 2005 nonroad compression-ignition engines that it knew to be out of compliance with the nonroad pull-ahead requirement.

Where, as here, a consent decree "does not specify the consequences of a breach," the district court has "equitable discretion" to fashion a remedy for violations of the decree. *Cook v. City of Chicago*, 192 F.3d 693, 698 (7th Cir. 1999); *accord Shy*, 701 F.3d at 532-33; *United States v. Virgin Islands*, 363 F.3d 276,

290-91 (3d Cir. 2004); *United States v. Local 359, United Seafood Workers*, 55 F.3d 64, 69 (2d Cir. 1995). Of course, "if parties to a consent decree wish to cabin the district court's equitable discretion by stipulating the remedies for breach, they are free to do so," and "the stipulation will fix the measure of relief to which the victim of a breach is entitled." *Cook*, 192 F.3d at 698. But we cannot read the ambiguous and self-defeating provision for stipulated penalties here as embodying an intention to "cabin the district court's equitable discretion" in the circumstances of this case. Nothing in the decree expressly or impliedly precludes the district court from exercising its equitable discretion to fashion an alternative remedy. Rather, the consent decree fails to specify the consequences of the breach that occurred. *See id*. The district court therefore retained equitable discretion to craft a remedy for Volvo Powertrain's violations.

B.

When a district court exercises its equitable discretion to impose monetary penalties for violations of a consent decree, "the court must explain why it chose the calculation method it did and how the record supports its calculations." *FTC v. Trudeau*, 579 F.3d 754, 773 (7th Cir. 2009). The penalty figure must be "a reasonable approximation of losses, gains, or some other measure the court finds appropriate." *Id.; see also Leman v. Krentler-Arnold Hinge Last Co*., 284 U.S. 448, 455-57 (1932) (when court exercises equitable discretion to impose monetary penalty for violation of its own order, penalty not limited to "the pecuniary injury or damage which the act of disobedience caused the complaining party") (internal quotation marks omitted).

The district court adequately explained its calculation method here. As the court noted, paragraph 129 of the consent decree provides that, when reviewing any dispute under the decree, the court "should consider the effect of the resolution" on the other manufacturers who settled under comparable terms. Consent Decree ¶ 129. The consent decrees covering the other manufacturers contain similar stipulated penalty provisions. And one of the other manufacturers, Caterpillar, has already paid penalties for consent decree violations in line with the stipulated penalty formula. *See United States v. Caterpillar, Inc.*, 227 F. Supp. 2d 73, 86-89 (D.D.C. 2002). The district court explained that, "[t]o allow Volvo Powertrain to pay a lesser penalty here might place it at a competitive advantage relative to the settling manufacturers who either complied with the emissions standards in their consent decrees or else paid the stipulated penalties." *Volvo Powertrain*, 854 F. Supp. 2d at 73. Accordingly, the court followed the formula specifying stipulated penalties for violations of the nonroad pull-ahead, resulting in a penalty of $65,759,212 before interest.

Volvo Powertrain seeks to distinguish the Caterpillar case on the ground that Caterpillar made a "conscious decision" to certify engines in violation of the consent decree, while Volvo Powertrain had no opportunity to make an "informed, *ex ante* choice" between complying with the decree and paying a penalty. Appellant's Br. 58-59. Volvo Powertrain did, however, have an opportunity to seek clarification from the district court of its obligations concerning the Penta engines. As a general rule, "a party may ask the district court to issue an order clarifying . . . a [consent] decree." *Nehmer v. U.S. Dep't of Veterans Affairs*, 494 F.3d 846,

860 (9th Cir. 2007) (emphasis omitted); *see, e.g., SEC v. Am. Int'l Grp.*, 712 F.3d 1, 3 (D.C. Cir. 2013); *Microsoft*, 147 F.3d at 942; *see also United States v. Philip Morris USA, Inc.*, 793 F. Supp. 2d 164, 168-69 (D.D.C. 2011) (collecting cases in which parties filed successful motions for clarification "ask[ing] the Court to construe the scope of its Order by applying it in a concrete context or particular factual situation"). And the decree in this case specifically states that the district court "retains jurisdiction . . . for the purpose of enabling any of the Parties to apply to the Court at any time for such further order, direction, and relief as may be necessary or appropriate for the construction . . . of this Consent Decree." Consent Decree ¶ 151. That option was available to Volvo Powertrain, for instance, when the California Air Resources Board official asked in late 2004 whether the Volvo Penta engines were subject to the consent decree.

Volvo Powertrain also argues that EPA has presented no "specific evidence" that Volvo entities obtained a competitive advantage by certifying the noncompliant Penta engines. Appellant's Br. 59. We acknowledge that the district court *could* have chosen to deviate downward from the consent decree's formula for stipulated penalties based on that consideration. But the "abuse of discretion" standard "means 'that the [district] court has a range of choice, and that its decision will not be disturbed as long as it stays within that range and is not influenced by any mistake of law.'" *United States v. Dockery*, 955 F.2d 50, 54 (D.C. Cir. 1992) (emphasis omitted) (quoting *Kern v. TXO Prod. Corp.*, 738 F.2d 968, 970 (8th Cir. 1984)). We believe the district court's decision to follow the

stipulated penalty formula lies comfortably within that range of choice.

Volvo Powertrain further contends that the district court should have considered the statutory factors enumerated in section 205(c) of the Clean Air Act for civil penalties in EPA administrative actions. *See* Clean Air Act § 205(c), 42 U.S.C. § 7524(c) (EPA Administrator may assess civil penalty for violations of Clean Air Act certificate-of-conformity requirements, taking into account "gravity of the violation," "economic benefit or savings," "size of the violator's business," "violator's history of compliance," "action taken to remedy the violation," "effect of the penalty on the violator's ability to continue in business," and "such other matters as justice may require"); *accord* 40 C.F.R. § 89.1006(c)(2) (restating same seven statutory factors). But Volvo Powertrain is charged with violations of the consent decree, not with violations of the Clean Air Act. *See Microsoft*, 147 F.3d at 944 ("As the settlement of a litigation, the decree may require less than the statute under which the suit was brought, or more, so the violation of one is not necessarily a violation of the other.") (citations omitted). And while the consent decree provides that Volvo Truck (and its successor Volvo Powertrain) "shall be subject to and comply with all requirements of 40 C.F.R. Part 89 and of the Act," Consent Decree ¶ 61, it does not say that the *district court* shall be bound by the factors set forth in the Clean Air Act and Part 89 with respect to the assessment of penalties.

None of this is intended to suggest that the district court could not consider the statutory factors in section 205 when crafting an equitable remedy. Those factors reflect traditional equitable principles, which

of course guide the district court in its exercise of equitable discretion. *See Leman*, 284 U.S. at 456- 57; *Connolly v. J.T. Ventures*, 851 F.2d 930, 932-34 (7th Cir. 1988). But the district court was not required expressly to address each of those factors one by one. And we cannot say that the district court's ultimate decision to impose a monetary penalty of $65,759,212 plus interest was inequitable.

C.

Finally, Volvo Powertrain contests the district court's calculation of its liability for interest. Volvo Powertrain argues that it should not be held liable for interest that accrued before the date of the United States' written demand. The United States acknowledges that interest ordinarily should not accrue before the written demand, but contends that the assessment of pre-demand interest should be upheld because another settling manufacturer paid pre-demand interest on stipulated penalties for violation of a parallel consent decree.

We need not resolve the merits of the issue because Volvo Powertrain failed to preserve its challenge to the assessment of pre-demand interest. Under the dispute resolution provisions of the consent decree, the parties must first seek to resolve any dispute through informal negotiations, *see* Consent Decree ¶ 132; if those negotiations fail, "the position advanced by the United States shall be considered binding, unless, within 30 days after the conclusion of the informal negotiation period," Volvo Truck (or its successor Volvo Powertrain) "invokes the formal dispute resolution procedures of this Section by serving on the United States a written Statement of Position on the

matter in dispute." *Id.* ¶ 133. The parties agreed that the prescribed procedure would be the "exclusive mechanism" to resolve disputes related to the decree. *Id*. ¶ 129. And while Volvo Powertrain invoked the formal dispute resolution procedures by serving a written statement of position on the United States, that statement contained no challenge to the inclusion of interest accruing before the United States' written demand.

Volvo Powertrain argues that it preserved its challenge to the award of pre-demand interest by raising the matter in district court. Ordinarily, that would suffice to preserve an issue for appellate review. Here, however, the parties assented to a different dispute resolution procedure, and agreed that the United States's position would prevail on any matter unless Volvo Powertrain contests the matter promptly. Volvo Powertrain does not dispute that its statement of position omitted any mention of pre-demand interest, and it identifies no other document that might qualify as "a written Statement of Position on the matter" within the 30 days allotted. Volvo Powertrain thus forfeited its challenge to the award of pre-demand interest.

* * * * *

The judgment of the district court is affirmed.

So ordered.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action 98-2547 (RCL)

UNITED STATES OF AMERICA,

Plaintiff,

v.

VOLVO POWERTRAIN CORPORATION,

Defendant.

MEMORANDUM OPINION

This dispute concerns a consent decree to which the United States and Volvo Powertrain Corporation are parties. Volvo Powertrain has assumed the obligations of Volvo Truck Corporation, the original signatory to the decree. The California Air Resources Board, which signed a substantially identical settlement agreement with Volvo Truck, has intervened. Before the Court is Volvo Powertrain's motion for judicial review of the demand by the United States for stipulated penalties pursuant to the decree. Powertrain asks the Court to find either that it has not violated the decree or else that the stipulated penalties established therein do not apply. Upon consideration of the motion, the oppositions thereto, and the record of this case, the Court concludes that Volvo Powertrain's motion must be denied in part, because the company violated the consent decree. Because the stipulated penalties do not clearly apply to this violation, the Court

goes on to exercise its equitable authority and discretion to fashion a remedy. Finally, the Court turns to the essentially identical dispute between Volvo Powertrain and the California Air Resources Board regarding the effect of their settlement agreement.

I. FACTUAL BACKGROUND

In 1998, the United States brought enforcement actions against many manufacturers of truck engines, alleging that a feature of their fuel injection systems violated the Clean Air Act. Those fuel injection systems were operated by computer software, which the government alleged had been programmed to operate differently at highway speeds than under the standardized conditions of federal emissions testing, thereby improving the fuel economy of the engines but causing them to emit nitrogen oxide at levels well above the legal limit. The government argued that the "principal effect" of such a fuel injection timing system was "to bypass, defeat, or render inoperative" the engines' emissions control system, in violation of 42 U.S.C. § 7522(a)(3)(B), and that the timing system was therefore a prohibited "defeat device," 40 C.F.R. § 86.000-16(a). The manufacturers denied that their systems were prohibited.

After a year of negotiations, including a session at which counsel for the engine manufacturers collectively negotiated settlement terms with the United States, the parties agreed to be bound by a series of similar consent decrees. (The decrees' similarity ensured that no manufacturer would gain a competitive advantage by negotiating superior settlement terms.) Under these decrees, the engine manufacturers were required to meet new emissions standards for heavy-duty diesel engines, which are

used in trucks and other on-road vehicles, before those standards took general effect. The manufacturers also agreed to accelerate the implementation of heightened emissions standards for non-road compression-ignition engines with a horsepower of at least 300 but less than 750. (The parties refer to this term as the "non-road pull-ahead," and the Court will call the engines to which it applies "non-road engines.") Non-road engines had not been a part of the alleged violation, but were included in the consent decrees in an attempt to further reduce the levels of ambient air pollutants.

After a period of public comment, the Honorable Henry H. Kennedy, Jr. found that the decrees would serve the public interest. He entered them on July 1, 1999. This case concerns one such decree. The consent decree in question was initially signed by Volvo Truck Corporation, which did not sell non-road engines. Volvo Construction Equipment, which did, intervened shortly before the decree was entered so as to be bound by the non-road pull-ahead. In 2001, as part of a corporate reorganization, Volvo Powertrain acquired certain production facilities from Volvo Truck and assumed Volvo Truck's responsibilities under the consent decree. Thereafter, Volvo Powertrain used its manufacturing facility in Skövde, Sweden to produce non-road engines for Volvo Penta, a corporate sibling, as Volvo Truck had done when it owned the Skövde plant. In late 2004, Volvo Penta asked the US EPA to certify that eleven families of engines produced by Volvo Powertrain at the Skövde facility conformed with the emissions standards for non-road engines produced in Model Year 2005. The EPA issued the certificates of conformity. After a competing engine manufacturer suggested to the United States that, under the consent decree, those engines might have been required to conform to the more stringent

standards for Model Year 2006, the United States submitted a series of information requests to Volvo Powertrain. In July 2008, the government issued a letter alleging that the company had violated the decree and demanding penalties of approximately $72 million under its stipulated penalty provisions. Volvo Powertrain denied the allegations and, after the parties attempted to resolve the dispute as required by the consent decree, petitioned this Court for review.

II. JURISDICTION AND LEGAL STANDARD

"[D]istrict courts enjoy no free-ranging . . . jurisdiction to enforce consent decrees, but are instead constrained by the terms of the decree and related order." *Pigford v. Veneman*, 292 F.3d 918, 924 (D.C. Cir. 2002) (citing *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 380–81 (1994)). When the District Court entered the consent decree at issue here, it retained jurisdiction "for the purpose of enabling any of the Parties to apply to the Court at any time for such further order, direction, and relief as may be necessary . . . to effectuate or enforce compliance with its terms, or to resolve disputes in accordance with the dispute resolution procedures" described by the decree. Consent Decree ¶ 151. The parties have followed those procedures, *see id.* ¶¶ 129–36, and this Court has jurisdiction over Volvo Powertrain's motion for judicial review of their dispute.

"[C]onstruction of a consent decree is essentially a matter of contract law." *Segar v. Mukasey*, 508 F.3d 16, 21 (D.C. Cir. 2007) (quoting *Citizens for a Better Environment v. Gorsuch*, 718 F.2d 1117, 1125 (D.C. Cir. 1983)).[1] "The court's task, then, is to discern the

[1] A federal court interpreting its own consent decree applies the federal common law of contracts. *See In re Harvey*, 213 F.3d

bargain that the parties struck." *United States v. Microsoft Corp*., 147 F.3d 935, 946 (D.C. Cir 1998). "Our inquiry begins, of course, with the text of the Decree." *United States v. Western Elec. Co*., 12 F.3d 225, 230 (D.C. Cir. 1993). If the text is unambiguous, the inquiry ends there, because "a court may not look to extrinsic evidence of the parties' subjective intent unless the document itself is ambiguous." *Segar*, 508 F.3d at 22. In determining whether the document is, in fact, ambiguous, "reliance upon certain aids to construction is proper, as with any other contract. Such aids include the circumstances surrounding the formation of the consent order, any technical meaning words used may have had to the parties, and any other documents expressly incorporated in the decree." United States v. I.T.T. Continental Baking Co., 420 U.S. 223, 238 (1975). However, "a contract provision 'is not ambiguous merely because the parties later disagree on its meaning.' It is ambiguous only 'if it is reasonably susceptible of different constructions.'" *Segar*, 508 F.3d at 22 (quoting *Bennett Enterprises, Inc. v. Domino's Pizza, Inc.*, 45 F.3d 493, 497 (D.C. Cir. 1995)).

318, 321 (7th Cir. 2000); *United States v. Witco Corp.*, 76 F. Supp. 2d 519, 530 (D. Del. 1999); *cf. KenAmerican Resources, Inc. v. International Union, United Mine Workers of America*, 99 F.3d 1161, 1164 n.2 (D.C. Cir. 1996) ("A federal court interpreting a collective bargaining agreement applies [the] federal common law of contracts."). The Restatement (Second) of Contracts is an appropriate source from which to fashion such federal common law rules, *Bowden v. United States*, 106 F.3d 433, 439 (D.C. Cir. 1997), but where the principles of contract law in question are "unexceptional" and "urged in the briefs of both parties," the Court may look to other sources. *Segar v. Mukasey*, 508 F.3d 16, 21 n.3 (D.C. Cir. 2007).

III. THE CONSENT DECREE

To resolve this dispute, the Court must answer three questions. The first is whether the consent decree covers engines produced by Volvo Powertrain but submitted for certification by Volvo Penta, which is not a party to the decree. It does. All non-road engines built at a Powertrain facility and submitted for certification by the EPA are covered by Paragraph 110 of the consent decree and required to conform to the non-road pull-ahead. The second question is whether, under the consent decree, a non-road engine is defined by its certification or by its actual use. Because a definition grounded in actual use would make the consent decree practically impossible to enforce, the Court concludes that any engine labeled for use as a non-road engine is a non-road engine within the meaning of the decree. Third, the court must determine whether the stipulated penalties established in the decree apply to the violations at issue here. Because the engines in question were submitted for certification by Volvo Penta rather than Volvo Powertrain, the stipulated penalties do not clearly apply and the Court must fashion an equitable remedy instead.

A. Volvo Powertrain violated Paragraph 110 of the consent decree.

Although the Court is mindful that a consent decree, like a contract, should be read as a whole and each part interpreted with reference to the whole, three provisions of the decree are especially relevant here. Paragraph 60 requires that all non-road engines

"manufactured by" Volvo Powertrain[2] on or after January 1, 2005 must meet certain emissions standards as well as "all other requirements that would apply as if the engines were Model Year 2006 engines." Paragraphs 109 and 110 appear below the header "Non-Circumvention Provisions." Paragraph 109 says that Volvo Powertrain "shall not . . . circumvent the requirements of this Consent Decree through leasing, licensing, sales, or other arrangements, or through stockpiling." Paragraph 110 requires that all non-road engines "manufactured at any facility owned or operated by [Volvo Powertrain] on or after January 1, 1998, for which a Certificate of Conformity is sought, must meet all applicable requirements of this Decree, regardless of whether [Volvo Powertrain] still owned, owns, operated, or operates that facility at the time the engine is manufactured."

The United States argues that, under each of these provisions, non-road engines built by Volvo Powertrain after January 1, 2005 were required to meet the emissions standards for Model Year 2006. Volvo Powertrain maintains that they were not. The company contends that under Paragraph 60 engines are "manufactured by" the entity that orders them and submits them for certification, and that in any event the United States has waived its argument as to the direct applicability of that provision to this case. Volvo Powertrain denies that it has circumvented the requirements of the consent decree, as Paragraph 109 forbids, and urges the Court to limit the scope of Paragraph 110 to engines that would have been required to meet the non-road pull-ahead set out by

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[2] Volvo Powertrain has assumed these obligations as the successor to Volvo Truck Corporation. Consent Decree ¶ 4.

Paragraph 60 but for the transfer of manufacturing facilities from Volvo Powertrain to another owner. The Court concludes, however, that Paragraph 110 means what it says: all non-road engines manufactured at Volvo Powertrain facilities and submitted for certification by the EPA must meet the requirements of the consent decree. The Court need not address the government's arguments that Paragraphs 60 and 109 also compel that result.

Volvo Powertrain begins its interpretation of Paragraph 110 with the header that appears above it: "Non-Circumvention Provisions." The company argues that such provisions are administrative in nature and should not be interpreted to expand the scope of decree's substantive provisions. Powertrain reasons that one can only violate a non-circumvention provision by evading otherwise-applicable requirements, which brings the company to the text of Paragraph 110:

> All . . . Nonroad CI Engines manufactured at any facility owned or operated by [Volvo Powertrain] on or after January 1, 1998, for which a Certificate of Conformity is sought, must meet all applicable requirements of this Decree, regardless of whether [Volvo Powertrain] still owned, owns, operated, or operates that facility at the time the engine is manufactured.

Powertrain contends that the phrase "all applicable requirements of this Decree" must mean "the requirements that are made applicable by a provision other than Paragraph 110." It also places a great deal of emphasis on the final clause, "regardless of whether [Volvo Powertrain] still owned, owns, operated, or

operates that facility at the time the engine is manufactured," suggesting that this language identifies the purpose and the function of the provision: to prevent the evasion of substantive obligations through the transfer of manufacturing operations or facilities. On Volvo Powertrain's reading, Paragraph 110 prohibits only such acts of evasion. The company further points to the stipulated penalties provision, which on its face applies only when Volvo Powertrain—and not any other entity—seeks certificates of conformity. The company argues that to read Paragraph 110 to allow the possibility that the decree could be violated when some other company sought a certificate of conformity would render that paragraph inconsistent with the penalty provision. Finally, Powertrain argues that the government's reading of Paragraph 110 would have made the intervention of Volvo Construction Equipment in this case superfluous, since all of that company's engines were produced at Volvo Truck facilities when the consent decree was negotiated.

i. The plain language of Paragraph 110 covers all non-road engines manufactured at Volvo Powertrain facilities.

The plain text of Paragraph 110 clearly supports the government's argument. The provision applies to all non-road engines "manufactured at" a facility owned or operated by Volvo Powertrain at any time since the beginning of 1998 "for which a Certificate of Conformity is sought," "regardless of" who controls that facility at the time of manufacture. Powertrain argues that giving an ordinary reading to the "regardless of" phrase would deprive the clause of independent meaning, because the reference to all non-road engines "manufactured at any facility owned

or operated by [Volvo Powertrain] on or after January 1, 1998" necessarily implies a lack of regard for the ownership of the facility at the time of manufacture. Although the Court must interpret the consent decree so as to avoid surplusage, it should not strain normal syntax in its effort to do so—and contracts, like normal speech, often employ a certain redundancy in the interest of clarity. The court therefore rejects the argument that it must interpret "regardless of whether [Volvo Powertrain] still owned, owns, operated, or operates that facility at the time the engine is manufactured" to limit the scope of Paragraph 110. The "regardless of" clause is plainly meant to emphasize the breadth of the "all non-road engines" clause, not to limit it—and the Court construes the provision accordingly.

Paragraph 110 requires that the engines to which it pertains "must meet all applicable requirements of this Decree." Volvo Powertrain contends that the "applicable requirements" must be those that are rendered applicable by some other provision of the decree, rather than by Paragraph 110 itself. This argument has some force if one considers the language in isolation, but loses that force when the language is considered in the context of the provision and the decree as a whole. Both parties agree that if Volvo Powertrain had sold its factories and its engine business, Paragraph 110 would ensure that the purchaser was subject to the requirements of the consent decree for the non-road engines that it produced in facilities acquired from Powertrain. In that hypothetical case, it is obvious that the requirements applicable to those non-road engines would include the ones set out by Paragraph 60—and it would be Paragraph 110 that made those requirements "applicable," since Paragraph 60 only

covers engines "manufactured by" Volvo Powertrain or Volvo Construction Equipment. And so it cannot be the case that the "applicable requirements of this Decree" are only those that another provision makes applicable. At least in some cases—and, a sensible reading would suggest, in this case—that language refers to substantive requirements that are set out in another provision but rendered applicable to certain engines by Paragraph 110.

ii. The plain language of Paragraph 110 does not conflict with the header identifying it as a non-circumvention provision.

Of course, the plain language of Paragraph 110 cannot be considered alone. Volvo Powertrain rightly urges the Court to interpret that paragraph in light of the header that identifies it as a "non-circumvention provision." It would, Powertrain argues, render the header meaningless to find that Paragraph 110 covered circumstances in which the company did not attempt to circumvent the consent decree. If the header conflicted with the text of Paragraph 110 an ambiguity might result, as it did in *International Multifoods Corporation v. Commercial Union Insurance Company*, 309 F.3d 76 (2d Cir. 2002). That case involved an insurance contract whose "War Exclusion Clause" included a provision the plain language of which appeared to exclude coverage for peacetime seizures. *Id*. at 80–81. The covered company lost a shipment of frozen meat when the Russian government seized the goods as part of a criminal investigation, and its insurer argued that such a seizure was excluded from coverage by the second provision of the "War Exclusion Clause." *Id.* at 80. The food company responded that, properly understood, the contract only excluded wartime seizures.

Considering the caption "in tandem with" the contractual provisions that it describes, *id.* at 86, the Second Circuit concluded that "competing inferences . . . can be drawn" and that the scope of the provision was therefore ambiguous, *id*. at 87.

But the header "Non-Circumvention Provisions" does not conflict with the text of Paragraph 110, even if it does identify that provision's purpose. To hold otherwise would ignore the fact that there are many ways to achieve a particular purpose when drafting an agreement. To use an old dichotomy, one can create a rule or a standard. Whereas a standard "refers directly to [its] substantive objectives," Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1688 (1976)—for instance, to prevent the circumvention of other contractual provisions—a rule simply instructs the person to whom it is addressed to respond to particular facts in a particular way. "[T]he two great . . . virtues of . . . rules, as opposed to standards . . . are the restraint of official arbitrariness and certainty," *id*., but those benefits also have a cost because "[t]he choice of rules [over standards] involves the sacrifice of precision in the achievement of the objectives lying behind the rules." *Id*. at 1689.

When Paragraph 109 says that Volvo Powertrain "shall not . . . circumvent the requirements of this Consent Decree" it is employing the language of standards. The question of whether any particular action circumvents the agreement can only be answered by "discover[ing] the facts of [the] particular situation and . . . assess[ing] them in terms of the purposes . . . embodied in the" agreement. *Id*. at 1688. One cannot know whether the decree is being circumvented without asking what the decree was

meant to accomplish. So Paragraph 109 prohibits those actions that would truly "circumvent" the decree, and no more, but does so at the cost of binding the parties to a judge's interpretation of the agreements' aims and what it would mean to evade them.

Paragraph 110, by contrast, is cast as a rule. Its language does not ask the judge to discern and directly apply the provision's purpose, but rather provides "a list of easily distinguishable factual aspects of a situation," *id.* at 1687, which trigger a determinate consequence. Volvo Powertrain urges that to read Paragraph 110 as a rule would render it overinclusive and unbound by the purpose that it was meant to achieve—and that such a reading might reach instances in which the substantive requirements of the decree were not circumvented. Even if this is so—and the government disputes the notion, arguing that it bargained for that added emission reduction—a certain disjunction between purpose and effect is the inevitable cost of employing a rule. The benefit of a rule—the benefit for which the parties bargained in this instance—is the ease and certainty of application. To substitute the Court's own judgment for theirs would deprive the parties of that benefit. Paragraph 110 functions as a non-circumvention provision even if it reaches cases in which no circumvention has been proven.

iii. The stipulated penalty provisions do not render Paragraph 110 ambiguous.

Volvo Powertrain goes on to argue that the phrasing of the stipulated penalty provisions supports its reading of Paragraph 110. Indeed, the stipulated penalty provisions, which on their face apply whenever Volvo Powertrain—but not any other corporation—"seeks certificates of conformity for any

affected [heavy-duty diesel engine], but cannot certify compliance with" the requirements of the consent decree, Consent Decree ¶ 116, do fit imperfectly with the language and purpose of Paragraph 110. As discussed at greater length below, this imperfect fit is at least partly due to inartful drafting: the penalty provisions contain several grammatical and structural ambiguities that render them difficult to apply directly to clearly foreseeable violations of the consent decree. To name only the most obvious examples, the language cited above would appear not to apply to violations that occurred when Volvo Construction Equipment sought certificates of conformity, nor when any company sought certificates of conformity for non-road engines, nor when a company that had purchased Volvo Powertrain facilities (and therefore, the parties agree, had become bound by the decree) sought such certificates.

The proper interpretation of the stipulated penalty provisions involves difficulties that will be taken up in short order. But those difficulties, which are numerous, internal to the penalty provisions themselves, and largely independent of Paragraph 110, cast no doubt on the plain meaning of that non-circumvention provision.

iv. To interpret Paragraph 110 by its plain language would not render the intervention of Volvo Construction Equipment superfluous.

Finally, Volvo Powertrain argues that if Paragraph 110 meant what the government now urges, the intervention of Volvo Construction Equipment would have been superfluous. The Court considers this argument because it invokes "the circumstances surrounding the formation of the" consent decree. *United States v. ITT Continental Baking Co.*, 420

U.S. 223, 238 (1975). The Court, however, rejects it: although the engines that Volvo Construction Equipment manufactured at Volvo Powertrain facilities would have been covered under the plain language of Paragraph 110 whether or not Volvo Construction Equipment had intervened, that intervention brought Volvo Construction Equipment engines manufactured at other facilities within the terms of Paragraph 60. The governments' construction therefore would not render the intervention superfluous.

This case is not *International Multifoods*. Nor is it *Segar v. Mukasey*, 508 F.3d 16 (D.C. Cir. 2007), which stands for the proposition that a general disclaimer cannot be read to vitiate the specifically negotiated terms of an agreement. The consent decree unambiguously reaches all non-road engines produced at Volvo Powertrain facilities, and subjects them to the substantive requirements set out in Paragraph 60. The Court therefore proceeds to determine what constitutes a non-road engine under the consent decree.

B. Because any engine labeled for use as a non-road engine is one for the purposes of the consent decree, all of the engines in question violated the decree.

To know how many non-road engines Volvo Powertrain has produced in violation of the consent decree, the Court must determine how a non-road engine is properly defined. Under the consent decree, "'Nonroad CI Engine' means a compression-ignition engine subject to the regulations in 40 C.F.R. Part 89." Consent Decree ¶ 3. Under those regulations,

> Nonroad engine means

> (1) Except as discussed in paragraph (2) of this definition, a nonroad engine is any internal combustion engine:
>
> . . .
>
> (iii) that, by itself or in or on a piece of equipment, is portable or transportable, meaning designed to be and capable of being carried or moved from one location to another. Indicia of transportability include, but are not limited to, wheels, skids, carrying handles, dolly, trailer, or platform.
>
> (2) An internal combustion engine is not a nonroad engine if:
>
> . . .
>
> (iii) the engine otherwise included in paragraph (1)(iii) of this definition remains or will remain at a location for more than 12 consecutive months or a shorter period of time for an engine located at a seasonal source. . . .
>
> 40 C.F.R. § 89.2

All non-road engines must be labeled as such at the time of manufacture. 40 C.F.R. § 89.110(a) ("The manufacturer must affix at the time of manufacture a permanent and legible label identifying each nonroad engine.").

The regulatory definition of non-road engine focuses on the design—and, more problematically, on the use—of a particular engine. *See* 59 Fed. Reg. 31306, 31311 (June 17, 1994) (noting that the regulation "distinguishes between nonroad engines and stationary internal combustion engines on the basis of engine mobility and residence time . . . . thus ensuring that engines that are actually used in a stationary manner are considered stationary engines"). So the

same engine may be non-road or stationary depending on whether it is moved from one site to another or instead stays put. Of course, there is no way for a manufacturer to know when it builds an engine whether or not that engine will be frequently moved when it is put to use. The government therefore argues that, for the purposes of the consent decree, any engine certified and labeled for use as a non-road engine is a non-road engine. Volvo Powertrain contends that only those engines that fall within the Part 89 definition—that is, those engines that do not "remain[] . . . at a location for more than 12 consecutive months or a shorter period of time for an engine located at a seasonal source," 40 C.F.R. § 89.2, notwithstanding their labeling—can be considered non-road engines.

The government's interpretation is correct because it alone produces a workable enforcement scheme. An interpretation "which gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable," RESTATEMENT (SECOND) OF CONTRACTS § 203(a) (1981), and Volvo Powertrain's interpretation of what constitutes a non-road engine would render the consent decree unreasonably difficult to enforce. On the company's reading, the United States would have to collect (or, perhaps, force Powertrain to collect) information on the use to which each individual engine was put. Even if Powertrain certified an engine to conform with the non-road emissions standards and labeled it for importation as a non-road engine in conformity with 40 C.F.R. § 89.110(a), it would not become a non-road engine for purposes of the consent decree until it was actually used in the manner described above. There is no reason to think that either the government or Powertrain could accomplish this data collection, as the affidavits attempting to

demonstrate that certain engines have been put to stationary uses show. It is therefore reasonable to interpret the agreement as applying to engines that are certified and labeled for use as non-road engines.[3]

Powertrain's fallback argument, that the consent decree applies only to non-road engines that are introduced into domestic commerce, fares no better. "As the settlement of a litigation, the decree may require less than the statute under which the suit was brought, or more . . . ." *United States v. Microsoft Corp*., 147 F.3d 935, 944 (D.C. Cir. 1998). Regardless of whether the EPA could have regulated engines produced for sale abroad, the requirements of Paragraph 110 plainly apply to all non-road engines "for which a Certificate of Conformity is sought." That provision does not require actual importation, nor does any other provision of the decree. Paragraphs 60 through 62, which make reference to the "requirements that would apply . . . if the engines were Model Year 2006 engines," Consent Decree ¶ 60, to the "requirements of 40 C.F.R. Part 89 and of the [Clear Air] Act," *id.* ¶ 61, and to the EPA's "authority under its regulations found at 40 C.F.R. Part 89 or under the Act," *id*. ¶ 62, refer to the substantive requirements

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[3] The largest trouble with the government's account is comparatively minor. Because Volvo Penta submitted these engine families for certification, and thereby brought them within the scope of the consent decree, it could have imposed liability upon Volvo Powertrain without that company's knowledge or consent. Powertrain might have built the engines expecting that they would be used as stationary engines. But Powertrain could have solved that problem through contract, informing Penta ahead of time that Powertrain would have to build mobile engines to the standards of the consent decree and extracting a promise from Penta to pay any penalties associated with engines that Penta later certified for non-road use.

and substantive authority described in those provisions. They do not limit the agreement's clear application to non-road engines manufactured at Powertrain facilities and "for which a Certificate of Conformity is sought." *Id*. ¶ 110.

The parties agree that 8,354 Model Year 2005 engines were produced at a Powertrain factory and labeled for importation as non-road engines. They agree that those engines did not comply with the Model Year 2006 emissions standards. Those 8,354 engines were therefore manufactured and submitted for certification in violation of the consent decree. The Court proceeds to consider the consequences of that violation.

C. Because the stipulated penalties do not apply to this violation, the Court must exercise its equitable discretion to determine a penalty.

The third question in the case is what penalties should apply to the violation at issue here. In answering that question, the Court begins from the proposition that a district court has the inherent "authority to exercise its discretion as a court of equity in fashioning a remedy to . . . enforce a consent decree." *Cobell v. Norton*, 391 F.3d 251, 257 (D.C. Cir. 2004); *Holland v. N.J. Dept' of Corrections*, 246 F.3d 267, 270 (3d Cir. 2001) ("[A] court does have inherent power to enforce a consent decree in response to a party's non-compliance. . . ."). "[A] consent decree is an order of the court and thus, by its very nature, vests the court with equitable discretion to enforce the obligations imposed on the parties." *United States v. Local 359, United Seafood Workers*, 55 F.3d 64, 69 (2d Cir. 1995); *see also Bergmann v. Michigan State Transportation Commission*, 665 F.3d 681, 683 (6th Cir. 2011); *Cook v. City of Chicago*, 192 F.3d 693, 695 (7th Cir. 1999)

(Posner, J.) ("From the standpoint of interpretation a consent decree is a contract, but from the standpoint of remedy it is an equitable decree."); *Berger v. Heckler*, 771 F.2d 1556, 1566–67 (2d Cir. 1985) ("Consent decrees are a hybrid in the sense that they are at once both contracts and orders; they are construed largely as contracts, but are enforced as orders.") (citation omitted). "Until parties to such an instrument have fulfilled their express obligations, the court has continuing authority and discretion—pursuant to its independent, juridical interests—to ensure compliance." *EEOC v. Local 580, International Association of Bridge, Structural & Ornamental Ironworkers*, 925 F.2d 588, 593 (2d Cir. 1991).

Of course, "parties to a consent decree [may] cabin the district court's equitable discretion by stipulating the remedies for breach." *Cook*, 192 F.3d at 698. The parties to this decree have stipulated that Volvo Truck Corporation, which has been succeeded by Volvo Powertrain, "shall pay stipulated penalties and other payments to the United States" if it "seeks certificates of conformity for any affected [heavy-duty diesel engines], but cannot certify compliance with . . . the [non-road] pull-ahead requirements. . . ." Consent Decree ¶ 116. Volvo Powertrain argues that this provision does not constrain the Court's discretion, because Volvo Penta rather than Volvo Powertrain sought certificates of conformity for these engines. The United States responds that such a reading would eviscerate the stipulated penalty provision, since it would imply that the penalties similarly did not apply when Volvo Construction Equipment—which, unlike Penta, is a party to the decree—sought certificates of conformity.

There is a genuine difficulty here, which begins with the fact that the provision is poorly drafted. Read literally, it applies whenever Volvo Powertrain cannot certify that heavy-duty diesel engines comply with the non-road pull-ahead. But that literal reading is nonsense: the non-road pull-ahead does not apply to heavy-duty diesel engines, which are by definition on-road engines. *See* 40 C.F.R. § 86.082-2 ("Heavy-duty engine means any engine which the engine manufacturer could reasonably expect to be used for motive power *in a heavy-duty vehicle*.") (incorporated into the Consent Decree at ¶ 3). As discussed above, the provision has other problems, too: it does not prescribe a penalty for violations committed by Volvo Construction Equipment, nor by any manufacturers that may purchase Powertrain factories, nor by Powertrain itself when the engines are submitted for certification by another company.

If this were an ordinary contract, the Court would conclude that the provision was ambiguous because its plain language indicated one reading while its context indicated another. In such a case, the Court would proceed to examine extrinsic evidence of the parties' intent. But the Court is mindful that where a "[consent] decree does not specify the consequences of a breach" that question is "[i]mplicitly . . . referred to the district court's equitable discretion." *Cook*, 192 F.3d at 698. "[T]hough a court cannot randomly expand or contract the terms agreed upon in a consent decree, judicial discretion in flexing its supervisory and enforcement muscles is broad." *EEOC v. Local 580, International Association of Bridge, Structural & Ornamental Ironworkers*, 925 F.2d 588, 593 (2d Cir. 1991). If the parties wish to limit that broad discretion, they must do so clearly—and gain the Court's approval for their proposal. *See Cook*, 192 F.3d at 698 (citing

Blankenship & Assocs. v. NLRB, 54 F.3d 447, 449–50 (7th Cir. 1995)). In the absence of an unambiguous constraint on its inherent power to enforce its own decrees, the Court will proceed to fashion an equitable remedy for the violation that it has found.

The Court has few markers to guide it in the exercise of its equitable authority, and so it places particular emphasis on the consent decree's instruction that, in reviewing any dispute, "the Court . . . should consider the effect of the resolution on other Settling HDDE Manufacturers." Consent Decree ¶ 129. Those manufacturers were subject to identical stipulated penalty provisions, see, e.g., Consent Decree at ¶ 116, *United States v. Mack Trucks, Inc*., et al., Civil Action No. 98-2543 (D.D.C. July 1, 1999); Consent Decree at ¶ 116, *United States v. Cummins Engine Co, Inc*., Civil Action No. 98-2546 (D.D.C. July 1, 1999), and one has paid $193 million in non-conformance penalties. Pl.'s Opp. to Def.'s Mot. for Judicial Review, Ex. S (Declaration of Anne K. Wick (Apr. 30, 2009)) ("Wick Decl."), at ¶ 9 (describing penalties paid by Caterpillar, Inc., the defendant in Civil Action No. 98-2544). Although this penalty is substantial, when it submitted the decrees for approval the government explained that "[t]he non-conformance payments are valued at more than the estimated cost of compliance . . . to take away any economic incentive not to meet the more stringent emission levels." Pl.'s Mot. to Enter Consent Decree at 31. To allow Volvo Powertrain to pay a lesser penalty here might place it at a competitive advantage relative to the settling manufacturers who either complied with the emissions standards in their consent decrees or else paid the stipulated penalties.

The stipulated penalty provision does not bind the Court in its exercise of equitable discretion, but that provision does offer guidance. The Court therefore notes that Volvo Powertrain does not dispute that the stipulated penalties, if they applied to this violation, would require it to make a payment of $65,759,212, but does contest the government's demand for $6,247,125 in interest accruing from the time that the violations occurred until the government issued its demand letter. The government responds that such an interest payment is appropriate because the penalties accrued on the date of non-compliance, Pl.'s Opp. at 51 (citing Consent Decree ¶ 119), and at least one other manufacturer paid interest on delayed payments in a similar circumstance. *Id*. at 52 (citing Wick Decl. at ¶ 6).

The requirements at issue here bound all of the engine manufacturers subject to these decrees. Manufacturers that violated their decrees have been penalized in accordance with the stipulated penalty provisions. Although those provisions are drafted so poorly that they do not clearly apply to this violation, the Court finds that they provide useful guidance and exercises its equitable authority to order Volvo Powertrain to forfeit to the government $72,006,337, an amount equal to the penalty that would have been assessed under the stipulated provision plus interest accrued from the date of the violation.

IV. THE SETTLEMENT AGREEMENT

The Court now turns to a settlement agreement between Volvo Powertrain and the California Air Resources Board, which was signed to resolve accusations that the same alleged "defeat devices" violated state law. The Air Resources Board intervened in this case to claim that Volvo Powertrain

had violated that settlement agreement, which contains provisions essentially identical to Paragraphs 60 and 110 of the consent decree. *See* Def.'s Mot. for Judicial Review, Ex. A (Settlement Agreement Between the California Air Resources Board and Volvo Truck Corporation (Oct. 21, 1998)) ("Settlement Agreement"), at ¶¶ 60, 110.

The Court has supplemental jurisdiction over this dispute under 28 U.S.C. § 1367(a) because the claim of the Air Resources Board is so related to the United States' claim that it forms part of the same Article III case or controversy. A settlement agreement is essentially a contract, *Makins v. District of Columbia*, 277 F.3d 544, 546 (D.C. Cir. 2002), and a contract dispute is a state law claim. *Bender v. Jordan*, 623 F.3d 1128, 1130 (D.C. Cir. 2010). "A federal claim and a state law claim form part of the same Article III case or controversy if the two claims 'derive from a common nucleus of operative fact' such that 'the relationship between [the federal] claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional "case."'" *Lindsay v. Gov't Emps. Ins. Co.*, 448 F.3d 416, 423–24 (D.C. Cir. 2006) (quoting *Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156, 164–65 (1997) (quoting *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966))) (alteration in *Int'l Coll.*). This is so even if the state law claim "involve[s] the joinder or intervention of additional parties." 28 U.S.C. § 1367(a). Here, the two disputes involve the production of the same engines and the interpretation of essentially the same contractual language. Moreover, the recovery provisions of the Consent Decree and Settlement Agreement are intertwined: each provides for stipulated penalties, but provides that Volvo Powertrain shall only be liable to pay those penalties once,

whether they are "paid to the United States, [the Air Resources Board], or both." Consent Decree ¶ 118; Settlement Agreement ¶ 118. Given the close connection between the claim advanced by the Air Resources Board and that put forward by the United States, the Court concludes that the claims derive from a common nucleus of operative fact, and goes on to consider the merits of the Air Resources Board's claim.

The Air Resources Board argues that Volvo Powertrain violated the Settlement Agreement for the same reasons and in the same way that it violated the Consent Decree. The Board's argument is persuasive, and the analysis of the Consent Decree set out at III.A and III.B above is entirely applicable to the Settlement Agreement. Briefly, Paragraphs 60 and 110 of the Settlement Agreement are indistinguishable from the Paragraphs 60 and 110 of the Consent Decree. The engines in question here were "manufactured at [a] facility owned or operated by [Volvo Powertrain] on or after January 1, 1998," and "an Executive Order [the California equivalent of a federal Certificate of Conformity] [was] sought" for them. Settlement Agreement ¶ 110. The engines were therefore required to "meet all applicable requirements of [the] Settlement Agreement, regardless of whether [Volvo Powertrain] still owned, owns, operated, or operates that facility at the time the engine[s] [were] manufactured." *Id.* Those "applicable requirements" are set out in Paragraph 60, which requires that "Nonroad CI Engines" manufactured on or after January 1, 2005 meet the standards "that would apply if the engines were Model Year 2006 engines." Id. ¶ 60. A "Nonroad CI Engine" is, for purposes of Settlement Agreement, an "off-road compression-ignition engine" within the meaning of the California Code of

Regulations, Title 13 § 2421(a)(38). See Pl.'s Motat 41 n.12. This definition employs the same language found in 40 C.F.R. § 89.2, which focuses on the use to which engines are put. An apparently mobile (and therefore apparently covered) engine is excluded from the definition if it "remains or will remain at a location for more than 12 consecutive months or a shorter time for an engine located at a seasonal source." Cal. Code Regs. tit. 13 § 2421(a)(38)(A)(3), (B)(3) with 40 C.F.R. § 89.2, which focuses on the use to which engines are put. An apparently mobile (and therefore apparently covered) engine is excluded from the definition if it "remains or will remain at a location for more than 12 consecutive month or a shorter time for an engine located at a seasonal source." Cal. Code Regs. tit. 13, § 2421(a)(38)(B)(3). A settlement agreement, like a consent decree, must be read to give its terms a reasonable and effective meaning, and the Air Resources Board is no more capable than the United States of collecting information on the use to which each individual engine in put. An engine is therefore a Nonroad CI Engine for purposes of the Settlement Agreement if it is labeled for use as such. All 8, 534 engines at issue here were so labeled, and all were therefore required to meet the standards applicable to Model Year 2006 engines. None did. Volvo Powertrain has therefore breached the Settlement Agreement, and the Court turns to analyze the Agreement's stipulated penalty provision.

Like the Consent Decree, the Settlement Agreement provides that Volvo Powertrain, as successor to Volvo Truck, "shall pay stipulated penalties," Settlement Agreement ¶ 116, if it "seeks Executive Orders for any affected [heavy-duty diesel engines], but cannot certify compliance with . . . the Nonroad CI Engine standard pull-ahead requirement," *id.* ¶ 116(a). Again,

an interpretive problem arises from the difficulty of this language and the fact that Volvo Penta rather than Volvo Powertrain sought the Executive Orders. But the easy analogy to the Consent Decree ends here, because the Settlement Agreement is not an order of the court. The Court has no "independent, juridical interests" in seeing the Settlement Agreement enforced, *Local* 580, 925 F.2d at 593, nor any "equitable discretion to enforce the obligations imposed on the parties" by that agreement. *Local* 359, 55 F.3d at 69. The Court can only enforce the bargain that the parties have struck. The Court must therefore conclude that the stipulated penalty provision is ambiguous, because its plain language indicates that it is limited to engines for which Volvo Powertrain sought Executive Orders, while its context suggests that it should at least apply to violations committed by Volvo Construction Equipment or by any manufacturers that may purchase Powertrain factories—and therefore that it cannot be limited to the scope of the plain text. To resolve this ambiguity, the Court must examine the circumstances surrounding the formation of the Settlement Agreement, but the present motions and their attached exhibits do not offer the Court a sufficient evidentiary basis from which to conduct that examination.

V. CONCLUSION

For the reasons stated above, Volvo Powertrain's motion for judicial review will be DENIED this 13th day of April 2012 insofar as it asks the Court to find that it has not violated the consent decree. The Court will exercise its equitable authority and enter a separate judgment of $72,006,337 against Volvo Powertrain and in favor of the United States.

Volvo Powertrain's motion for judicial review is further DENIED insofar as it asks the Court to find that it has not violated its settlement agreement with the Air Resources Board. But because the scope of that agreement's stipulated penalty provision is ambiguous, the Court will consider parol evidence as to the parties' intent. The parties will be directed to meet and confer and submit within twenty days a proposed order to schedule further proceedings.

Royce C. Lamberth

Chief Judge

United States District Court
for the District of Columbia

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-5234

UNITED STATES OF AMERICA,

Appellee

v.

VOLVO POWERTRAIN CORPORATION,

Appellant

CALIFORNIA AIR RESOURCES BOARD,

Appellee

September Term, 2014
1:98-cv-02547-RCL
Filed On: September 24, 2014

BEFORE: Griffith and Srinivasan, Circuit Judges; Sentelle, Senior Circuit Judge

ORDER

Upon consideration of appellant's petition for panel rehearing filed on September 2, 2014, it is

ORDERED that the petition be denied.

PER CURIAM

FOR THE COURT:

Mark J. Langer, Clerk

BY: /s/ Michael C. McGrail
Michael C. McGrail
Deputy Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-5234

UNITED STATES OF AMERICA,
Appellee

v.

VOLVO POWERTRAIN CORPORATION,
Appellant

CALIFORNIA AIR RESOURCES BOARD,
Appellee

September Term, 2014
1:98-cv-02547-RCL
Filed On: September 24, 2014

BEFORE: Garland, Chief Judge; Henderson, Rogers, Tatel, Brown, Griffith, Kavanaugh, Srinivasan, Millett, Pillard, and Wilkins, Circuit Judges; Sentelle, Senior Circuit Judge

ORDER

Upon consideration of appellant's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

PER CURIAM

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Michael C. McGrail
Michael C. McGrail
Deputy Clerk

APPENDIX E

United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 85. Air Pollution Prevention and Control
(Refs & Annos)
Subchapter II. Emission Standards for
Moving Sources
Part A. Motor Vehicle Emission and Fuel Standards
(Refs & Annos)

42 U.S.C.A. § 7522

Currentness

42 U.S.C.A. § 7522. Prohibited acts

(a) Enumerated prohibitions

The following acts and the causing thereof are prohibited—

(1) in the case of a manufacturer of new motor vehicles or new motor vehicle engines for distribution in commerce, the sale, or the offering for sale, or the introduction, or delivery for introduction, into commerce, or (in the case of any person, except as provided by regulation of the Administrator), the importation into the United States, of any new motor vehicle or new motor vehicle engine, manufactured after the effective date of regulations under this part which are applicable to such vehicle or engine unless such vehicle or engine is covered by a certificate of conformity issued (and in effect) under regulations prescribed under this part or part C in the case of clean-fuel vehicles (except as provided in subsection (b) of this section);

* * *

42 U.S.C.A. § 7524

Currentness

42 U.S.C.A. § 7524. Civil penalties

(a) Violations

Any person who violates sections' 7522(a)(1), 7522(a)(4), or 7522(a)(5) of this title or any manufacturer or dealer who violates section 7522(a)(3)(A) of this title shall be subject to a civil penalty of not more than $25,000. Any person other than a manufacturer or dealer who violates section 7522(a)(3)(A) of this title or any person who violates section 7522(a)(3)(B) of this title shall be subject to a civil penalty of not more than $2,500. Any such violation with respect to paragraph (1), (3)(A), or (4) of section 7522(a) of this title shall constitute a separate offense with respect to each motor vehicle or motor vehicle engine. Any such violation with respect to section 7522(a)(3)(B) of this title shall constitute a separate offense with respect to each part or component. Any person who violates section 7522(a)(2) of this title shall be subject to a civil penalty of not more than $25,000 per day of violation.

* * *

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 98 2547

UNITED STATES OF AMERICA

Plaintiff,

v.

VOLVO TRUCK CORPORATION

Defendant.

CONSENT DECREE

WHEREAS, Plaintiff, the United States of America, at the request of the Administrator of the United States Environmental Protection Agency ("EPA"), and by authority of the Attorney General, filed the Complaint herein against Defendant, Volvo Truck Corporation ("VTC") alleging violations of the Clean Air Act, as amended, 42 U.S.C. §§ 7401 *et seq*., (the "Act") in connection with certain heavy-duty diesel engines manufactured and sold by VTC, and has filed

similar complaints in related actions against other heavy-duty diesel engine manufacturers; and

WHEREAS, VTC denies the violations alleged in the Complaint; and

WHEREAS, the United States and VTC have consented to entry of this Consent Decree without trial of any issue; and

WHEREAS, EPA is charged with primary responsibility for enforcing the Clean Air Act; and

WHEREAS, EPA has conducted an extensive investigation of the matters which are the subject of the Consent Decree; and

WHEREAS, the United States has determined that the comprehensive relief set forth in this Consent Decree will provide protection of the health and welfare of the people of the United States; and

WHEREAS, the United States and VTC agree, and the Court by entering this Consent Decree finds, that this Consent Decree has been negotiated by the United States and VTC in good faith, that implementation of this Consent Decree will avoid prolonged and complicated litigation between the Parties, and that this Consent Decree is fair, reasonable, and in the public interest;

NOW, THEREFORE, before the taking of any testimony, and without trial or adjudication of any issue of fact or law and without this Consent Decree constituting an admission by any Party with respect to any such issue, and the Court having considered the matter and being duly advised, it is hereby ORDERED AND DECREED as follows:

I. JURISDICTION AND VENUE

1. This Court has jurisdiction over the subject matter of this action and the Parties to this Consent Decree pursuant to 28 U.S.C. §§ 1331, 1345, 1355, and Title II of the Act, 42 U.S.C. §§ 7521-7590.

2. For purposes of this action and this Consent Decree, VTC does not contest that venue is proper in this District pursuant to Sections 204 and 205 of the Act, 42 U.S.C. §§ 7523 and 7524.

II. DEFINITIONS

3. Unless specifically defined in this Section or elsewhere in this Consent Decree, terms used herein shall have the meanings currently set forth in Sections 216 and 302 of the Act, 42 U.S.C. §§ 7550 and 7602, and any regulation promulgated under Title II of the Act, 42 U.S.C. §§ 7521-7590. The following definitions shall apply for purposes of this Consent Decree.

"Act" means the Clean Air Act, as amended, 42 U.S.C, §§ 7401 *et seq*.

"A,B&T" means the motor vehicle engine emission averaging, banking and trading program set forth in 40 C.F.R. §§ 86.091-15, 86.092-15, 86.094-15, and 86.004-15.

"AECD," or "Auxiliary Emission Control Device," means any device or element of design that senses temperature, vehicle speed, engine RPM, transmission gear, manifold vacuum, or any other parameter for the purpose of activating, modulating, delaying, or deactivating the operation of the emission control system.

"California Settlement Agreement" means the agreement between VTC and the California Air

Resources Board resolving California claims with respect to matters addressed in this Consent Decree.

"CARB" means the California Air Resources Board.

"Certificate of Conformity" or "Certificate" means a certificate issued by EPA pursuant to Section 206 of the Act, 42 U.S.C. § 7525.

"Consent Decree" or "Decree" means this Consent Decree, including the Appendices specifically identified herein.

"Date of Entry" means the date on which this Consent Decree is entered as a final judgment by the United States District Court for the District of Columbia.

"Date of Filing" means the date this Consent Decree is filed with the Clerk of the United States District Court for the District of Columbia.

"Day" means a calendar day. In computing any period of time under this Consent Decree, where the last day would fall on a Saturday, Sunday, or Federal holiday, the period shall run until the close of business of the next working day.

"Defeat Device" means an AECD that reduces the effectiveness of the emission control system under conditions that may reasonably be expected to be encountered in normal vehicle operation and use, unless:

(a) such conditions are substantially included in the Federal emission test procedure;

(b) the need for the AECD is justified in terms of protecting the vehicle against damage or accident; or

(c) the AECD does not go beyond the requirements of engine starting.

"Emissions Surface Limits" means the EURO III Test Protocol-based maximum allowable emission levels set forth in Paragraphs 14, 16, 17, 19 and 20, as determined in accordance with Section 1 of Appendix C to this Consent Decree.

"Engine Rebuild" means an activity occurring over one or more maintenance or repair events involving:

(a) disassembly of the engine, including removal of the cylinder heads; and

(b) the replacement or reconditioning of more than one Major Cylinder Component in more than half the cylinders.

"EPA" means the United States Environmental Protection Agency.

"EURO III Composite Value Limits" means the EURO III Test Protocol-based maximum composite value emission limits set forth in Paragraphs 14, 16, 17, 19 And 20, as determined in accordance with Section 1 of Appendix C to this Consent Decree.

"EURO III Limits" means, collectively, the EURO III Composite Value Limits and the Emissions Surface Limits.

"EURO III Test Protocol" means the test protocol for measuring diesel engine emissions specified in Section 1 of Appendix C to this Consent Decree.

"FTP" means the Federal Test Procedure for HDDEs specified in 40 C.F.R. Part 86.

"HDDE" means a diesel (as defined in 40 C.F.R. § 86.090-2) heavy-duty engine (as defined in 40 C.F.R. §§ 86.082-2(b)), for which a United States Certificate of Conformity is sought or required.

"HHDDE" means an HDDE certified as a motor vehicle heavy heavy-duty engine in accordance with the definition of "primary-intended service class" in 40 C.F.R. §86.085-2.

"Interim Engines" means all new electronically controlled LMB Engines manufactured on or after November 1, 1998, until compliance with the provisions of Paragraph 16B are achieved; and all new electronically controlled Truck HHDDEs manufactured on or after December 31, 1998, until compliance with the provisions of Paragraph 20 are achieved.

"LHDDE" means an HDDE certified as a motor vehicle light heavy-duty engine in accordance with the definition of "primary intended service class" in 40 C.F.R. §§ 86.085-2.

"LMB Engine" means an LHDDE or MHDDE manufactured by VTC, or any HDDE manufactured by VTC and offered for sale or intended for installation in an Urban Bus.

"Low NOx Rebuild Kit" means the software and/or minor hardware included by VTC in a rebuild kit offered for sale in the United States for purposes of complying with Section IX.B.

"Major Cylinder Component" means piston assembly, cylinder liner, connecting rod, or piston ring set.

"MHDDE" means an HDDE Certified as a motor vehicle medium heavy-duty engine in accordance with the definition of "primary intended service class" in 40 C.F.R. § 86.085-2.

"Model Year" means (a) for on-highway engines, the period defined at 40 C.F.R. Part 85, Subpart X; and

(b) for Nonroad CI Engines, the period defined at 40 C.F.R. § 89.2.

"NMHC" means non-methane hydrocarbon.

"NOx" means oxides of nitrogen, as defined in 40 C.F.R. § 86.082-2.

"Nonroad CI Engine" means a compression-ignition engine subject to the regulations in 40 C.F.R. Part 89.

"NTE Limit" means the Not to Exceed Emission Limit, *i.e.*, the maximum allowable NOx, NOx plus NMHC, and PM emission levels set forth in Paragraphs 14, 16, 17, 19 and 20, as determined in accordance with Section 2 of Appendix C to this Consent Decree.

"NOx plus NMHC Limit" means the maximum allowable NOx plus NMHC emission levels, which are set forth in Paragraphs 17 and 20 of this Consent Decree, when an engine is tested using the applicable FTP.

"Opacity Limit" means the maximum opacity level set forth in Paragraphs 14, 16, 17, 19 and 20 that is applicable within the Not to Exceed Control Area specified in Section 2 of Appendix C.

"Paragraph" means a portion of this Consent Decree identified by an Arabic numeral.

"Parties" means the United States and VTC.

"PM" means particulate matter.

"Pre-Settlement Engines" means all electronically controlled engines equipped by VTC with fuel economy injection timing strategy and manufactured, with respect to LMB Engines, prior to November 1, 1998, and, with respect to Truck HHDDEs, prior to

December 31, 1998. Appendix A to this Consent Decree lists VTC's Pre-Settlement Engine Families.

"Section" means a portion of this Consent Decree identified by a Roman numeral.

"Settling HDDE Manufacturers" means Caterpillar Inc., Cummins Engine Company, Inc., Detroit Diesel Corporation, Mack Trucks, Inc., Renault V.I., and Volvo Truck Corporation.

"Smoke Limit" means the maximum emission levels set forth in Paragraphs 14, 16, 17, 19 and 20, as measured in accordance with Appendix C, applicable within the Not to Exceed Control Area specified in Section 2 of Appendix C to this Consent Decree.

"TNTE Limit" means the "Transient Load Response Not To Exceed Limit," *i.e.*, the TNTE Test Protocol-based maximum emission levels set forth in Paragraphs 23 through 25 and determined in accordance with Section 2 of Appendix C to this Consent Decree.

"TNTE Test Protocol" means the test protocol for measuring diesel engine NOx plus NMHC and PM emissions during hard accelerations which is set forth in Appendix C to this Consent Decree.

"Truck MIDDEN means an HHDDE manufactured by VTC, except any HHDDE specifically included in the definition of LMB Engine herein.

"United States" means the United States of America.

"Urban Bus" means an urban bus as defined at 40 C.F.R. § 86.093-2.

"Useful Life" means the applicable useful life of an engine as presently defined in 40 C.F.R. Parts 86 and 89.

III. APPLICABILITY

4. This Consent Decree applies to and is binding upon the United States and VTC, its agents, successors, and assigns. Any change in VTC's ownership or corporate or other legal status shall in no way alter VTC's responsibilities under this Consent Decree. In any action to enforce this Consent Decree, VTC shall not raise as a defense the failure of its officers, directors, agents, servants, contractors, or employees to take actions necessary to comply with the provisions hereof. VTC agrees that before the United States moves for entry of this Consent Decree, VTC will seek to obtain the intervention of Volvo Construction Equipment ("VCE") for the purposes of enforcing the provisions of Section IX.A, and other Consent Decree provisions pertaining to the nonroad CI Engine emission standards pull-ahead, and shall so notify the Court of VCE's consent to intervention. If VTC is unable to obtain the consent of VCE, then either the parties will agree on appropriate modifications to the Consent Decree, or the United States reserves the right to withdraw its Consent to the Consent Decree.

IV. FACTUAL BACKGROUND

5. VTC has manufactured and sold, offered for sale, or introduced or delivered for introduction into commerce in the United States new motor vehicle engines, including the Pre-Settlement Engines.

6. Each Certificate of Conformity issued to VTC by EPA during the time period relevant to the claims alleged in the Complaint provides that the Certificate

covers only those new motor vehicle engines' which conform in all material respects to the engine design specifications provided to EPA in the Certificate application for such engines, except any Certificate of Conformity issued by EPA for engines VTC intended or intends to sell only in California provides that the Certificate covers only those new motor vehicle engines which conform, in all material respects, to the engine design specifications described in the application submitted to CARB. In addition, each Conditional Certificate of Conformity issued to VTC for Model Year 1998 specifically provides that the Certificate does not cover engines equipped with Defeat Devices.

7. VTC has installed on engines manufactured for sale in the United States certain computer-based strategies to adjust the timing of fuel injection, including but not limited to, the fuel economy timing strategy and other injection-timing strategies on all of its Pre-Settlement Engines. The United States alleges in its Complaint that these strategies have the effect of advancing injection timing relative to the injection timing used by VTC to control NOx emissions on the FTP. The United States further alleges that these strategies have an adverse effect on the engine's emission control system for NOx, that they were not adequately disclosed to EPA, that they are Defeat Devices Prohibited under the Act, and that these engines are not covered by an EPA-issued Certificate of Conformity.

8. VTC denies the material allegations of the Complaint and contends that its engines fully comply with NOx emissions limits, that it fully and adequately disclosed its emission control systems to EPA, that it did not employ Defeat Devices prohibited

by the Act, and that these engines are covered by an EPA-issued Certificate of Conformity.

V. OBJECTIVES

9. VTC has represented that it cannot immediately eliminate the current injection-timing strategies at issue by recalibrating the engine computer software without causing such damage to the engine in-use as to make the engine unmarketable. VTC has agreed to develop and to use new technology to change existing electronic injection-timing strategies and. meet the emission levels specified herein as quickly as is technologically feasible, and VTC represents that the schedule of emissions reductions set forth in Paragraphs 16, 17, 19 and 20 herein is, based on the best information currently available, the most expeditious schedule technologically feasible by VTC. Accordingly, the objectives of this Consent Decree are: (i) to resolve the United States' claims for injunctive relief as described in Sections VI through X and XVIII through XIX and Paragraph 116(a), as follows: (a) to have VTC reduce emissions from Interim Engines and meet specified emission levels in accordance with the schedule set forth herein by modifying the current injection-timing strategies and implementing new technology; (b) to resolve disputed claims arising under the Act and ensure compliance with the Act by having VTC replace the strategies that the United States alleges are defeat devices and providing for emissions and compliance monitoring during the term of this Decree through supplementary test requirements, auditing procedures, in-use testing of engines, and reporting requirements; (c) to have VTC reduce ambient levels of air pollutants by accelerating implementation of more stringent on-road HDDE and Nonroad CI Engine emission standards and other

emission reduction programs; and (ii) to resolve the United States' claims for civil penalties as described in Paragraphs 113 and 137.

VI. REQUIREMENTS FOR ON-ROAD HDDEs.

A. Requirements for Applications for Certificates of Conformity

10. In each application for a Certificate of Conformity submitted by VTC for an Interim Engine family, VTC shall state whether the application covers LMB Engines or Truck HUDDEs. If, based on reasonable evidence, EPA concludes that the engines covered by an application for Truck HHDDEs are intended for use as LMB Engines, EPA may deny the application, notwithstanding any statement by VTC to the contrary.

11. Commencing with applications for Certificates of Conformity for 1999 Model Year engines, VTC shall comply with all AECD reporting requirements found in 40 C.F.R. Part 86, Subpart A, consistent with EPA's regulations and written guidance of October 1998 or by reference to Appendix B-1 through B-4, as applicable under this Consent Decree, including the requirements to identify and provide a detailed description of all AECDs and to provide a justification for each AECD, consistent with the applicable Appendix B-1 through B-4 requirements and EPA's guidance, that results in a reduction in the effectiveness of the emission control system.

B. Applicability of Additional Compliance Requirements

12. All EURO III, NTE, TNTE, and Smoke (or alternate Opacity) Limits specified in Paragraphs 14,

16, 17, 19 and 20 shall apply to all normal vehicle operation and use. Subject to the provisions of this Paragraph, VTC shall meet all requirements specified in Paragraphs 13 through 20, and 23 through 25, of this Consent Decree throughout the Useful Life of the engine. Compliance by an engine family with the NOx plus NMHC limits prior to Model Year 2004 shall not subject the engine family to the longer Useful Life requirement promulgated by EPA and published at 62 Fed. Reg. 54694. The specific Useful Life requirements applicable to engines produced before Model Year 2004 shall be as follows:

(a) For Interim Engines manufactured on or before December 31, 1999, the definition of Useful Life contained in 40 C.F.R. Part 86 shall apply for all applicable limits. VTC shall apply the deterioration factors, if any, developed for the FTP in order to demonstrate compliance with the EURO III and NTE standards. VTC may increase the applicable EURO III or NTE deterioration factors for the engine family if, after completion of engine testing, deterioration factors applicable to EURO III or NTE Limits are found to be greater than the deterioration factors used to determine compliance with the FTP standards. The EURO III or NTE Limit for such engine family may then be increased by the difference between the FTP factor and the applicable EURO III or NTE factor for the purpose of any in-use determination of compliance. VTC must generate and submit to EPA with its Model Year 2000 applications for Certificates, data supporting a change in the original deterioration factors, but all such data must be submitted prior to December 31, 1999.

(b) For an HDDE manufactured on or after January 1, 2000, or when VTC has determined a

specific deterioration factor for the EURO III and NTE Limits for a particular engine family, whichever is sooner, the Useful Life for all such limits under this Consent Decree shall be the Useful Life set forth in 40 C.F.R. Part 86 for HDDEs manufactured before Model Year 2004, with no adjustments when determining in-use compliance.

(c) Beginning with Model Year 2004, the Useful Life for all limits under this Consent Decree shall be the Useful Life set forth in 40 C.F.R. Part 86 for HDDEs manufactured in Model Year 2004 and later.

C. Additional Requirements Applicable to LMB Engines Only

13. Subject to the provisions of this Consent Decree, VTC shall not employ a Defeat Device in any electronically controlled LMB Engine manufactured on or after November 1, 1998. Notwithstanding the foregoing sentence, and without either Party to this Consent Decree conceding that any such strategy is or is not a Defeat Device, VTC's LMB Engines that are Interim Engines may employ the injection-timing strategies as described and specified in Appendix B-1 and B-2 to this Consent Decree, provided that, at the time of certification, such engines are in compliance with all requirements of Paragraph 14. These strategies are used: (a) for engine startup; (b) to prevent engine or vehicle damage or accident; (c) to protect the engine from excessive deterioration during sustained high speed or high load operation; and/or (d) to control emissions of unburned hydrocarbons at low ambient temperatures.

14. For all electronically controlled LMB Engines manufactured on or after November 1, 1998, including the engines specified in Paragraph 13, VTC shall

comply, except as described and specified in Appendix B-2, with the following: (a) all applicable FTP standards when tested in accordance with the FTP for HDDEs; (b) EURO III Composite Value Limits of 6.0 g/bhp-hr for NOx (i.e., 1.5 times the applicable FTP standard for NOx), 1.0 times the applicable FTP standard for all other regulated emissions when tested using the EURO III Test Protocol in accordance with Appendix C of this Decree, and the associated Emissions Surface Limits specified in that Appendix; (c) an NTE limit of 7.0 g/bhp-hr for NOx (*i.e.*, 1.75 times the applicable FTP standard for NOx) in accordance with Appendix C to this Consent Decree; and (d) either a Smoke Limit of 1.0 or a thirty second average smoke opacity of 4% for a 5 inch path limit for transient testing, and a ten second average smoke opacity of 4% for a 5 inch path limit for steady state testing.

15. Except as excluded in Paragraph 16, without either Party to this Consent Decree conceding that any such strategy is or is not a Defeat Device: (a) no electronically-controlled LMB Engine manufactured by VTC after December 31 1999, shall employ any of the injection-timing strategies described in Appendix B-1 of this Consent Decree, unless EPA determines that the strategy is not a Defeat Device; but (b) VTC's electronically controlled LMB Engines manufactured after July 31, 1999 and prior to October 1, 2002 may employ the strategies as described and specified in Appendix B-2 and B-3, provided that, at the time of certification, such engines are in compliance with all requirements of Paragraph 16, and provided that beginning in Model Year 2000, VTC's LMB Engines may employ such strategies only if, at the time of certification, they comply with, or are revised to

conform to, the applicable limitations set forth in Appendix B-4.

16.A. All electronically controlled LMB Engines manufactured on or after July 1, 1999, shall comply, except as described and specified in Appendix B-2 and B-3, with the following: (a) all applicable FTP standards when testing in accordance with the FTP for-HDDEs; (b) EURO III Composite Value Limits of 5.0 g/bhp-hr for NOx (i.e., 1.25 times the applicable FTP standard for NOx), 1.0 times the applicable FTP standard for all other regulated emissions when tested using the EURO III Test Protocol in accordance with Appendix C of this Decree, and the associated Emissions Surface Limits specified in that Appendix; (c) an NTE Limit of 6.25 g/bhp-hr for NOx (*i.e.*, 1.5625 times the applicable FTP standard for NOx) in accordance with Appendix C to this Consent Decree; and (d) either a Smoke Limit of 1.0 or a thirty second average smoke opacity of 4% for a 5 inch path limit for transient testing, and a ten second average smoke opacity of 4% for a 5 inch path limit for steady state testing. VTC shall be allowed up to 1,058 MY99 engines under this provision. Any engines produced beyond this amount shall meet the limits set forth in Paragraph 16.B.

16.B. All electronically controlled LMB Engines manufactured on or after January 1, 2000, shall comply, except as described and specified in Appendix B-2 and B-3, and as limited by-B-4, with the following: (a) all applicable FTP standards when tested in accordance with the FTP for HDDEs; (b) EURO III Composite Value Limits of 4.0 g/bhp-hr for NOx (*i.e.*, 1.0 times the applicable FTP standard for NOx), 1.0 times the applicable FTP standard for all other regulated emissions when tested using the EURO III

Test Protocol in accordance with Appendix C of this Decree, and the associated Emissions Surface Limits specified in that Appendix; (c) an NTE Limit of 5.0 g/bhp-hr for NOx (*i.e*., 1.25 times the applicable FTP standard for NOx) in accordance with Appendix-C to this Consent Decree; and (d) either a Smoke Limit of 1.0 or a thirty second average-smoke opacity of 4% for a 5 inch path limit for transient testing, and a ten second average smoke opacity of 4% for a 5 inch path limit for steady state testing.

17. No LMB Engine manufactured by VTC on or after October 1, 2002, shall employ any of the injection-timing strategies described in Appendix B-1, B-2, B-3 and B-4 to this Consent Decree, unless EPA determines that the strategy is not a Defeat Device. In addition, all such LMB Engines (whether mechanically or electronically controlled), shall comply with the following: (a) an FTP Limit of 2.4 g/bhp-hr for NOx plus NMHC, or 2.5 g/bhp-hr for NOx plus NMHC if NMHCs do not exceed 0.5 g/bhp-hr; (b) EURO III Composite Value Limits of 2.4 g/bhp-hr for NOx plus NMHC, or 2.5 g/bhp-hr for NOx plus NMHC if NMHCs do not exceed 0.5 g/bhp-hr (*i.e*. 1.0 times the applicable NOx plus NMHC Limit), and 1.0 times the applicable FTP standard for all other applicable emissions when tested using the EURO III Test Protocol in accordance with Appendix C to this Consent Decree; (c) all associated Emissions Surface Limits specified in Appendix C; (d) an NTE Limit of 3.0 g/bhp-hr for NOx plus NMHC, or 3.125 g/bhp-hr for NOx plus NMHC if NMHCs do not exceed 0.6250 g/bhp-hr (i.e., 1.25 times the applicable NOx plus NMHC Limit), in accordance with Appendix C of this Decree; (e) an NTE Limit of 0.1250 g/bhp-hr for PM (i,e., 1.25 times the applicable FTP standard for PM), except the applicable NTE limit for PM for Urban Bus

engines shall be 0.06250 g/bhp-hr and 0.08750 g/bhp-hr for in-use testing purposes, in accordance with Appendix- C of this Decree; and (f), either a Smoke Limit of 1.0 or a thirty second average smoke opacity of 4% for a 5 inch path limit for transient testing, and a ten second average smoke opacity of 4% for a 5 inch path limit for steady state testing.

D. Additional Requirements Applicable to Truck HHDDEs Only

18. Subject to the provisions of this Consent Decree, VTC shall not employ a Defeat Device in any electronically controlled Truck HHDDE manufactured on or after December 31, 1998: Notwithstanding the foregoing sentence, and without either Party to this Consent Decree conceding that any such strategy is or is not a Defeat Device, VTC's Truck HHDDEs that are Interim Engines may employ those injection-timing strategies as described and specified in Appendix B-1, B-2 and B-3 to this Consent Decree, provided that, at the time of certification, such engines are in compliance with all requirements of Paragraph 19, and provided that beginning in Model Year 2000, VTC's Truck HHDDEs may employ the strategies as described and specified in Appendix B-1, B-2 and B-3 provided that, at the time of certification, they comply with, or are revised to conform to, the applicable limitations set forth in Appendix B-4. These strategies are used: (a) for engine startup; (b) to prevent engine or vehicle damage or accident; (c) to protect the engine-from excessive deterioration during sustained high-speed or high load operation; and/or (d) to control emissions of unburned hydrocarbons at low ambient temperatures.

19. In addition, all electronically controlled Truck HHDDEs manufactured on or after December 31,

1998, including engines specified in Paragraph 18, shall comply, except as described and specified in Appendix B-2 and B-3, and as limited by B-4, with the following: (a) all applicable FTP standards when tested in accordance with the FTP for HDDEs; (b) EURO III Composite Value Limits of 6.0 g/bhp-hr for NOx (*i.e.*, 1.5 times the applicable FTP standard for NOx), 1.0 times the applicable FTP standard for all other regulated emissions when tested using the EURO III Test Protocol in accordance with Appendix C of this Decree, and the associated Emissions Surface Limits specified in that Appendix; (c) an NTE Limit of 7.0 g/bhp-hr for NOx (*i.e.*, 1.75 times the applicable FTP standard for NOx) in accordance with Appendix C to this Consent Decree; and (d) either a Smoke Limit of 1.0 or a thirty second average smoke opacity of 4% for a 5 inch path limit for transient testing, and a ten second average smoke opacity of 4% for a 5 inch path limit-for steady state testing.

20. No Truck HHDDE manufactured by VTC on or after October 1, 2002, shall employ any of the injection-timing strategies described in Appendix B-1, B-2, B-3-and B-4 to this Consent Decree, unless EPA determines that the strategy is not a Defeat Device. In addition, all Truck HHDDEs (whether mechanically or electronically controlled). Manufactured on or after October 1, 2002, shall comply with the following: (a) an FTP Limit of 2.4 g/bhp-hr for NOx plus NMHC, or 2-5 g/bhp-hr for NOx plus NMHC if NMHCs do not exceed 0.5 g/bhp-hr; (b) EURO III Composite Value Limits of 2.4 g/bhp-hr for NOx plus NMHC, or 2.5 g/bhp-hr for NOx plus NMHC if NMHCs do not exceed 0.5 g/bhp-hr (*i.e.*, 1.0 times the applicable NOx plus NMHC Limit), and 1.0 times all other applicable regulated emissions when tested using the EURO III Test. Protocol in accordance with

Appendix C of this Decree; (c) all associated Emissions Surface Limits specified in Appendix C; and (d) an NTE Limit of 3.0 g/bhp-hr for NOx plus NMHC, or 3.125 g/bhp-hr for NOx plus NMHC if NMHCs do not exceed 0.625 g/bhp-hr (i.e., 1.25 times the applicable NOx plus NMHC Limit), in accordance with Appendix C of this Decree; (e) an NTE Limit of 0.125 g/bhp-hr for PM (i.e., 1.25 times the applicable FTP standard for PM); and (f) either a Smoke Limit of 1.0 or a thirty second average smoke opacity of 4% for a 5 inch path limit for transient testing, and a ten second average smoke opacity of 4% for a 5 inch path limit for steady state testing.

E. Averaging, Banking and Trading

21. VTC shall have zero (0) NOx credits for HHDDEs and zero (0) NOx credits for MHDDEs from its A,B&T account at the end of Model Year 1997 for use during the 1998 and 1999 Model Years.

22. Except as specified in Paragraphs 21 through 23, the applicable A,B&T regulations shall apply only to the FTP standards of this Consent Decree.

(a) For purposes of averaging and generating credits, the Family Emissions Limit ("FEL") of the engine family shall be compared to the FTP limit applicable under this Consent Decree.

(b) The A,B&T regulations applicable to Model Year 2004 and later engines shall apply to all engines certified to the NOx plus NMHC Limits.

(c) Credits generated from engines not certified to the NOx plus NMHC Limits may be used in A,B&T for engines not certified to the NOx plus NMHC Limits. Credits generated from engines not certified to the NOx plus NMHC Limits may be used in A,B&T for

engines certified to the NOx plus NMHC Limits, but only for engines manufactured on or after January 1, 2003, and only if the credit-generating engines are also certified to a EURO III Composite Value Limit equal to or less than 1.0 times the NOx FEL for such engines.

(d) An HDDE manufactured after October 1, 2002, and before January 1, 2003 may be certified to the 4.0 g/bhp-hr NOx FTP standard only if the manufacturer has previously generated enough engine-credits within the same class of engines (i.e., HHDDE, MHDDE, and LHDDE) to offset the engine-credit used by the engine. Any such engine manufactured prior to October 1, 2002, and certified to the NOx phis NMHC Limit, with an FEL less than or equal to the NOx plus NMHC Limit shall generate one engine-credit. Any such engine manufactured after October 1, 2002, certified to the 4.0 g/bhp-hr NOx-FTP standard shall use one engine-credit. In addition, an engine-credit may only be used for an offset under this Subparagraph if the engine generating the credit was manufactured at least as many days before October 1, 2002, as the engine using the-credit was manufactured after October 1, 2002.

(e) A Nonroad CI Engine covered by Paragraph 60 of this Consent Decree and manufactured after January 1, 2005, and before July 1, 2005, may be certified to the emission limits that would otherwise apply to the engine prior to January 1, 2005 only if the manufacturer has previously generated enough engine-credits within the same A,B&T class of engines to offset the engine-credit used by the engine. Any such engine manufactured prior to January 1, 2005, and certified to the emission limits applicable under Paragraph 60, with a FEL less than or equal to such emission limits, shall generate one engine-credit. Any

such engine manufactured after January 1, 2005, certified to the emission limits applicable under Paragraph 60 shall use one engine-credit. In addition, an engine-credit may only be used "for an offset under this Subparagraph if the engine generating the credit was manufactured at least as many days before January 1, 2005, as the engine using the credit was manufactured after January 1, 2005.

23. Except as specified in Paragraph 21 of this Consent Decree, if VTC declares a NOx, NOx plus NMHC, or PM FEL for an engine family, then the applicable EURO III, NTE, and TNTE Limits shall be as follows:

(a) the EURO III Composite Value Limits for NOx and PM shall be the applicable multiplier times the NOx and PM FEL. The EURO III Composite Value Limits for NOx plus NMHC shall be the NOx plus NMHC FEL;

(b) the NTE Limits shall be the applicable multiplier times the NOx, PM, and NOx plus NMHC FELs; and

(c) the TNTE Limits shall be 1.7 times the PM FEL and 1.3 times the NOx plus NMHC FEL, unless modified in accordance with Paragraph 25.

F.TNTE Limits

24. On or after October 1, 2002, all HDDEs manufactured by VTC shall meet the TNTE Limits set forth below, or the alternate limits established pursuant to Paragraph 25, when tested in accordance with the TNTE Test Protocol specified in Appendix C to this Consent Decree. Subject to the provisions of Paragraph 25 of this Consent Decree, the TNTE Limit for NOx plus NMHC shall be 3.12 g/bhp-hr for NOx

plus NMHC, or 3:25 g/bhp-hr for NOx plus NMHC if NMHCs do not exceed 0:65 g/bhp-hr. The TNTE Limit for PM shall be 0.08 g/bhp-hr for Urban Bus engines (0.12 g/bhp-hr for in-use testing purposes) and 0.17 g/bhp-hr for all other heavy-duty diesel engines.

25. Prior to October 1, 2000, EPA and VTC shall review all TNTE test data submitted to the Agency by VTC pursuant to Paragraph 26(b) of this Consent Decree, and information on current and anticipated technologies, to determine whether the above TNTE Limits should be modified to ensure that the TNTE Limits are the lowest achievable given the technology available at that time. The Parties agree that the same TNTE Limits should apply to all Settling HDDE Manufacturers, and deliberations regarding the appropriate TNTE Limits should therefore be among EPA (after consultation with CARB) and all Settling HDDE Manufacturers. If EPA and VTC determine that different TNTE Limits are appropriate, or a different compliance date is appropriate, the Parties shall jointly petition the Court to modify the Consent Decree. If EPA and VTC disagree on the appropriateness of the TNTE Limits or the compliance date, the matter shall be resolved through the dispute resolution procedures in Section XVI of this Consent Decree, except: (a) any final TNTE Limits determined through mutual consent of the Parties shall be agreed upon only after consultation with, and the agreement of, all Settling HDDE Manufacturers; and (b) the Parties hereby consent to the consolidation of any judicial "dispute resolution proceedings under this Consent Decree with respect to the final TNTE Limits with dispute resolution proceedings regarding the same issue under a Consent Decree with any other Settling HDDE Manufacturer, and to intervention of any Settling HDDE Manufacturer in judicial dispute

resolution regarding this issue. Should any Settling HDDE Manufacturer seek judicial dispute resolution regarding the final TNTE Limits, VTC agrees to be bound by the final TNTE Limits determined by the Court in such proceeding, even if VTC has not sought judicial dispute resolution regarding this issue.

VII. FEDERAL CERTIFICATION, SELECTIVE ENFORCEMENT AUDITING, ADMINISTRATIVE RECALL, AND RECORD KEEPING AND REPORTING REQUIREMENTS ASSOCIATED WITH THE EURO III, NTE, TNTE, SMOKE (OR ALTERNATE OPACITY) AND NOX PLUS NMHC LIMITS

26. With respect to the EURO III, NTE, TNTE, Smoke (or alternate Opacity) Limits, and NOx plus NMHC Limit, VTC shall be subject to and comply with all requirements of EPA's regulations and the Act, and shall be entitled to invoke the administrative procedures of EPA's regulations and the Act, that would be applicable if those limits were emission standards and procedures adopted under Sections 202(a)(3) and 206 of the Act, 42 U.S.C. §§ 7521(a)(3)- and 7525, including the requirements and procedures relating to certification, warranty, selective enforcement auditing under Section 206(b) of the Act, 42 U.S.C. § 7525(b), administrative recall under Section 207(c) of the Act, 42 U.S.C. § 7541(c), and record keeping and reporting requirements, subject to the following:

(a) VTC shall comply with all record keeping and reporting requirements associated with certification testing done to-demonstrate compliance with the EURO III Composite Value Limit and the NOx plus NMHC Limit found in Paragraph 14, 16, 17, 19, 20, and 23 of this Decree, but need only submit the

compliance statements required in Appendix C of this Decree to demonstrate compliance with all other EURO III, NTE, TNTE, and Smoke (or the alternate Opacity) Limits. VTC shall keep and provide to the United States, within 30 days of a request, all emission test results, engineering analysis, and any other information which formed the basis for making such compliance statements;

(b) beginning with the 1999 Model Year, VTC shall submit TNTE test results conducted in accordance with Appendix C of this Decree for all of its certification engines as part of its Certificate applications. For applications submitted prior to March 1, 1999, submission of TNTE test results may be delayed until March 1, 1999. TNTE test results shall include the following speeds: the lowest speed in the Not to Exceed Control Area ("ESC"), the 15% ESC speed, the 25% ESC speed (Speed A), the 50% ESC speed (Speed B), the 75% ESC speed (Speed C), and the 100% ESC speed (Speed D);

(c) any dispute arising under or relating to the parties' obligations under this Consent Decree regarding the EURO III, NTE, TNTE, and Smoke (or alternate Opacity) Limits shall not be subject to the provisions of Section 307 of the Act, 42 U.S.C. §7607, but instead shall but be resolved through the dispute resolution procedures in Section XVI of this Consent Decree;

(d) Section 304 of the Act, 42 U.S.C. § 7604, shall not apply to compliance with the EURO III, NTE, TNTE, Smoke (or the alternate Opacity), or the NOx plus NMHC Limits;

(e) For any hearing regarding compliance with the EURO III, NTE, TNTE, Smoke (or alternate

Opacity), or the NOx plus NMHC Limits, at which, if they were standards under existing regulations, an administrative law judge would otherwise preside, EPA shall appoint a hearing officer who shall preside at such hearing; and

(f) any SEA testing of engines for conformance with EURO III, NTE, or TNTE Limits shall be conducted consistent with written ERA guidance.

27. Except as provided in Paragraph 26, EPA may exercise any Authority under its regulations or the Act, including certification, warranty, selective enforcement auditing under Section 206(b) of the Act, 42 U.S.C. § 7525(b), administrative recall under Section 207(c) of the Act, 42 U.S.C. § 7541(c), and taking enforcement actions under Sections 204 and 205 of the Act, 42 U.S.C. §§ 7523 and 7524, that would be applicable if the EURO III, NTE, TNTE, Smoke (or the alternate Opacity), and the NOx plus NMHC Limits were emissions standards and procedures adopted under Sections 202(a)(3) and 206 of the Act, 42 U.S.C. §§ 7521(a)(3) and 7525.

28. For LMB Engines and Truck HHDDEs that are Interim Engines, EPA agrees not to deny, suspend, withdraw, or revoke a Certificate of Conformity under the terms of 40 C.F.R. Part 86 on the grounds that an engine or engines contain one or more of the strategies specifically as described in the applicable portions of Appendix B-1 through B-4 of this Consent Decree.

29. Beginning with Model Year 1999, with respect to any. EURO III, NTE, TNTE, Smoke (or the alternate Opacity), or NOx plus NMHC Limit that becomes more stringent before the end of a Model Year, any Certificate of Conformity for that Model Year issued prior to the date the limits change shall

cover only those engines manufactured before the date the limits become more stringent. Beginning with Model Year 1999, VTC shall apply for a new Certificate to cover any engine it intends to manufacture and sell, or offer-for sale, for the rest of the Model Year by submitting information sufficient to show that the engines will comply with the more stringent limits. VTC shall have the option of satisfying the requirements of this Paragraph by designating engines as the following Model Year.

30. Except as specifically provided herein, this Decree does not modify; change, or limit in any way the rights and obligations of the Parties under the Act and EPA's regulations with respect to the control of emissions from HDDEs.

VIII. COMPLIANCE AUDITING AND IN-USE TESTING

A. Compliance Auditor

31. Within 120 days of the entry of this Decree, VTC shall designate and provide to the United States, subject to the United States' disapproval, the name, current employment position, and qualifications of a Compliance Auditor responsible for auditing VTC's progress in meeting the requirements of this Decree. The Compliance Auditor proposed by VTC shall be deemed approved by the United States unless disapproved within 30 days of the date when the information described in the preceding sentence is provided by VTC. Should the United States disapprove a proposed Compliance Auditor, VTC shall designate and provide to the United States the name, current position, and qualifications of an alternative Compliance Auditor within 20 days of the notice of disapproval. Any dispute regarding the United States'

disapproval of any proposed Compliance Auditor shall be resolved through the dispute resolution procedures of Section XVI of this Consent Decree. Any successor to the Compliance Auditor must also be approved in accordance with the procedure set forth in this Paragraph.

32. The Compliance Auditor: (a) shall be an employee of VTC; (b) shall have not less than ten years of practical experience in diesel engine design and/or manufacturing; (c) shall not have any direct responsibility for VTC's development of engines or technology to comply with the requirements of this Consent Decree; (d) shall not report to or be supervised by anyone below the level of the Chief Executive Officer ("CEO") having any responsibility for VTC's development of engines or technology to comply with the requirements of this Consent Decree; and (e) shall spend a minimum of 500 hours per year through compliance with the certification requirements of Paragraphs 17 and 20, at which time the minimum hours shall be reduced to 100 hours per year, fulfilling the duties described herein. In addition, with respect to the performance of the compliance auditing requirements of this Consent Decree, the Compliance Auditor shall report directly to the CEO for the purpose of carrying out the provisions of this Section, and shall provide copies of all reports required by this Section directly to the CEO. The Compliance Auditor shall execute his or her responsibilities under this Consent Decree in a manner consistent with the relevant provisions of the Institute of Internal Auditors' Codification of Standards for the Professional Practice of Internal Auditing.

33. VTC's Compliance Auditor shall be responsible for auditing VTC's progress in developing and

implementing the technology needed to meet the EURO III, NTE, TNTE, Smoke (or alternate Opacity), and the NOx plus NMHC Limits. The Compliance Auditor shall also be responsible for auditing VTC's progress in developing and implementing technology needed to meet-the Low NOx Rebuild and Nonroad CI Engine standard pull-ahead requirements specified in Paragraphs 60 and 64 of this Decree.

34. VTC shall make available to the Compliance Auditor all of VTC's records, except for privileged attorney-client communications, and all records of any contractor utilized by VTC to assist in the development and implementation of technology needed to meet the requirements specified in this Decree. These records shall include, but not be limited to, records pertaining or relating to decisions to pursue or to abandon potentially available technologies or strategies, and the level of funding requested, budgeted, or provided, to achieve compliance with this Consent Decree. VTC shall provide the Compliance Auditor with access to any facility where requisite technology is being developed, tested or implemented. VTC shall also provide all reasonable assistance to allow the Compliance Auditor to monitor VTC's progress in meeting the requirements, including: making employees or contractors available to answer questions, to provide updates, and to discuss next steps; and providing a running total of all monies spent in developing and implementing the requisite technology. VTC does not waive, and specifically reserves, all privileges applicable to information provided to the Compliance Auditor.

35. The Compliance Auditor shall submit quarterly reports to the United States and to the CEO providing his or her independent, unreviewed assessment and

analysis of: VTC's progress in developing and implementing the requisite technology; the likelihood of VTC's meeting the compliance schedules set forth in this Decree; the adequacy and sufficiency of the resources being provided by VTC for the purposes of this Decree; and the needed measures beyond those being taken by VTC so as to ensure compliance with the requirements of this Decree. The Compliance Auditor's assessment and analysis shall be supported with citations to relevant documents, test results, discussions with company officials, and other sources regarding VTC's progress in meeting the requirements of this Decree. Any statements of the Compliance Auditor shall be deemed to be his or her own personal opinions and shall be neither binding on, nor admissions of, VTC with regard to any issue. Prior to any public release of a report by the Compliance Auditor, or its contents, the United States shall provide VTC with an opportunity to designate all or part thereof as confidential business information in accordance with 40 C.F.R. Part 2. In addition, the quarterly reports shall include the following:

(a) a summary of the relevant technologies being developed by VTC;

(b) the names and addresses of any contractor being used by VTC to develop the relevant technology and a summary of what tasks the contractor has been hired to perform;

(c) a summary of the developmental work done over the last three months by VTC or any such contractor hired by VTC;

(d) a summary of any testing done by VTC with respect to any relevant technology being developed,

including all significant test results pertinent to VTC's progress in meeting the requirements of this Decree;

(e) a summary of VTC's activities over the previous three months regarding the implementation of any relevant technology needed to meet the requirements of this Decree, including developmental work done on secondary components such as the radiators to accommodate NOx reduction technologies, coordination with truck builders to accommodate engine changes, and the development of supply contracts;

(f) an accounting of the money and resources expended by VTC over the previous quarter to develop and implement relevant technology;

(g) the budget for, and summary of, all relevant activities expected to take place in the next quarter; and

(h) the Compliance Auditor's statement or opinion regarding the need to modify VTC's development and implementation plan, including next steps that may be necessary to achieve compliance with the schedules set out in this Decree.

36. The first report pursuant to Paragraph 35 shall be submitted to the United States within 180 days following the Date of Entry and shall include all of the above information with respect to all activities undertaken by VTC up to the time of the first report, including activities predating 'entry of this Decree, if any. Subsequent reports shall be provided within 30 days after the close of each calendar quarter, commencing with the first full quarter following the initial report, and shall provide the information described above with respect to the quarter covered by the report. Upon reasonable notice, the Compliance

Auditor shall also be available to answer oral and written questions from the United States regarding the activities of VTC in-meeting the requirements of this Decree. Any statements of the Compliance Auditor shall be deemed to be his or her own personal opinions and shall be neither binding on, nor admissions of, VTC with regard to any issue.

37. Attorneys for VTC may be present during any communication between the government and the Compliance Auditor where the government is represented by an attorney or an EPA Office of Enforcement and Compliance Assurance staff person.

B. In-Use Testing Program

38. VTC shall perform, by itself or in conjunction with other Settling HDDE Manufacturers, an In-Use Testing Program to ensure diesel engines manufactured or modified by VTC meet the requirements of this Consent Decree when driven under conditions which can reasonably be expected to be encountered during normal vehicle operation and use, and to evaluate the effectiveness of modifications to engine design made in response to the requirements of this Consent Decree in reducing emissions. Specifically, VTC shall conduct testing to assess in-use mobile monitoring technologies, establish calibration and operating procedures for selected monitoring technologies, establish a baseline emission characterization, and conduct on-road testing to monitor in-use compliance on representative HDDEs manufactured by VTC. This Program shall be conducted in four phases. VTC is obligated to spend the sum of 250,000 on the In-Use Testing Program, allocated in accordance with the percentages set forth below.

39. Should VTC elect to perform the In-Use-Testing Program, or any phase thereof, in conjunction with other Settling HDDE Manufacturers, the references in Paragraphs 38 through 59 to VTC shall refer to VTC and all other Settling HDDE Manufacturers who elect to perform the obligations of Paragraphs 38 through 59 jointly, but the amount VTC itself is required to spend on the In-Use Testing Program shall not be changed by such election. In the event VTC elects to perform any of the obligations of Paragraphs 38 through 59 jointly with any other Settling-HDDE Manufacturer(s), it shall so notify the United States in the Scope of Work for each Phase of the Program to be implemented jointly, and provide the names of the other Settling HDDE Manufacturers with whom VTC is going to perform the work. If VTC elects to perform any obligation under Paragraphs 38 through 59 with other Settling HDDE Manufacturers, VTC shall remain obligated to fulfill all of the requirements of Paragraphs 38 through 59, and shall be liable for stipulated penalties pursuant to Paragraph 116 for any failure to the same extent as if the obligation were undertaken solely by VTC.

40. In Phase I, VTC shall conduct engineering studies to determine the correlation, accuracy, precision, and repeatability of existing mobile monitoring technologies. The purpose of the engineering studies is to assess the technology or technologies in terms of their ability to provide accurate data regarding the mass of regulated gaseous emissions and actual engine torque, so this information can be incorporated in the use of mobile monitoring equipment for the on-road testing required under Phases III and IV. Phase I shall also include engineering studies to determine the highest degree of accuracy and precision of reported engine output

torque achievable consistent with good engineering practices.

41. Not later than January 1, 1999, VTC shall submit to the United States and CARB, for review and approval by each, a single Scope of Work for Phase I. The Scope of Work shall identify the mobile monitoring technology(ies) to be evaluated, the procedures for evaluating in-use monitoring equipment, the facility that will conduct the evaluation, the companies that will participate in the program, and the schedules for implementing those tasks.

42. Within thirty (30) days after submission of the proposed Scope of Work, the United States shall approve the Scope of Work or propose modifications. Within 10 days following EPA's proposed modifications VTC shall incorporate the proposed modifications; but, if VTC disputes the proposed modifications, or if the modifications requested.by the United States conflict with modifications requested by CARB, the dispute shall be governed by the dispute resolution provisions of Section XVI. The work set forth in the Scope of Work, as approved, shall be completed by September 1, 1999.

43. If, prior to the conclusion of Phase I, VTC believes the expenditure of additional funds in excess of the amount allotted under the Scope of Work would materially improve the capabilities of the mobile monitoring equipment, it may petition the United States to increase the percentage of VTC's obligation allocated to Phase I. The United States reserves the right, to disapprove such a request, and any denial of such a request shall not be subject to dispute resolution.

44. VTC shall include in the quarterly reports submitted pursuant to Paragraph 105 a description of the progress of testing under Phase I, and shall submit a final report within 30 days of the completion of the work, summarizing the study, and including all test data and other information not previously provided with the periodic reports.

45. VTC shall submit to the United States, within 60 days of the completion of the work under Phase I, a description of its proposed monitoring equipment for use in Phases III and IV. Such report shall include any modification to improve its correlation, accuracy, precision, and repeatability, which VTC proposes should be incorporated into the proposed monitoring equipment. The United States shall review and approve or disapprove the proposed modifications within 30 days. Any disapproval of a proposed modification shall not be subject to dispute resolution.

46. VTC shall implement any approved or agreed-upon improvement to the in-use monitoring equipment approved pursuant to Phase I by February 1, 2000. The cost of any such modification relating to improving the accuracy and precision of reported engine output torque shall be borne by VTC and shall not be deducted from the amount VTC is obligated to spend in accordance with Paragraph 38 and 83. The cost of any other approved modification, and the cost of procuring the equipment for the Phases III and IV studies; shall be considered to be part of the amount VTC is obligated to spend in accordance with either Paragraph 38 or 83 or both, to be determined by the United States in its unreviewable discretion.

47. VTC may not avoid its obligation to do testing under Phases III and IV on the basis of any claimed inadequacy in mobile monitoring technology.

Notwithstanding the foregoing sentence, nothing herein shall constitute a waiver of rights any Party may have under applicable principles of law with respect to the use of test results in any proceeding to enforce this Consent Decree or the Act.

48. In Phase II of the In-Use Testing Program, VTC shall develop in-use testing procedures to be used in connection with Phases III and IV of the In-Use Testing Program. The development of in-use testing procedures shall be based on testing of HDDEs engaged in a variety of typical on-road missions, and in a variety of seasonal conditions, and shall utilize engines extending over various stages of their Useful Life. The testing procedures shall include the identification of candidate driving routes representing typical urban, suburban, and highway driving. The candidate routes shall be of sufficient length to take 45 minutes when driven at posted speeds. At least one (1) candidate driving route shall include a portion where at least 15 minutes of operation at 65 mph or greater is permitted and generally attained by trucks.

49. Not later than March 1, 1999, VTC shall submit to the United States and CARB, for review and approval by each a single Scope of Work for Phase II, identifying the testing procedures for in-use monitoring equipment and driving routes to be evaluated during Phase II. Within thirty (30) days after submission of the proposed Scope of Work, the United States shall approve the Scope of Work or propose modifications. VTC shall incorporate the proposed modifications within 30 days of receiving the proposed modifications; but if VTC disputes the proposed modifications, or if the modifications requested by the United States conflict with modifications requested by CARB, the dispute shall

be governed by the dispute resolution provisions of Section XVI. VTC shall implement the Plan as approved.

50. VTC shall complete Phase II no later than November 1, 1999.

51. VTC shall submit to the United States and CARB, no later than 30 days after completion of Phase II, a single report that includes a summary of all test data, recommended test procedure and identification of candidate driving routes for use in Phases III and IV. Within thirty (30) days after submission of the report, the United States shall approve the report or propose modifications. VTC shall incorporate the proposed modifications; but, if VTC disputes the proposed modifications, or if the modifications requested by the United States conflict with modifications requested by CARB, the dispute shall be governed by the dispute resolution provisions of Section XVI. The report, as approved, shall form the basis for the testing which VTC shall conduct in Phases III and IV.

52. VTC shall spend no more than 20% of the amount set forth in Paragraph 38 on Phases I and II.

53. In Phase III VTC shall conduct emissions testing on a variety of its in service diesel engines to characterize real world emissions from such diesel engines. The purpose of this testing is to establish a baseline set of emission data on a wide range of in-use engines of varying age and service characteristics in order to demonstrate the effectiveness of the changes made to engines produced or modified in accordance with the Consent Decree. The focus of this testing shall be 1988 through 1998 Model Year engines, and shall include a mix of on-road and laboratory testing.

54. VTC shall submit to the United States and CARB, for review and approval by each, a single Scope of Work for Phase III no later than November 1, 1999. The Scope of Work shall identify the proposed engines to be tested, the test schedule, and any testing routes or facilities. Within thirty (30) days after submission of the proposed Scope of Work, the United States shall approve the Scope of Work or propose modifications. VTC shall incorporate the proposed modifications within 30 days of receiving the proposed modifications; but, if VTC disputes the proposed modifications, or if the modifications requested by the United States conflict with modifications requested by CARB, the dispute shall be governed by the dispute resolution provisions of Section XVI. VTC shall implement the Scope of Work as approved.

55. Not later than February 1, 2000, or, if EPA agrees, one month after the improvements to the in-use monitoring equipment are implemented, VTC shall commence testing for Phase III. Testing data shall be reported quarterly throughout Phase III.

56. VTC shall complete Phase III eight months after commencement, and shall submit to the United States a report describing tests as performed, test conditions, engines tested, and test results. VTC shall spend no more than 20% of the amount set forth in Paragraph 38 on Phase III.

57. In Phase IV, VTC shall conduct on-road compliance monitoring on its HDDEs using the monitoring technology and previously defined testing procedures and driving routes approved pursuant to Phases I and II, until the funds set forth in Paragraph 38 have been fully expended. In addition to using the previously defined testing procedures and driving routes, VTC shall follow the vehicle selection

procedures and data reporting requirements set forth in Appendix D.

58. VTC shall submit to the United States and CARB, for review and approval by each, a single proposed Scope of Work for Phase IV consistent with Appendix D no later than November 1, 1999. The Scope of Work shall include an itemized cost estimate of the testing identified in Appendix D and shall require testing to begin with Model Year 2000 HDDEs. Within thirty (30) days after submission of the proposed. Scope of Work, the United States shall approve the Scope of Work or propose modifications. VTC shall incorporate the proposed modifications within 30 days of receiving the proposed modifications; but, if VTC disputes the proposed modifications, or if the modifications requested by the United States conflict with modifications requested by CARB, the dispute shall be governed by the dispute resolution provisions of Section XVI. VTC shall implement the Scope of Work as approved. Testing data shall be reported monthly throughout Phase IV.

59. VTC shall submit to the United States quarterly Phase IV reports which include the amount of money spent on testing required by this Paragraph. If, at any time, VTC contends it cannot complete the required testing with the funds remaining, it shall notify the United States, provide a detailed explanation of the reasons it cannot complete the required testing with the remaining funds, and propose modifications to the Phase IV Scope of Work to conform the remaining testing obligation to the available funds. Within thirty (30) days after submission of the proposed modifications, the United States shall approve VTC's proposed modifications or propose its own modifications. VTC shall incorporate the proposed.

modifications within 30 days of receiving the proposed modifications; but, if VTC disputes the proposed modifications, or if the modifications requested by the United States conflict with modifications requested by CARB, the dispute shall be governed by the dispute resolution provisions of Section XVI. VTC shall implement the modified Scope of Work as approved, but in no event shall VTC be obligated to spend more than the amount specified in Paragraph 38.

IX. ADDITIONAL INJUNCTIVE RELIEF

A. Nonroad CI Engine Emissions Standard Pull-Ahead

60. All Nonroad CI Engines manufactured by VTC or its affiliate, VCE, on or after January 1, 2005, with a horsepower equal to or greater than 300 but less than 750 shall meet 3.0 g/bhp-hr for NOx plus NMHC when measured on the applicable FTP for those engines. In addition, all Nonroad CI Engines Manufactured by VCE or-VTC on or after January 1, 2005, with a horsepower equal to or greater than 300 but less than 750 shall comply with all other requirements that would apply as if the engines were Model Year 2006 engines. The standards set forth in this Paragraph shall be met throughout the Useful Life of the engine.

61. With respect to the limits specified in Paragraph 60 of this Decree, VCE and VTC shall be subject to and comply with all requirements of 40 C.F.R. Part 89 and of the Act, and shall be entitled to invoke the administrative procedures of EPA's regulations and the Act that would be applicable if those limits were emission standards and procedures adopted under Sections 202(a)(3) and 206 of the Act, 42 U.S.C. §§ 7521(a)(3) and 7525, including all

certification, warranty, selective enforcement auditing under Section 206(b) of the Act, administrative recall under Section 207(c) of the Act, 42 U.S.C. § 7541(c), and record keeping and reporting requirements, except as follows:

(a) any dispute arising under or relating to the parties' obligations under this Consent Decree. regarding such limits shall not be subject to the provisions of Section 307 of the Act, 42 U.S.C. §7607, but instead shall be resolved through the dispute resolution procedures in Section XVI of this Consent Decree;

(b) Section 304 of the Act does not apply to compliance with the requirements of Paragraph 60 of this Decree; and

(c) For hearings regarding compliance with Paragraph 60 of this Decree, EPA shall appoint a hearing officer who shall preside at any hearing at which an administrative law judge would preside if the standards were in effect in Model Year 2005.

62. EPA may exercise any authority under its regulations found at 40 C.F.R. Part 89 or under the Act, including certification, selective enforcement auditing, administrative recall, and taking enforcement action against prohibited acts that would be applicable if the limits specified in Paragraph 60 of this Decree were emissions standards and procedures adopted under Section 213 of the Act.

63. Except as specified, this Decree does not modify, change, or limit in any way the rights and obligations of the Parties under the Act and EPA's regulations with respect to the control of emissions from Nonroad CI Engines.

B. Low NOx Rebuild Program

64. VTG shall implement, in accordance with this Section, a program to reduce NOx emissions from VTC's Low NOx Rebuild Engines (as defined below) through certain software and/or minor hardware changes made to the engines through the use of a Low NOx Rebuild Kit. The term "Low NOx Rebuild Engines" means: VTC's Model Year 1994 and later MHDDE and RHODE Pre-Settlement Engines if VTC elects Option A below; or Model Year 1993 and later MHDDE and HHDDE Pre-Settlement Engines if VTC elects Option B below, but shall exclude, in either case, VTC's low-volume ratings representing not more than 10% in the aggregate of the total volume of MHDDE and HHDDE Pre-Settlement Engines manufactured during the applicable Model Years to avoid requiring unique calibrations or other modifications for such ratings where it would be unduly burdensome in relationship to the number of engines involved and the expected emission reductions.

65. Within 90 days of the Date of Filing, VTC shall submit to the United States and CARB, for review and approval by each, a single plan for the implementation of its Low NOx Engine Rebuild Program. Each Low NOx Rebuild Kit designed and developed by VTC shall meet the emission limits under either Option A or Option B:

Option A:

for *MHDDEs only*:

(a) EURO III Composite Value Limits for NOx of 6.0 g/bhp-hr for Model Years 1994-1998 engines, 1.0 times the applicable FTP standard for all other regulated pollutants when tested on the EURO III Test Protocol in accordance with Appendix C of this

Decree, and the associated Emissions .Surface Limits specified in that Appendix;

(b) an NTE Limit for NOx of 7.5 g/bhp-hr for Model Years 1994-1998 engines

for *HHDDEs only*:

(c) EURO III Composite Value Limits for NOx of 7.0 g/bhp-hr for Model Years 1994-1998 engines, 1.0 times the applicable FTP standard for all other regulated pollutants when tested on the EURO III Test Protocol in accordance with Appendix C of this Decree, and the associated Emissions Surface Limits specified in that Appendix; and

(d) an NTE Limit for NOx of 8.75 g/bhp-hr for Model Years 1994-1998 engines.

Option B:

for *MHDDEs only*:

(a) EURO III Composite Value Limits for NOx of 6.5 g/bhp-hr for Model Years 1993-1998 engines, 1.0 time the applicable FTP standard for all other regulated pollutants when tested on the EURO III Test Protocol in accordance with Appendix C of this Decree, and the associated Emissions Surface Limits specified in that Appendix;

(b) an NTE Limit for NOx of 8.1 g/bhp-hr for Model Year 1993-1998 engines.

for *HHDDEs only*:

(c) EURO III Composite Value Limits for NOx of 7.5 g/bhp-hr for Model Year 1993-1998 engines, 1.0 times the applicable FTP standard for all other regulated pollutants when tested on the EURO III Test Protocol in accordance with Appendix C of this

Decree, and the associated Emissions Surface Limits specified in that Appendix; and

(d) an NTE Limit for NOx of 9.38 g/bhp-hr for Model Year 1993-1998 engines.

66. If, prior to or-after submission of a plan pursuant-to Paragraph 65, VTC determines that it cannot meet the applicable limits specified in Paragraph 65 for any HDDE individual engine rating (referred to in this Paragraph as a "subject rating") with software and/or minor hardware changes, it shall submit to the United States and CARB for review and approval by each, a single alternative or revised Low NOx Rebuild Plan in-accordance with this Paragraph. The alternative or revised plan shall state the NOx emissions that it proposes to achieve for each subject rating and shall describe how VTC will offset a NOx emission limit higher than the limits in Paragraph 65 within the same class of engines subject to the Low NOx Rebuild Program. VTC may elect to use a production-weighted average approach within the applicable HDDE class (*i.e.*, HHDDE or MHDDE) to demonstrate compliance with the applicable limit specified in Paragraph 65. The NOx production-weighted average shall be calculated by multiplying the NOx emission level that will be achieved for each rating through the use of the appropriate Low NOx Rebuild Kit by the production volume for the rating, summing those terms, and 'dividing by the total production Low NOx Rebuild Engines. VTC's alternative or revised plan submitted pursuant to this Paragraph shall demonstrate that VTC's Low NOx Rebuild Kits would, on a production-weighted NOx average basis, achieve the applicable limits specified in Paragraph 65. As an alternative, if VTC contends that any individual rating cannot meet the applicable

limits, it may elect to increase the quantity of engines included in the Low NOx Rebuild Program by including portions of earlier Model Year engine families, such that the product of the quantity of additional engines and associated NOx reduction shall be equivalent to the product of the quantity of engines for the subject rating from the original Low NOx Rebuild Plan and the NOx exceedance for that rating.

67. In addition to software and minor hardware needed to meet the requirements specified in Paragraph 65, all Low NOx Rebuild Kits shall include a label meeting the requirements of Paragraph 77.

68. VTC shall make available Low NOx Rebuild Kits for distribution and sale for Low NOx Rebuild Engines according to the following schedule:

i. Beginning 180 days after entry of this Consent Decree, or 90 days following EPA's approval of the Low NOx Rebuild Plan required in Paragraph 65, whichever is later, VTC shall begin supplying Low NOx Rebuild Kits.

ii. Within 90 days following the applicable date in Paragraph 68(i), VTC shall make available Low NOx Rebuild Kits in quantities necessary to meet expected demand for engine families representing at least fifty percent of the engines for which Low NOx Rebuild Kits must be produced under the Low NOx Rebuild Plan.

iii. Within 360 days following the applicable date in Paragraph 68(i), VTC shall make available Low NOX Rebuild Kits in quantities necessary to meet expected demand for all engine families for which Low NOx Rebuild Kits must be produced under the Low NOx Rebuild Plan.

69. Beginning on the date a Low NOx Rebuild Kit is available for any engine family under Paragraph 68, VTC shall sell and use, and authorize the sale and use of, only Low NOx Rebuild Kits for any Low NOx Rebuild Engine in that family in the case of any Engine Rebuild for:

(a) any HHDDE that has accumulated mileage greater than 290,000 miles, or any MHDDE that has accumulated mileage greater than 185,000 miles; or

(b) any HHDDE or MHDDE that has accumulated less than the applicable mileage specified in Paragraph 69(a), where the service event includes replacement or reconditioning of more than one Major Cylinder Component in all of the engine's cylinders.

70. A Low NOx Rebuild Kit may not increase any regulated emission beyond applicable limits when tested on the FTP.

71. VTC shall install, and shall authorize its authorized dealers, distributors, repair facilities, and rebuild facilities to install only Low NOx Rebuild Kits as required under Paragraph 64 at no added cost to the owner above the amount the owner would otherwise pay to have the engine rebuilt or repaired. In addition, subject to the provisions of Paragraph 72, VTC shall make available, either directly or through its affiliated distribution networks, at no added cost, the appropriate Low NOx Rebuild Kit to any non-affiliated engine rebuilder or person who requests it. For the purposes of this Section, "at no added cost" shall mean:

(a) if a Low NOx Rebuild Kit contains parts normally replaced at engine rebuild, VTC shall not

charge more than the then-current price for the original part; and

(b) if a Low NOx Rebuild-Kit requires a part not normally replaced during rebuild, then such part shall be included without charge. VTC shall make arrangements to reimburse its authorized dealers, distributors, repair facilities, and rebuild facilities, so that the ultimate purchaser of a Low-NOx Rebuild Kit will not be charged for any required reprogramming through its authorized dealers, distributors, repair facilities, and rebuild facilities, including any computer connection fees.

72. Notwithstanding the provisions in Paragraph 71, VTC, its authorized dealers, distributors, repair facilities, and rebuild facilities may impose an additional fee for engine control software that includes both the low NOx reprogramming and other software enhancements for purposes unrelated to reducing NOx emissions, provided that:

(a) The customer is given the option of obtaining Low NOx Rebuild reprogramming alone at no cost; and

(b) The customer chooses the option that includes such other software enhancements.

73. Each Low NOx Rebuild Kit shall be clearly marked with an identifiable characteristic allowing the United, States to determine whether a Low NOx Rebuild Engine has been rebuilt with the-appropriate Low NOx Rebuild Kit. This identifiable characteristic may be a unique part number or other marking on the engine control module, or may be a readily accessible software identification parameter, including engine code marker or calibration marker.

74. VTC shall take all reasonable steps to inform its authorized dealers, distributors, repair facilities, and rebuild facilities about the requirements of this, program and the availability of Low NOx Rebuild Kits, including, but not limited to, sending written notification to these entities within 120 days after VTC's Low NOx Rebuild Plan is approved.

75. In addition to any requirement set forth above:

(a) VTC shall include as part of its Low NOx Rebuild Plan, submitted under Paragraph 65, the following:

(i) A description of each engine family to be covered by a Low NOx Rebuild Kit, including the Model Year, model, and such other information as may be required to identify the engines to be rebuilt with Low NOx Rebuild Kits, and any engine rating otherwise covered by the Low NOx Rebuild Program which VTC has elected to exclude under the ten percent exclusion for low-volume ratings.

(ii) A list of all VTC's authorized dealers, distributors, repair facilities, and rebuild facilities who will install the Low NOx Rebuild Kits, and a statement that these persons will be properly equipped and instructed to install such kits.

(iii) A description of the procedure to be followed by non-affiliated engine rebuild facilities or persons to obtain Low NOx Rebuild Kits.

(iv) A description of the system by which VTC ensure an adequate number of Low NOx Rebuild Kits will be available to be installed by affiliated and non-affiliated engine rebuild facilities, including the method to be used to ensure the supply of Low NOx

Rebuild Kits-remains both adequate and responsive to engine rebuild facilities' demand.

(v) An example of the written notification to be sent to all of VTC's authorized dealers, distributors, repair facilities, or rebuild facilities.

(b) VTC shall submit to EPA, 30 days prior to the date any Low NOx Rebuild Kit will be made available, the following additional information:

(i) A statement of the NOx limits each Low NOx Rebuild Kit achieves, and a certification that these limits meet the limits applicable under Paragraph 65, or, if (company) asserts such limits cannot be achieved, the submissions required under Paragraph 66.

(ii) A copy of all necessary instructions to be sent to those persons who are to install Low NOx Rebuild Kit, This shall include designation of the date on or after which the Low NOx Rebuild Kits will be available from VTC and the time reasonably necessary to perform the labor required to install the kits.

(iii) A description of the impact of the proposed changes on fuel consumption, driveability, and safety for each Class or category of Low NOx Rebuild Engines and a brief summary of the data, technical studies, or engineering evaluations which support these conclusions.

76. The written notification to be sent to all VTC's authorized dealers, distributors, repair facilities, and rebuild facilities shall contain the following:

(a) A copy of EPA's letter to rebuild facilities regarding the use of Low NOx Rebuild Kits.

(b) A clear description of actions that will be taken in the rebuild and an identification of the components that are affected by the Low NOx Rebuild.

(c) A description of the procedures which non-affiliated engine rebuilders should follow to obtain appropriate Low NOx Rebuild Kits and the time reasonably necessary to perform the labor required to install the appropriate Low NOx Rebuild. Kit.

77. The Plan for VTC's Low NOx Rebuild Program submitted to the United States shall provide that any of VTC's authorized dealers, distributors, repair facilities, or rebuilders who install a Low NOx Rebuild Kit shall be instructed to complete and affix a label to the engine. The label shall contain a statement with appropriate blank spaces for the rebuilder to indicate when and by whom the Low NOx Rebuild Kit was installed on the engine. The label shall be placed in such location as approved by EPA consistent with State law and shall be fabricated of a material suitable for the location in which it is installed and not readily removable intact. VTC shall also provide such label to any non-affiliated engine rebuilder who installs one of its Low NOx Rebuild Kits and instructions on how to complete the label and where to affix the label.

78. The United States shall provide VTC with notice of approval or disapproval of its Low NOx Rebuild Plan within 30 days of its submittal to the United States. If the plan is disapproved, the United States shall provide the reasons for disapproval, and VTC shall have 30 days to submit a revised Low NOx Rebuild Plan for approval. Any dispute between the Parties regarding the Low NOx Rebuild Plan shall be resolved in accordance with the dispute resolution provisions of Section XVI of this Decree (including circumstances where modifications requested by the

United States conflict with modifications requested by CARB). VTC shall implement the Plan as approved.

79. VTC shall send to the United States a copy of all written communications directed to 5 or more persons which relate to the Low NOx Rebuild Plan directed by VTC to engine rebuilders and other persons who are to install Low NOx Rebuild Kits under the Low NOx Rebuild Plan. Such copies shall be mailed to the United. States contemporaneously with their first transmission to engine rebuilders and other persons who are to install Low NOx Rebuild Kits under the Low NOx Rebuild Plan.

80. VTC shall provide for the establishment and maintenance of records to enable the Parties to monitor the implementation of the Low NOx Rebuild Program. The records shall include the following:

(a) the number of engines that will be subject to Low NOx Rebuild; and

(b) a cumulative total of the number of Low NOx Rebuild Kits sold, by part number.

81. VTC shall maintain in a form suitable for inspection, such as computer information storage devices or card files, lists of the names and addresses of engine rebuilders who were provided Low NOx Rebuild Kits and the number of kits provided. The records described in this Paragraph shall be made available to the United States upon request.

82. The records required by this Section shall be retained in accordance with the provisions of Paragraph 142 (Record Retention) of this Consent Decree. VTC's obligations under Section IX.B shall terminate ten (10) years from the date of introduction of the first Low NOx Rebuild Kit pursuant to

Paragraph 68(i). VTC accepts as a condition of such termination that, after termination, VTC will only make available for Engine Rebuilds on Low NOx Rebuild Engines the software and/or minor hardware that corresponds to the Low NOx Rebuild Kit described in Paragraphs 64 through 67 and that complies with Paragraphs 70 and 73.

C. Additional Injunctive Relief/Offset Projects

83 As further injunctive relief, VTC shall implement or perform, in accordance with the provisions of this Section, projects to reduce the amount of: NOx emitted into the environment nationwide-from mobile and stationary sources. Subject to the provisions of Paragraph 84, VTC shall be obligated to spend $9,000,000, for performance of these projects.

84. VTC may satisfy up to 3,000,000 of its obligation under Paragraph 83 through projects (referred to below as "Incentive Projects") to achieve verifiable reductions in NOx emissions from HDDEs manufactured by VTC, beyond those required by law or by other provisions of this Consent Decree, up to 66,000 tons of NOx. For example, VTC may satisfy a portion of its offset obligation under Paragraph 83 by reducing emissions from Pre-Settlement Engines, other than Low NOx Rebuild Engines, with the vehicle owners' consent, at the time the engines are brought in for service. Any emission reductions used in the Incentive-Projects shall not be used to satisfy any other Consent Decree obligations or in the A,B&T program. The dollar reduction in VTC's obligation under Paragraph 83 shall, be as follows: Reduction by $1,500,000 for 33,000 tons of excess NOx emissions; with two subsequent reductions of $750,000 for additional reductions of 16,500 tons of excess NOx

emissions; up to a maximum of $3,000,000 for reductions of 66,000 tons of NOx.

85. VTC's obligation under Paragraph 83 net of any reduction it elects to pursue through Incentive Projects under Paragraph 84 (the "Net Project Funds") shall be satisfied as follows:

(a) 20% of the Net Project Funds shall be spent on the projects agreed to in, or selected pursuant to, the California Settlement Agreement with respect to VTC's California Pre-Settlement and Interim Engines. VTC's satisfaction of its obligations under the California-Settlement Agreement with respect to this 20% of the Net Project Funds shall fully satisfy its obligation to the United States under this Consent Decree with respect to such amount.

(b) 25% of the Net Project Funds shall be spent on Projects. to be proposed by VTC consistent with the criteria set forth in Paragraph 89, after giving due consideration to projects submitted by third parties during the public comment period under Paragraph 149 of this Consent Decree (the "Company Proposed Projects").

(c) 55% of the Net Project Funds shall be spent on the projects set forth in Appendix E to this Consent Decree (the "Appendix E Projects").

86. Within 120 days of entry of this Decree, VTC, if it chooses to perform Incentive Projects, shall submit to the United States and CARB, for review and approval by each, a single plan for performance or implementation of its Incentive Projects. Within 120 days of entry of this Decree, VTC shall submit to the United States a plan for performance or implementation of its Company Proposed Projects and its Appendix E Project (collectively, the plans required

to be submitted pursuant to this Paragraph are referred to as "the Plans"). The Plans shall include a general description of each project VTC proposes to perform or implement, including the timetable for implementation of each project and an estimate of the emission reductions that each project will achieve. VTC shall include in the Plans the amount of money to be spent on the Company Proposed Projects and Appendix E Project. Each date for commencement of a project shall be the earliest practicable, given the nature of the project, after the United States' approval of the Scope of Work in accordance with Paragraph 92.

87. The Incentive Projects shall be completed no later than six years after entry of this Consent Decree. All Company Proposed Projects and Appendix E Project shall be completed no later than eight years after entry of the Consent Decree.

88. VTC's monitoring, administrative, or overhead costs associated with the implementation of any Company Proposed Projects or Appendix E Project shall not be included in the amounts spent on the projects, except to the extent such costs would be deemed reasonable, allocable, and allowable under 48 C.F.R. Part 31, Subpart 31.2.

89. Any Company Proposed Projects shall be consistent with the following priorities and shall meet the following criteria:

Priorities:

(a) projects providing the greatest amount of NOx emission reductions that are readily quantifiable, verifiable, and cost effective;

(b) projects providing such emission reductions in the near-term;

(c) projects that will leverage the use of funds from other sources;

(d) projects that will reduce NOx in those areas most severely affected by ozone and acid deposition; and

(e) projects that will focus on heavy-duty engines, unless other NOx reduction opportunities are shown to be more cost-effective and efficient.

(f) projects providing the greatest amount of PM reductions that are readily quantifiable, verifiable, and cost effective;

Criteria:

(a) the project may not be for emission reduction obligations already placed on VTC under-any federal, state or local law or which have been proposed for adoption as a mandatory federal, state, or local program;

(b) the project may not duplicate programs already funded by the United States or that the United States is required by statute to perform;

(c) if it is a research and development project, the. project shall demonstrate technologies having the goal of reducing HDDE NOx plus NMHC emissions below 1.5 g/bhp-hr and/or PM emissions below .05 g/bhp-hr and having the greatest likelihood of resulting in maximum long-term NOx or PM reductions. The results of such research programs shall be reported annually and shall not be considered confidential business information;

(d) the project should have broad impact or should address areas significantly affected by ozone and acid deposition; and

(e) the project must be one VTC would not otherwise be legally required to perform outside of this

Consent Decree or one previously planned by VTC. For this purpose, a project shall be deemed to have been previously planned by VTC if the project is reflected in a written plan approved by management on or before February 1, 1998.

90. The United States shall, within 30 days, review and either disapprove or approve the Plans. If the United States disapproves any of the Plans, in whole or in part, it shall provide VTC with proposed modifications, and VTC shall have 30 days to submit a revised version of the disapproved Plan(s) to the United States incorporating the United States' proposed modifications; but, if VTC disputes the proposed modifications, the dispute shall be governed by the dispute resolution provisions of Section XVI. With respect to the Incentive Project Plan(s), if the modifications requested by the United States conflict with modifications requested by CARB, the dispute shall be governed by the dispute resolution provisions of Section XVI. In reviewing VTC's Company Proposed Projects Plan, the United States may consider, in addition to the priorities and criteria set forth above, whether the proposed projects, when viewed together with the proposals of the other Settling HDDE Manufacturers, will achieve-maximum environmental benefit in terms of NOx and PM reductions nationwide, and are cost-effective in terms of expected NOx and PM reductions.

91. Within 90 days of the United States' approval of each of the Plans, or resolution of any dispute by the Court, VTC shall submit a Scope of Work for each project in each approved Plan, including the manner in which it will be implemented, the timetable for implementation, the expected reductions in the emission of air pollutants, the location in which each

project will be performed or in which the NOx reductions are likely to occur, and any issue that must be resolved for the project to be successful. With respect to any Incentive Project, VTC shall Submit to the. United States and CARB, for review and approval by each, a single Scope of Work.

92. The United States shall review and approve or disapprove each proposed Scope of Work submitted under Paragraph 91 within 30 days of receiving it. If a Scope of Work is disapproved, the United States shall provide VTC with an explanation as to why it is being disapproved along with proposed modifications. VTC shall incorporate the proposed modifications within 30 days of receiving the proposed modifications; but, if VTC disputes the proposed modifications, the dispute shall be governed by the dispute resolution provisions of Section XVI. With respect to the Scope of Work for each Incentive Project, if the modifications requested by the United States conflict with modifications requested by CARB, the dispute shall be governed by the dispute resolution provisions of Section XVI.

93. Following the United States' approval of each Scope of Work, VTC shall commence implementation of the project covered by that Scope of Work by the date set out in the Scope of Work and shall comply with the implementation schedule set forth in the Scope of Work. VTC shall be granted an extension of the final completion date for any project for good cause shown.

94. Each Scope of Work shall provide a certification that, as of the date the certification is submitted, VTC is not required by any federal, state, or local law to perform or develop any of the projects it proposes to implement or perform, nor is VTC required to perform or develop the projects by any agreement, other than

this Consent Decree, by grant, or as injunctive relief in any other case. Except as set forth in Paragraph 85, VTC shall further certify that it has not received, and is not presently negotiating to receive, and will not seek, credit for the projects in any other environmental enforcement proceeding.

95. The United States' approval of a Plan or a Scope of Work under this Section shall not be construed as a permit, modification to a permit, or determination concerning compliance with any local, state or federal law.

96. VTC shall submit to the United States a completion report for each project no later than 30 days after the completion date. The report shall contain the following information:

(a) with respect to each approved project: (i) a detailed description of the project as implemented, including a summary for public disclosure; and (ii) certification that the project has been implemented or performed in accordance with the requirements of this Consent Decree and the applicable Scope of Work;

(b) with respect to each approved project of the Company Proposed Projects or Appendix E Project: (i) a detailed analysis of full costs; and (ii) a description of the environmental or public health benefits resulting from implementation of the project (including, where applicable, an estimation of the emission reduction benefits); and

(c) with respect to each approved project included in the Incentive Projects, a certification that the emission reduction amounts required under Paragraph 84 to receive the corresponding dollar reductions in its obligation under Paragraph 84 have been achieved.

97. VTC shall submit a report as required by Paragraph 105 for any quarter in which project implementation activities have occurred, or project expenditures are made, or in which problems related to a project are encountered. Such report shall include a summary of such activities, expenditures with respect to projects, or problems and their solutions.

98. In itemizing its costs in the completion reports for Company Proposed Projects and Appendix E Project, VTC shall clearly identify and provide adequate documentation to substantiate all project costs.

99. Within 30 days following the date for completion of its Incentive Projects, VTC shall certify to the United States that it has fully implemented its Incentive Projects and has achieved all the emission reductions required for the dollar reduction set forth in Paragraph 84. If VTC cannot make the required certification, then any dollar reductions that VTC has not qualified to receive shall become available for the implementation of Supplemental Offset Projects. Twenty percent of the available funds shall be spent on projects agreed to in, or selected pursuant to, the California Settlement Agreement, and eighty percent shall be spent on projects approved by the United States in accordance with this Section. Within 120 days following the deadline for completing the Incentive Projects, VTC shall submit a Supplemental Offset Project Plan proposing projects consistent with the priorities and criteria set forth in this Section. The Supplemental Offset project Plan shall be subject to the United States' review and approval or disapproval in the same manner as set forth in Paragraph 90 above, and VTC shall submit Scopes of Work and implement any approved Scope of Work in the same

manner as set forth in Paragraphs 92 and 93 above, except that all Supplemental Offset Projects shall be completed within 3 years from the date of EPA's approval of the applicable Scope of Work.

100. During the term of this Consent Decree, in any prepared public statements, oral or written, made by the VTC about the projects under this Section, VTC shall include the following language: "This project was undertaken pursuant to an agreement with the United States in connection with settlement of disputed claims in an enforcement action under the Clean Air Act."

101. Except as provided herein, VTC shall not use or rely on the emission reductions generated as part of any projects undertaken pursuant to the approved Scope of Work in any Federal or State emission averaging, banking, trading or other emission compliance program. If VTC proposes to implement a project to research and develop new technology or new fuels, the project must include a field demonstration of the technology, if practicable. No emission reductions generated by the engines required by the project may be used or relied on for purposes of Federal or State emission averaging, banking, trading, or other emission compliance programs. However, if VTC thereafter employs that technology in engines other than those specifically required by the project, nothing herein shall prohibit the use of the credits generated from the additional vehicles in Federal or State emission averaging, banking, trading, or other emission compliance programs.

X. ADDITIONAL DATA ACCESS, MONITORING, AND REPORTING REQUIREMENTS

A. Access to Engine Control Module Data

102. Within 90 days after the Date of Entry of this Consent Decree, VTC shall provide EPA with current decoder tools, passwords, and any other device or information required to obtain access to data from VTC's HDDEs necessary to determine reported output torque from an engine. Thereafter, VTC shall provide EPA with any modified tool or device and any changed information promptly after any modification or change is made, so as to ensure EPA's continuing capability to access such data. At the time that VTC provides to EPA any device or information required by this Paragraph, VTC may designate all or a portion of the information provided to EPA, or obtainable by EPA through the use of the device or information provided directly, as Confidential Business Information in accordance with 40 C.F.R. Part 2.

103. Beginning with Model Year 2000 engines, VTC shall configure the engine control modules installed on HDDEs manufactured by VTC to calculate and report engine output torque (in ft-lb), engine speed (in RPM), and commanded fuel injection timing (in degrees before top dead center ("DBTDC")) at a minimum update rate of 5 Hz. Subject to the phase-in provisions of this Paragraph, VTC shall demonstrate to the highest degree of precision and accuracy achievable consistent with good engineering practices at the time of certification that: (a) the reported output torque is equal to actual output torque; (b) the reported output RPM is equal to actual engine RPM; and (c) the Commanded injection timing is equal to actual commanded injection timing in DBTDC: The

obligation to make a demonstration with respect to reported output torque imposed by this Paragraph shall be phased in as follows: Beginning with Model Year 2000, at least 25% of the total volume of HDDEs manufactured by VTC shall be configured to provide reported output torque to the degree of precision and accuracy established pursuant to this Paragraph; And beginning in Model Year 2001, all HDDEs manufactured by VTC shall be so configured. All of the required data outputs specified above shall be made compatible with industry standard data links.

B. Compliance-Representative

104. Within 15 days of entry of this Consent Decree, VTC shall designate a duly authorized representative whose responsibility shall be to oversee VTC's program for implementation of the measures specified in Section VI (Requirements for On-road HDDEs), Section VIII.B (In-use Testing Requirements), Section IX (Additional Injunctive Relief), and to file such reports and certifications as are required under this Consent Decree. This person may not be the same individual as VTC's Compliance Auditor. The designated representative shall also attend the progress meetings among the Parties as provided for in Paragraph 106, and shall be responsible for providing all additional information and documentation requested by the United States in accordance with Paragraph 105 of this Consent Decree.

C. Progress Reporting

105. In addition to any other requirement of this Consent Decree, VTC shall submit to EPA written quarterly progress reports that: (a) describe the actions which have been taken toward achieving compliance with this Consent Decree during the

previous quarter; (b) include a summary of all research and development activity, investigatory activity and procurement activity engaged in during the quarter which relates to the development, procurement, or implementation of technology to assist in meeting any of the compliance obligations of this Decree; (c) include the information required by Paragraphs 44, 55, 59 and 97; (d) describe all actions, including, but not limited to, actions related to compliance with the EURO III, NTE, TNTE, Smoke (or alternate Opacity), and NOx plus NMHC limits of this Decree, and actions related to implementation of the Section IX.C requirements, and the In-Use Testing Program; (e) include the current running total of Low NOx Rebuild Kits provided to engine rebuilders; and (f) include a summary of all tests conducted in order to comply with the requirements of this Consent Decree, with documentation for such tests being made available by VTC to the United States upon request. VTC may designate all or a portion of a report as Confidential Business Information in accordance with 40 C.F.R. Part 2.

106. VTC shall submit an initial progress report to EPA within 45 days of the close of the quarter during which this Consent Decree is entered and within 30 days of the close of each quarter thereafter; through and including the quarter in which this Consent Decree is terminated pursuant to Section XXVI of this Consent Decree, containing the information required by Paragraph 105. If requested by the United States, VTC shall provide briefings for the United States to discuss the progress of implementation of this Consent Decree.

107. Each notice, submission, or report required by this Consent Decree, except for any report required to

be submitted by the Compliance Auditor, shall contain the following statement signed by a responsible corporate official: "To the best of my knowledge, after thorough investigation, I certify that the information contained in or accompanying this submission is true, accurate and complete. I am aware that there are significant penalties for knowingly submitting false information, including the possibility of fines and imprisonment for knowing violations." Each notice, submission or report shall be accompanied by a transmittal letter referencing the appropriate Paragraph of this Consent Decree. VTC shall not object to the admissibility in evidence of any such notice, submission, or reports, except on the grounds of relevancy, in any proceeding to enforce this Consent Decree.

108. Compliance with the reporting requirements of this Consent Decree shall not relieve VTC of its obligation to comply with any other reporting requirements imposed by any applicable federal, state, or local laws, regulation, or permit.

XI. NON-CIRCUMVENTION PROVISIONS

109. VTC shall not, directly or indirectly through its dealers, distributors, or other third parties (including any present or future manufacturer of HDDEs or Nonroad CI Engines), circumvent the requirements of this Consent Decree through leasing, licensing, sales, or other arrangements, or through stockpiling (*i.e.*, build up of an inventory of engines outside normal business practices before a new limit under this Consent Decree takes effect).

110. All HDDEs and Nonroad CI Engines manufactured at any facility owned or operated by VTC on or after January 1, 1998, for which a

Certificate of Conformity is sought, must meet all applicable requirements of this Decree, regardless of whether VTC still owned, owns, operated, or operates that facility at the time the engine is manufactured.

XII. NOTICE AND SUBMITTALS

111. Whenever, under the terms of this Consent Decree, a notice, submission, report, or other document is required to be sent by one Party to another, it shall be directed to the individuals at the addresses specified below, unless those individuals or their successors give notice of a change to the other Party in writing. All notices and submissions shall be considered effective upon receipt, unless otherwise provided. Such notice shall be sent to the Parties as follows:

As to the United States:
Chief
Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611, Ben Franklin Station
Washington, D.C. 20044

and

Director, Air Enforcement Division (2242A)
U.S. Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460

As to VTC:
Lars Gustavsson
Manager, Engine Development
Volvo Truck Corporation
Dept. 24640 BC2
SE-405 08 Gothenburg, Sweden

and

Michael E. Yaggy
Julie R. Domike
Piper & Marbury L.L.P.
4200 Nineteenth Street, NW
Washington, D.C. 20036

112. Any Party may change the address for providing notices to it by serving all other addressees identified above with a notice setting forth such new address.

XIII. CIVIL PENALTY

113. VTC has agreed to pay an aggregate civil penalty of $5,000,000 under this Consent Decree and the California Settlement Agreement to resolve the federal and state claims described in those agreements. Accordingly, under this Consent Decree, within 15 days of entry of this Consent Decree, VTC shall pay $3,750,000 to the United States in the manner described in Paragraph 114. Late payment of the civil penalty to the United States is subject to interest and fees as specified in 31 U.S.C. § 3717.

114. 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 VTC upon entry of this Consent Decree and shall reference Department of Justice Case No. 90-5-2-1-2256 and the Civil action number of this matter. VTC shall transmit notice of such payments to the United States.

115. Penalty payments made pursuant to Paragraph 113 of this Consent Decree are civil penalties within the meaning of Section 162(f) of the Internal Revenue

Code, 26 U.S.C. § 162(f) and are not tax deductible for the purposes of Federal Law.

XXV: STIPULATED PENALTIES AND OTHER PAYMENTS

116. VTC shall pay stipulated penalties and other payments to the United States as follows:

(a) If VTC seeks certificates of conformity for any affected HDDEs, but cannot certify compliance with any applicable EURO III, NTE, TNTE, Smoke (or alternate Opacity), or NOx plus NMHC Limits, or the Nonroad CI Engine standard pull-ahead requirements, VTC shall make payments to the United States as follows:

(i) For failure to certify to the applicable EURO III Limits for CO or HC, per engine non-conformance penalties ("NCPs") shall be $200;

(ii) For failure to certify to the applicable Smoke or alternate Opacity Limits, per engine NCPs shall be $200;

(iii) For failure to certify to the applicable EURO III, NTE, or TNTE Limits for NOx, NOx plus NMHC, or PM, the NOx plus NMHC Limits, or the Nonroad CI Engine standard pull-ahead requirements, NCPs shall be calculated using the NCP procedures, equations, and values specified in 40 CFR Part 86, Subpart L as if they were failures of the regulatory FTP limit for HDDEs, with the following exceptions:

(A) For HDDEs manufactured prior to October 1, 2002, the applicable EURO III and NTE "upper limit" (the UL value in the equations found at 40 CFR 86.1113-87) for NOx shall be 1.0 g/bhp-hr plus the applicable EURO III or NTE Limit. For HDDEs

manufactured on or after October 1, 2002, the applicable EURO III, NTE, and TNTE upper limit for NOx plus NMHC shall be the upper limit for NOx plus NMHC for Model Year 2004 engines set out in the regulations minus 2.5 g/bhp-hr plus the EURO III, NTE or TNTE Limit--i.e.,

$$(UL_{Nox} + {}_{NMHC} - 2.5 \text{ g/bhp-hr}) + S;$$

however, if no upper limit is set by regulation for NOx plus NMHC for Model Year 2004 engines, then the applicable EURO III, NTE, and TNTE upper limit for NOx plus NMHC shall be 1.5 g/bhp-hr plus the EURO III, NTE or TNTE Limit. For HDDEs, except Urban Bus Engines, the applicable EURO III, NTE, and TNTE upper limit for PM shall be 0.15 g/bhp-hr plus the applicable EURO III, NTE, or TNTE Limit. For Urban Bus Engines, the applicable EURO III, NTE, and TNTE upper limit for PM shall be 0.02 g/bhp-hr plus the applicable EURO III, NTE, or TNTE Limit. For Nonroad CI Engines at or above 750 horsepower, the applicable upper limit for NOx plus NMHC shall be 6.9 g/bhp-hr;

(B) For HDDEs manufactured prior to October 1, 2002, the COC_{50}, COC_{90}, MC_{50}, and F values and the factor used to calculate the engineering and development component of the NCP for NOx shall be those found at 40 CFR 86.1105-87(h). For HDDEs, except Urban Bus engines, the. COC_{50}, COC_{90}, MC_{50}, and F values and the factor used to calculate the engineering and development component of the NCP for PM shall be those found at 40 CFR 86.1105-87(f)(2). For Urban Bus engines, the COC_{50}, COC_{90}. MC_{50}, and F values and the factor used to calculate the engineering and development component of the NCP for PM shall be those found at 40 CFR 86.1105-87(g)(3).

(C) The "S" value used in the equations found at 40 CFR 86.1113-87 shall be the applicable emission limit that is exceeded under this Decree;

(D) For purposes of calculating the annual adjustment factor (the "AAF" values used in the equations found at 40 CFR 86.1113-87), the first model for which an NCP shall be considered available shall be the first Model Year that an emission limit is applicable or becomes more stringent;

(E) For HDDEs manufactured on or after October 1, 2002, subject to the exceptions specified in Paragraph 116(a), NCPs for failure to certify to the EURO III, NTE, TIME, or NOx plus NMHC emission limits shall be calculated in accordance with the NCP procedures, equations and values found in 40 CFR Part 86, Subpart L applicable to Model Year 2004 HDDEs. If no COC_{50} COC_{50}, MC_{50}, and F values or factors used to calculate the engineering and development component of the NCR for Model Year 2004 HDDEs are established by regulation, then the values and factors shall be those applicable to the 1998 Model Year multiplied by 1.5. Payment of NCPs pursuant to Subparagraph 116(a)(iii)(E) will satisfy any NCPs that are otherwise owed to the United States as a result of a failure to certify to the regulatory FTP limit for NOx plus NMHC;

(F) For failure to certify to the Nonroad CI Engine standard pull-ahead requirements, subject to the exceptions specified in Paragraph 116(a), NCPs shall be calculated in accordance with the NCP procedures, equations and values found in 40 CFR Part 86, Subpart L applicable to Model Year 2004 HHDDEs. If no COC_{50}, COC_{90}, MC_{50}, and F values or factors used to calculate the engineering and development component of the NCP for Model Year

2004 HHODEs are established by regulation, then the values and factors shall be those applicable to 1998 Model Year HHDDEs multiplied by 1.3.

(G) If the "compliance level" for an engine family exceeds the applicable upper limit, then NCPs will be determined by calculating the applicable NCP as if the compliance level were equal to the upper limit and then multiplying the resulting NCP amount by the following:

$$\frac{1 + [.25 \times (CL - UL)]}{[(UL - EL)]}$$

where:

CL = The actual compliance level

UL = The upper limit

EL = The applicable emission limit under this Decree;

(H) A separate NCP shall be paid for each pollutant where there is a failure to certify to any emission limit imposed by this Consent Decree. For example, if a particular engine configuration exceeds the applicable NTE Limit for both NOx and PM, then VTC shall be liable for separate NCPs based on the amounts determined under this Subparagraph for both the NOx and PM exceedances of the NTE Limit. However, if an engine configuration exceeds more than one emission limit under this Decree for the same pollutant (e.g., an engine configuration fails to meet the applicable NOx limit for both the EURO III Composite Value Limit and the NTE Limit), VTC shall be liable for only one NCP. To determine the per engine NCP where an engine configuration exceeds multiple emission limits for the same pollutant, VTC shall calculate the applicable per engine NCP in

accordance with this Subparagraph for each limit exceeded, and the per engine NCP shall be the one resulting in the largest payment;

(I) Any dispute arising under or relating to this consent Decree regarding whether a compliance level has been appropriately calculated shall be subject to the administrative hearing procedures found at 40 CFR 86.1115-87. However, any appeal of a final decision by the Environmental Appeals Board shall not be subject to the provisions of Section 307 of the Act, 42 U.S.C. § 7607, but instead shall be resolved through the dispute resolution procedures in Section XVI of this Consent Decree. For any hearing under Subparagraph 116(a)(iii)(I), EPA shall appoint a hearing officer who shall preside at any hearing at which, under existing regulations, an administrative law judge would otherwise preside; and,

(J) Payment of NCPs under this Subparagraph shall be made in accordance with the procedures found at 40 CFR 86.1113-87(g), except that the quarterly payments shall be payable to the "Treasurer, United States of America," and sent to the Office of the United States Attorney for the District of Columbia, referencing the civil action number of this matter. A copy of the transmittal letter and check and the information required to be submitted quarterly to EPA pursuant to 40 CFR 86.1113-87(g)(3) shall be sent to the United States.

(b) In-use Compliance. This Subparagraph (b) applies only to HDDEs installed in vehicles and introduced into commerce. The stipulated penalties set forth in Subparagraph (b) apply only to engines manufactured on or after January 1, 2000, and only to NOx or NOx plus NMHC violations of the EURO III, NTE, TNTE, and NOx plus NMHC limits and

requirements set forth in this Consent Decree. Stipulated penalties may be assessed only once under Subparagraph (b)(1) and once under (b)(ii) for an affected population of engines, unless the subsequent emissions exceedance is the result of a separate, previously unidentified cause. In evaluating the scope of the affected population for purposes of this Section, there shall be a rebuttable presumption that the affected population is the engine family to which the tested engines belong. No engine may be used to establish the existence of an emissions exceedance if the engine or vehicle in which it was installed was subject to abuse or improper maintenance or operation, or if the engine was improperly installed, and such acts or omissions caused the exceedance.

(i) The stipulated penalties set forth in this Subparagraph apply when a population of engines, i n-use, exceeds an applicable emission limit by 0.5 g/bhp-hr or more. For purposes of this Subparagraph, the "emissions threshold" shall mean (A) for a test using vehicle test equipment (e.g., an over-the-road mobile monitoring device such as "ROVER", or a chassis dynamometer), the applicable maximum-NOx emission limit plus the greater of 0.5 g/bhp-hr or one standard deviation of the data set established pursuant to Subparagraph (b)(i)(A) below; or (B) for a test using an engine dynamometer, the applicable maximum NOx emission limit plus 0.5 g/bhp-hr.

(A) Where an engine dynamometer or vehicle test shows an apparent exceedance of the emissions threshold, the party conducting the original test shall repeat such test under the same conditions at least nine times. If the mean of the tests does not exceed the emissions threshold, VTC shall not be obligated to take further action under Subparagraphs (b)(1)(B),

(C), or (E) based on the results of the tests. If the mean of the tests exceeds the emissions threshold, then the party conducting the tests shall notify the other party to this Decree within 30 days of completing testing, and VTC shall, perform the engineering analysis and/or conduct further testing in accordance with Subparagraphs (b)(i)(B) and (C).

(B) If the testing conducted under Subparagraph (b)(1)(A) was performed using vehicle test equipment, then VTC may elect to conduct additional tests of that engine using an engine dynamometer, provided that all environmental and engine operating conditions present during vehicle testing under Subparagraph (b)(i)(A) can be reproduced or corrected consistent with Subparagraph (b)(i)(D). If VTC elects to conduct such additional engine dynamometer tests, it shall provide EPA with at least three business days notice prior to commencement of such testing. If based on such additional tests VTC demonstrates that the engine does not exceed the emissions threshold, VTC shall not be obligated to take further action under Subparagraphs (b)(i)(A), (B), (C), or (E). Otherwise, VTC shall conduct further testing in accordance with Subparagraph (b)(1)(C) and/or perform an engineering analysis to determine the percentage of the affected population that exceeds the emissions threshold and the emission levels of the exceeding engines. However, VTC may not determine the percentage of the affected population or the emission levels solely on the basis of an engineering analysis unless it demonstrates that such analysis alone is sufficient under the circumstances.

(C) Such testing shall be conducted as follows unless VTC otherwise resolves-the issue with EPA or EPA approves an alternate, procedure. Within 60 days

of receiving notice of an exceedance under Subparagraph (b)(1)(A) if EPA was the party that conducted the testing, or within 60 days of completing testing under Subparagraph (b)(1)(A) that demonstrated an exceedance if VTC conducted the testing, VTC shall commence testing of not less than ten additional in-service engines. VTC may conduct these tests using vehicle testing equipment, or using an engine dynamometer, at VTC's option. If on two prior occasions in any one calendar year, VTC was notified by EPA pursuant to Subparagraph (b)(i)(A) (or CARB pursuant to Paragraph 116 (b)(i)(A) of the California Settlement Agreement) of apparent exceedances and established that there were no exceedances of the emission threshold in the affected populations as a result of testing conducted under Subparagraph (b)(i)(C), then for the remainder of the calendar year VTC shall not be obligated to perform further testing under this Subparagraph, but nothing herein shall be construed to limit EPA's authority to conduct such testing.

(D) The testing of additional engines under Subparagraphs (b)(i)(B) and (C), above, shall be conducted under conditions that are no less stringent than the initial test in terms of those parameters that may affect the result, and, at VTC's option, may be limited to those emission limits and conditions for which apparent exceedances have been identified. Such parameters typically, but not necessarily, include relevant ambient conditions, operating conditions, service history, and age of the vehicle. Prior to conducting any testing, VTC shall submit a test plan to EPA for its review and approval. EPA shall approve the test plan or propose modifications to the test plan within 10 days of receipt. Within 30 days following EPA's proposed modifications, VTC shall

incorporate the proposed modifications; but if VTC disputes the proposed modifications, the dispute shall be resolved in accordance with the dispute resolution provisions of Section XVI of this Consent Decree. VTC shall implement the test plan as approved. Special conditioning of test engines shall not be permitted. Where VTC elects to conduct the additional testing utilizing an engine dynamometer, it shall reproduce relevant engine operating and environmental conditions associated with the initial exceedance; provided, however, that correction factors may be used to reproduce temperature, humidity or altitude conditions that cannot be simulated in the laboratory. Regardless of the testing equipment utilized, the test results shall be adjusted to reflect documented test systems error and/or variability in accordance with good engineering practices.

(E) VTC shall pay stipulated penalties under Subparagraph (b)(i) for each engine in the affected population estimated, based on an engineering analysis or testing conducted under Subparagraph (C) and using standard statistical procedures and good engineering judgment, to have an emission level equal to or in excess of the emission threshold, as follows:

HHDDE Engines	≥ Emission Threshold, but < Emission Threshold Limit + 1.5 g/bhp-hr	≥ Emission Threshold Limit + 1.5 g/bhp-hr
1 - 4,000	$250 per engine	$500 per engine
4,001-12,000	$250 per engine	$250 per engine
> 12,000	$100 per engine	$100 per engine

LHDDE/MHDDE Engines	≥ Emission Threshold, but < Emission Threshold Limit + 1.5 g/bhp-hr	≥ Emission Threshold Limit + 1.5 g/bhp-hr
1 - 4,000	$125 per engine	$250 per engine
4,001-12,000	$125 per engine	$125 per engine
> 12,000	$ 50 per engine	$ 50 per engine

(ii) The stipulated penalties set forth in this Subparagraph apply when the mean emissions of a population of engines, in-use, exceeds an applicable NOx or NOx plus NMHC emission limit by less than 0.5 g/bhp-hr. In such circumstances, the United States shall have the burden of proving, by a preponderance of the evidence in a de novo proceeding in this Court, that the mean emissions of the affected population exceeds the applicable emission limit. In determining the mean emission level of an affected population for purposes of Subparegraph (b)(ii), any engines for which a penalty is due or has been paid under Subparagraph (b)(1)(E) shall not be included in the calculation. If the Court determines that the mean emissions of the affected population exceeds the applicable emission limit, then VTC shall pay a stipulated penalty for each engine in the affected population as follows:

HHDDE Engines	$ per .1 g/bhp-hr exceedance
1 – 4,000	$50 per engine
4,001 – 12,000	$40 per engine
> 12,000	$30 per engine

LHDDE/MHDDE Engines	$ per .1 g/bhp-hr exceedance
1 – 4,000	$25 per engine
4,001 – 12,000	$20 per engine
> 12,000	$10 per engine

(iii) In any case where an emissions exceedance under Subparagraphs (b)(1) or (b)(ii) above is identified and VTC agrees with EPA to recall or otherwise take steps to modify the affected engines to correct the emissions exceedance, the stipulated

penalties otherwise due under this Subparagraph shall be adjusted and shall be payable as follows: the affected population for purposes of calculating the penalty amount due shall be reduced by the number of engines modified within one year of when the stipulated penalty would otherwise be due; and the penalty, plus interest at the rate specified in 31 U.S.C. 3717, shall be due and payable one year plus 30 days after the date when it would otherwise be due under this Section.

(c) AECD Reporting: for failure to comply with AECD reporting requirements of Paragraph 11, a stipulated penalty of $25,000 per certification application;

(d) Defeat Device: for violations of Paragraphs 13 and 18, a stipulated penalty of $500 per engine, provided however that if the device involved was disclosed by VTC as an AECD in accordance with Paragraph 11, no stipulated penalty will be assessed;

(e) Submissions and Testing: stipulated penalties for each separate failure: to submit a Low NOx Rebuild Program Plan within the time set forth in Paragraph 65; to complete any test required by the in-use testing requirements of Section VIII.B; to submit a quarterly report within the time required by Paragraph 106 of this Decree; or to comply with any requirement of Section XIX:

Days of Non-compliance or violation	Penalty per violation per day
1st to 30th day	$100
31st to 60th day	$250
After 60 days	$500

(f) Low NOx Rebuild: stipulated penalties for failure to comply with the schedules in the approved Low NOx Rebuild Plan within the time 'frames required by Paragraph 68:

Days of Non-compliance or violation	Penalty per violation per day
1st to 30th day	$500
After 30 days	$2,000

(g) Compliance Auditor: for failure to identify a Compliance. Auditor as required by Paragraph 31 of this Decree, a stipulated penalty of $1,000 per day;

(h) Plan and Scope of Work: stipulated penalties for failure to submit a Plan or a Scope of Work within the times set forth in Paragraphs 42, 49, 54, 58, 59, 86, 90, 91, 92 and 99 as follows for each day of delay:

Days of Non-compliance or violation	Penalty per violation per day
1st to 30th day	$250
31st to 60th day	$500
After 60 days	$750

(j) stipulated penalties for failure to complete any project of an approved Offset Scope of Work within the times required by Paragraph 93 and the Scope of Work, or agreed to by the Parties, for each day of delay for each project:

Days of Non-compliance or violation	Penalty per violation per day
1st to 30th day	$250
31st to 60th day	$750
After 60 days	$1,500

(k) For failure to comply with the requirements of Paragraph 141, a stipulated penalty of $5,000 per day per violation.

117. Upon entry of this Consent Decree, the stipulated penalty and other payment provisions of this Consent Decree shall be retroactively enforceable with regard to any and all violations of, or noncompliance with, the Consent Decree that have occurred after the date of filing but prior to the date of entry of the Consent Decree.

118. Stipulated penalties provided for in this Consent Decree shall automatically begin to accrue on the day performance is due or the non-compliance occurs, and shall continue to accrue through the day performance is completed or the non-compliance ceases. Nothing herein shall be construed to prevent the simultaneous accrual of separate stipulated penalties for separate violations of this Consent Decree. The amounts specified. in Subparagraph 116(a), (b), (d), (e), (f), and (g), shall be the maximum NCPs or stipulated penalties under those Subparagraphs for which VTC shall be liable, whether paid to the United States, CARB, or both. Payment of stipulated penalties as set forth above is in addition to, and the United States specifically reserves all other rights or remedies which may be available to the United States by reason of VTC's failure to comply with the requirements of this Consent Decree, or any federal, state or local law or regulation applicable to VTC's HDDEs. Payment of NCPs pursuant to Paragraph 116(a) shall constitute compliance with the provisions of this Consent Decree applicable to the limits for which the NCPs were paid.

119. Stipulated penalties from the date of accrual are due and payable upon demand by the United

States on or before the thirtieth day following the demand and shall be due and payable monthly thereafter. Late payment of stipulated penalties shall be subject to interest and fees as specified in 31 U.S.C. § 3717. All stipulated penalties shall be paid by cashiers or certified check or electronic funds transfer, payable to the "Treasurer, United States of America," and sent to the Office of the United States Attorney for the District of Columbia, referencing the civil action number of this matter. A copy of the transmittal letter and check shall be sent to the United States.

120. Stipulated penalties shall continue to accrue during any dispute resolution process. Should VTC dispute its obligation to pay part or all of a stipulated penalty, it shall place the disputed amount demanded by the United States in a commercial escrow account pending resolution of the matter and request that the matter be resolved through the dispute resolution procedures in Section XVI of this Consent Decree. In the event the Court resolves the dispute in VTC's favor, the escrowed amount plus accrued interest shall be returned to VTC.

121. If the United States prevails in an action to enforce this Consent Decree, VTC shall reimburse the United States for all its costs in such action, including attorney time. Claims for such costs, including attorney time, shall proceed in accordance with to Fed. R. Civ. P. 54(d).

122. Notwithstanding any other provision of this Section, the United States may in its unreviewable discretion, waive any portion of stipulated penalties that have accrued pursuant to this Consent Decree.

XV. FORCE MAJEURE

123. "Force Majeure," for purposes of this Consent Decree, shall mean any event arising wholly from causes beyond the control of VTC or any entity controlled by the VTC (including, without limitation, VTC's contractors and subcontractors, and any entity in active participation or concert with VTC with respect to the obligations to be undertaken by VTC pursuant to this Decree), which prevents timely compliance with the requirements of this Consent Decree. The requirements of the Consent Decree include obligation reasonably to anticipate any potential Force Majeure event and best efforts to address the effects of any potential Force Majeure event (1) as it is occurring and (2) following the potential Force Majeure event, such that the delay is minimized to the greatest extent possible.

124. "Force Majeure" does not include technological infeasibility, financial inability, or unanticipated or increased costs or expenses associated with the performance of VTC's obligations under this Consent Decree.

125. If any event occurs or has occurred that may delay compliance with any requirement of this Consent Decree, whether or not caused by a Force Majeure event, VTC shall notify, either in writing or orally, the United States within 5 days of when VTC first knew that the event might cause a delay. Within 10 days thereafter, VTC shall provide in writing to the United States an explanation and description of the reasons for the delay; the anticipated duration of the delay; all actions taken or to be taken to prevent or minimize the delay; a schedule for implementation of the measures to be taken to prevent or mitigate the delay or the effect of the delay; and VTC's rationale for

attributing such delay to a Force Majeure event if VTC intends to assert such a claim.

126. VTC shall include with any notice, the documentation supporting its claim that the delay was attributable to a Force Majeure event. Failure to comply with the requirements of Paragraphs 123 and 125 shall preclude VTC from asserting any claim of Force Majeure for that event for the period of time of such failure to comply, and for any additional delay caused by such failure. VTC shall be deemed to know of any circumstance of which VTC or any entity controlled by VTC knew or, through the exercise of due diligence, should have known.

127. If the United States does not dispute that the delay or anticipated delay is attributable to a Force Majeure event; the time for performance of the obligations under this Consent Decree affected by the Force Majeure event will be extended for such time as is necessary to complete those obligations. An extension of the time for performance of the obligations affected by the Force Majeure event shall not, of itself, extend the time for performance of any other obligation under the Decree.

128. If the United States does not agree that the delay or anticipated delay has been or will be caused by a Force Majeure event, it will notify VTC in writing of its decision. Within 15 days of receiving written notice from the United States of such disagreement, VTC may submit the matter to the Court for resolution. If VTC submits the matter to the Court for resolution, VTC shall have the burden of proving by a preponderance of the evidence that the event is a Force Majeure as defined herein, that VTC used best efforts to avoid a Force Majeure or minimize the delay; the duration of any delay attributable to the Force

Majeure; and that it met the requirements of Paragraph 125. If, upon submission to the Court, the Court determines that the delay was caused by a Force Majeure event, as defined herein, the delay shall be excused, but only for the period of the actual delay resulting from the Force Majeure event. If, upon submission to the Court, the Court determines that the delay was not caused by a Force Majeure event, as defined herein, VTC shall pay the stipulated penalties attributable to such delay, plus accrued interest, in accordance with Paragraph 118. Any such payments shall be made within 15 days from the court's decision.

XVI. DISPUTE RESOLUTION

129. The dispute resolution procedures of this Section shall be the exclusive mechanism to resolve all disputes arising under or with respect to this Consent Decree unless otherwise expressly provided for in this Consent Decree. However, the procedures set forth in this Section shall not apply to actions by the United States to enforce obligations of VTC that have not been disputed in accordance with this Section. In reviewing any dispute under this Section, the Parties agree that the Court, or any hearing officer appointed under this Consent Decree, should consider the effect of the resolution on other Settling HDDE Manufacturers. The United States and VTC consent to intervention by CARB for purposes of resolution of disputes arising under Paragraphs 42, 49, 51, 54, 58, 59, 66, 78, 90 and/or 92 of this Consent Decree, or as otherwise necessary for the proper administration of this Consent Decree.

130. Any dispute regarding the meaning of this Consent Decree shall be reviewed in accordance with applicable principles of law.

131. Existing administrative hearing and other procedures applicable to currently enforceable emission limits shall apply to any dispute which arises with respect to emission limits set forth in this Consent Decree regarding EURO III, NTE, TNTE, Smoke (or the alternate Opacity), the NOx plus NMHC Limit, NCPs under Paragraph 116(a), or pursuant to Paragraph 60 of this Consent Decree (regarding the requirements specified in Section IX.A of this Decree), subject, however, to the following:

(a) EPA shall appoint a hearing officer who shall preside at any hearing at which, under existing regulations, an administrative law judge would otherwise preside; and

(b) Review by the Court shall be as if it were review of final agency action under 5 U.S.C. § 706.

132. Any dispute that arises under or with respect to this Consent Decree, other than the disputes subject to Paragraph 131 of this Decree, shall in the first instance be the subject of informal negotiations between the Parties. The period of informal negotiations shall not exceed 20 days from the time the dispute arises, unless the Parties agree to extend the time period for informal negotiations. The dispute shall be considered to have arisen when one Party sends the other Party a written Notice of Dispute. Judicial review of any dispute governed by this Paragraph shall be governed by applicable principles of law.

133. In the event the Parties cannot resolve a dispute by informal negotiations under the preceding Paragraph, then the position advanced by the United States shall be considered binding, unless, within 30 days after the conclusion of the informal negotiation

period, VTC invokes the formal dispute resolution procedures of this Section by serving on the United States a written Statement of Position on the matter in dispute. This Statement of Position shall include, but not be limited to any factual data, analysis or opinion supporting that position and any supporting-documentation relied upon by VTC.

134. Within 30 days after receipt of VTC's Statement of Position, the United States shall serve on VTC its Statement of Position, including, but not limited to, any factual data, analysis, or opinion supporting that position and all supporting documentation relied upon by the United States.

135. Following receipt of the United States' Statement of Position, VTC shall have 10 days to file with the Court and serve on the United States a motion for judicial review of the dispute; otherwise the United States' Statement of Position shall be binding on VTC. VTC's motion for review shall set forth the matter in dispute, the efforts made by the Parties to resolve it, the relief requested, and the schedule, if any, within which the dispute must be resolved to ensure orderly and timely implementation of the Consent Decree. The United States may file a response to VTC's motion within 10 days of service of that motion.

136. The invocation of formal dispute resolution procedures under this Section shall not extend, postpone or affect in any way any obligation of VTC under this Consent Decree, unless the United States or the Court agrees otherwise, stipulated penalties with respect to the disputed matter shall continue to accrue but payment shall be stayed pending resolution of the dispute as provided in Paragraph 120 of this Decree. Notwithstanding the stay of payment,

stipulated penalties shall accrue from the first day of noncompliance with any applicable provision of this Consent Decree. In the event VTC does not prevail on the disputed issue, stipulated penalties shall be assessed and paid as provided in Section XIV of this Decree.

XVII. EFFECT OF SETTLEMENT

137. Satisfaction of all the requirements of this Consent Decree, and payment of 1,250,000 to CARB under the California Settlement Agreement, constitutes full settlement of and shall resolve all civil liability of VTC to the United States for the civil violations alleged in the Complaint, and for any civil violations that could hereafter be alleged under the Clean Air Act or regulations promulgated thereunder based on: (i) the use of the injection-timing strategies described in the Complaint on Pre-Settlement Engines; and (ii) the use of electronic engine control strategies on HDDEs in accordance with Appendix B-1, B-2, B-3, and B-4, and this Consent Decree.

138. With respect to LMB Engines manufactured on or before December 31, 1999, EPA shall not base a determination under Section 207(c)(1) of the Act, 42 U.S.C. § 7541, that any class or category of the Pre-Settlement or Interim. Engine does not conform to the regulations prescribed Under-Section 202 of the Act, 42 U.S.C. § 7521, or a determination under Section 206(b) of the Act, 42 U.S.C. § 7525(b), to suspend or revoke a Certificate of Conformity, on the basis that the engine contains one or more of the injection-timing strategies specifically described in Appendix B-1 or B-2, as limited by B-4 in Model Year 2000, if all other requirements applicable to that engine found in this Decree and the regulations are met.

139. With respect to LMB Engines manufactured before October 1, 2002, EPA shall not base a determination under Section 207(c)(1) of the Act, 42 U.S.C. § 7541, that any class or category of the Pre-Settlement or Interim Engine does not conform to the regulations prescribed under Section 202 of the Act, 42 U.S.C. § 7521, or a determination under Section 206(b) of the. Act, 42 U.S.C. § 7525(b), to suspend or revoke a Certificate of Conformity, on the basis that the engine contains one or more of the injection-timing strategies specifically described in Appendix B-2 or B-3 (after December 31, 1999), as limited by B-4 in Model Year 2000, if all other requirements applicable to that engine found in this Decree and the regulations are met.

140. With respect to Truck HHDDEs manufactured before October 1, 2002, EPA shall not base a determination under Section 207(c)(1) of the Act, 42 U.S.C. § 7541, that any class or category of the Pre-Settlement or Interim Engine does not conform to the regulations prescribed under Section 202 of the Act, 42 U.S.C. § 7521, or a determination under Section 206(b) of the Act, 42 U.S.C. § 7525(b), to suspend or revoke a Certificate of Conformity, on the basis that the engine contains one or more of the injection-timing strategies specifically described in Appendix B-1, B-2 or B-3, as limited by B-4 in Model Year 2000, if all other requirements applicable to that engine found in this Decree and the regulations are met.

XVIII. RIGHT OF ENTRY

141. Until termination of this Consent Decree VTC shall allow the United States, and its authorized representatives, contractors, consultants, and attorneys access, at reasonable times and with reasonable advance notice, to any facilities owned or

controlled by VTC relating to the manufacture of diesel engines and to any facilities owned or controlled by VTC where activities related to compliance with this Decree are being performed, for the purpose of monitoring the progress of activities required by this Consent Decree; verifying any data or information submitted by VTC to the United States; inspecting records; or conducting testing. This provision is in addition to, and in no way limits or otherwise affects, any right of entry, inspection or information collection held by the United States pursuant to the Act or other applicable federal law or regulations promulgated thereunder.

XIX. ACCESS TO INFORMATION AND RETENTION OF DOCUMENTS

142. VTC shall preserve, for five (5) years after termination of the applicable Section of this Consent Decree, an original or a copy of all data and final documents and records (including all electronic documents and records, but excluding drafts, where a final version exists, and notes) and information within its possession or control or that of its contractors or agents relating to implementation of and compliance with this Consent Decree, including, but not limited to, testing, analysis, production records, receipts, reports, research, correspondence, or other documents or information related to compliance with the Consent Decree.

143. VTC shall provide to the United States, upon request, originals or copies of all documents and information within its possession or control or that of its contractors or agents relating to implementation of and compliance with this Consent Decree, including, but not limited to, testing, analysis, production records, receipts, reports, research, correspondence, or

other documents or information related to compliance with the Consent Decree.

144. All information and documents submitted by VTC to the United States pursuant to this Consent Decree shall be subject to public inspection, unless identified and supported as Confidential business information by VTC in accordance with 40 C.F.R. Part 2.

145. VTC may assert that certain documents, records and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If VTC asserts such a privilege in lieu of providing documents, VTC shall provide the United States with the following: (1) the title of the document, record, or information; (2) the date of the document, record, or information; (3) the name and title of the author of the document, record, or information; (4) the name and title of each addressee and recipient; (5) a description of the contents of the document, record, or information; and (6) the privilege asserted by VTC. However, no document, report or other information required to be created or generated by this Consent Decree shall be withheld on the grounds that it is privileged. If a claim of privilege applies only to a portion of a document, the document shall be provided to the United States in redacted form to mask the privileged information only. VTC shall retain all records and documents it claims to be privileged until the United States has had a reasonable opportunity to dispute the privilege claim and any such dispute has been finally resolved in VTC's favor.

XX. NON-WAIVER PROVISIONS

146. This Consent Decree does not pertain to any matters other than those expressly specified in Paragraphs 7 and 137 of this Decree. Nothing in this Consent Decree shall relieve VTC of its obligation to comply with applicable Federal, State and local laws and regulations, and this Consent Decree does not release the liability, if any, of any person or entity for any civil claims other than the civil claims referred to in Paragraph 137, or for any criminal claims.

XXI. THIRD PARTIES

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

XXII. COSTS

148. Each Party to this action shall bear its own costs and attorneys' fees.

XXIII. PUBLIC NOTICE AND COMMENT

149. The Parties agree and acknowledge that final approval of this Consent Decree by the United States is subject to the public notice and comment requirements of 28 C.F.R. § 50.7, which requires, *inter alia*, notice of this Consent Decree and an opportunity for public comment. The United States may withdraw or withhold its consent if the public comments demonstrate that entry of this Consent Decree would be inappropriate, improper, or inadequate. After reviewing the public comments, if any, the United States shall advise the Court by motion whether it

seeks entry of this Consent Decree. VTC agrees to the entry of this Consent Decree without further notice.

XXIV. MODIFICATION

150. There shall be no modification of this Consent Decree without written approval by the Parties to this Consent. Decree and Order of the Court.

XXV. RETENTION OF JURISDICTION

151. This Court retains jurisdiction over both the subject matter of this Consent Decree and VTC for the duration of the performance of the terms and provisions of this Consent Decree for the purpose of enabling any of the Parties to apply to the Court at any time for such further order, direction, and relief as may be necessary or appropriate for the construction or modification of this Consent Decree, or to effectuate or enforce compliance with its terms, or to resolve disputes in accordance with the dispute resolution procedures set forth in Section XVI.

XXVI. EFFECTIVE DATE AND TERMINATION

152. This Consent Decree shall be effective upon the Date of Entry.

153. Termination of all or any part of this Consent Decree shall occur only as provided in this Section. Termination of a part of this Consent Decree pursuant to Subparagraphs 154(a) or (b) below shall not terminate any other part.

154. (a) The certification requirements in Section VI of this Consent Decree shall terminate as of the earlier of December 31, 2004, or two years after the date in 2002 when VTC has received Certificates of Conformity for all of its engine families required to meet the NOx plus NMHC Limit (the "Termination Date"), provided that VTC certifies to the United

States, at least 30 days prior to the Termination Date, that VTC has met all of the requirements of Paragraphs 13 through 20 and 23 through 25 of this Decree, and provided further that the United States, prior to December 31, 2004, does not dispute VTC's certification under the dispute resolution provisions of this Consent Decree. If, after the date of filing of this Consent Decree, regulations under the Act are promulgated imposing an emission standard or other requirement set forth in Section VI of this Consent Decree, VTC shall not be liable for stipulated penalties or other payments (or interest thereon) associated with compliance with the corresponding Consent Decree requirements for engines manufactured after the effective date of the new regulations. For engines manufactured before the Termination Date, or before the date Such new standard or other requirement becomes effective, whichever is earlier, the stipulated penalties associated with the Section VI requirements shall remain in effect through, and shall terminate at the end of, the Useful Life of such engines.

(b) The certification requirements in Section IX.A of this Consent Decree shall terminate as of December 31, 2005, provided that VTC certifies to the United States, at least 30 days prior to such termination date, that it has met all of the requirements of Section IX.A of this Decree, and provided further that the United States, prior to December 31, 2005, does not dispute the certification under the dispute resolution provisions of this Consent Decree. Notwithstanding termination of the certification requirements of Section IX.A pursuant to this Paragraph, requirements imposed for the Useful Life of engines subject to Section IX.A of this Consent Decree shall remain in effect through, and shall terminate at the end of, the Useful Life of such engines.

(c) The entire Consent Decree may be terminated by further order of the Court if VTC certifies to the United States that: (i) VTC has paid all civil penalties, interest, and stipulated penalties due under the Consent Decree; (ii) VTC has fully and successfully completed all of the requirements of Sections VI, VII, VIII, IX, and X; (iii) no matter subject to dispute resolution pursuant to Section XVI remains unresolved; (iv) no action to enforce the requirements of this Consent Decree-is pending; and (v) if Sections VI and IX.A have not been previously terminated, the requirements in Subparagraph 154(a) and (b) above have been met. Notwithstanding this termination, the United States retains the right to enforce the Useful Life requirements set forth in Subparagraphs 154(A) and (b) above even after the termination of the entire Consent Decree, and the United States May reopen the Consent Decree for purposes of such enforcement.

155. Any dispute regarding termination of all or any part of this Consent Decree shall be resolved pursuant to the dispute resolution provisions of Section XVI of this Consent Decree.

XXVII. ENTIRE AGREEMENT

156. This Consent Decree contains the entire agreement between the United States and VTC 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 Consent Decree.

XXVIII. SIGNATORIES

157. The Assistant Attorney General of the Environment and Natural Resources Division of the Department of Justice and the undersigned representative of

VTC each certify that he or she is fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind the Party he or she represents.

United States v. Volvo Truck Corporation
Consent Decree—Signature Page

FOR PLAINTIFF, UNITED STATES OF AMERICA

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FOR Volvo Truck Corporation,

/s/ Karl-Erling Trogen
Karl-Erling Trogen
President and CEO

/s/ Hans Polkesson
Hans Polkesson
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/s/ Michael E. Yaggy
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APPENDIX G

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

[Filed 05/22/2013]

Case Number 1:98CV02547

UNITED STATES OF AMERICA,
U.S. Department of Justice Environment & Nat. Res. Div. 950 Penn. Ave., N.W., Rm. 2143 Washington, D.C. 20530

Plaintiff,

v.

VOLVO TRUCK CORPORATION
S-405 08 Gothenburg Sweden,

Defendant.

JUDGE: Henry H. Kennedy
DECK TYPE: Civil General
DATE STAMP: 10/22/98

COMPLAINT

The United States of America, by authority of the Attorney General of the United States and at the request of the Administrator of the United States Environmental Protection Agency ("EPA"), files this complaint and alleges as follows:

NATURE OF ACTION

1. This is a civil action brought pursuant to Sections 204 and 205 of the Clean Air Act ("the Act"), 42 U.S.C. §§ 7523 and 7524, for injunctive relief and

the assessment of civil penalties against Volvo Truck Corporation ("Volvo") for violations of the Act and regulations promulgated thereunder.

JURISDICTION AND VENUE

2. This Court has jurisdiction over the subject matter of and the parties to this action pursuant to Sections 203, 204, and 205 of the Act, 42 U.S.C. §§ 7522,. 7523, and 7524, and 28 U.S.C. §§ 1331, 1345, and 1355.

* * *

GENERAL ALLEGATIONS

13. Volvo has sold, offered for sale, or introduced or delivered for introduction into commerce new motor vehicle engine in the United States, including engines identified by Volvo a s being in the heavy duty diesel engine ("HDDE') families identified in Exhibit A to this Complaint (the "Subject Engines").

* * *

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1:98CV02547

UNITED STATES OF AMERICA,

Plaintiff,

v.

VOLVO TRUCK CORPORATION,

Defendant.

MOTION OF THE UNITED STATES OF AMERICA
TO ENTER CONSENT DECREE
AND RESPONSE TO PUBLIC COMMENTS

Honorable Henry H. Kennedy, Jr.

The United States of America, on behalf of the Environmental Protection Agency ("EPA"), respectfully requests this Court to enter the Consent Decree between the United States and Volvo Truck Corp. ("Volvo") that was filed with the Court on October 22, 1998. The proposed Consent Decree resolves the claims of the United States against Volvo for violations of the Clean Air Act, as amended, 42 U.S.C. §§ 7401, et sea.(the "Act"), in connection with the alleged unlawful sale of certain heavy duty diesel engines manufactured and sold by them.

For the reasons set forth in the accompanying memorandum, the United States believes that the proposed Consent Decree is fair, reasonable, consistent with the goals of the Clean Air Act, and in

the public interest, and should be entered by this Court.

Dated: April 30, 1999

Respectfully submitted,

LOIS J. SCHIFFER (Bar No. 56630)
Assistant Attorney General
Environment & Natural Resource Division

By: /s/ Karen Dworkin
KAREN DWORKIN (Bar. No. 333757)

THOMAS P. CARROLL (Bar No. 388593)

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1:98CV02547

UNITED STATES OF AMERICA,

Plaintiff,

v.

VOLVO TRUCK CORPORATION,

Defendant.

MEMORANDUM OF LAW OF THE UNITED STATES OF AMERICA IN SUPPORT OF MOTION TO ENTER CONSENT DECREE AND RESPONSE TO PUBLIC COMMENTS

Honorable Henry H. Kennedy, Jr.

I. INTRODUCTION

The United States of America, on behalf of the Environmental Protection Agency ("EPA"), submits this common Memorandum of Law in Support of its individual Motions to Enter the Consent Decrees between the United States and defendants Caterpillar Inc, ("Caterpillar"), Cummins Engine Company ("Cummins"), Detroit Diesel Corporation ("DDC"), Mack Trucks, Inc. ("Mack"), Renault, V.I. ("Renault"), and Volvo Truck Corporation ("Volvo") (hereinafter the "engine manufacturers") that were filed with this Court on October 22, 1998.[1]

[1] The United States is filing a different memorandum with respect to its Motion to Enter the Consent Decree between the

* * * *

C. The Consent Decrees

Our primary goal in this matter is to protect the environment and the health and safety of the American people,

* * * *

2. Provisions to Ensure Compliance with Consent Decree Requirements

The Consent Decrees contain a number of provisions to ensure that their requirements are met.

a) Integrating the Consent Decrees with EPA's Administrative Certification and Compliance Programs

EPA will continue to receive and review certification applications for consistency with the Consent Decrees and with other statutory and regulatory requirements. Should EPA find a violation at the certification stage, during assembly-line testing, or through tests of engines on the road; the Consent Decrees ensure that EPA retains all of its administrative remedies to deny, suspend, or revoke a Certificate of Conformity or to order a recall. The Consent Decrees provide that non-FTP limits in the Consent Decrees have the same effect as emission limits under the Act and the regulations, except that judicial review of EPA action on a Certificate of Conformity, that is based on a Consent Decree-imposed limit, will be brought to this Court rather than the Court of Appeals, because this Court is, in effect, imposing the limits by virtue of

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United States and Navistar International Transportation Corp. ("Navistar"), because that settlement is substantially different from the other six.

entering the Consent Decrees as final judgments. Consent Decrees, ¶s 26-30.

* * * *

A settlement agreement which seeks to enforce a statute must be consistent with the public objectives sought to be attained by Congress. *Stewart v. Rubin*, 948 F. Supp. 1077, 1087 (D.D.C. 1996). Congress passed the Clean Air Act "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." 42 U.S.C. § 7401(b)(1).

* * * *

The Consent Decrees further the Congressional goals embodied in the Clean Air Act and this serve the public interest. The settlements achieve, without litigation delays or costs, significant environmental benefits by reducing NO_x emissions from new existing engines, and by requiring the engine manufacturers to undertake projects to offset some of the excess emissions.

* * * *

Response: For purposes of our negotiations with the engine manufacturers, we calculated the degree to which each engine manufacturer's NO_x emissions exceeded what would have been emitted without the strategies we allege are defeat devices. Thus, for each engine manufacturer, for each year its engines contained these computer strategies, we compared the numeric limit in effect at the time with our estimate of the manufacturer's actual emissions. Our estimates of each manufacturer's actual emissions were based on estimates of the percentage of time the engines were operated in the "defeated" mode, annual vehicle miles traveled and scrappage rates, and the amount by

which the emissions exceeded the applicable numeric standard, less a ten percent safety margin, when they were in the defeated mode. We refer to this as the "excess emissions," and these are the emissions to which these commenters are referring.[44]

The United States estimates that past excess emissions (through the end of 1998) from engines already on the road, i.e., excess emissions that are no longer preventable, are approximately 6.8 million tons. The United States also estimates that future excess emissions from engines already on the road would be 6.4 million tons, but for the Low NO_x Rebuild Program, which we believe will reduce future excess emissions from existing engines to approximately 3.9 million tons. Future excess emissions from engines to be produced under the Consent Decrees, i.e., beginning November 1998, will be approximately 2.3 million tons, taking into account the reductions attributable to the pull ahead of the 2.5 g/bhp-hr NO_x plus NMHC standard by fifteen months. In addition, we estimate that the pull ahead of the nonroad standards will save an additional 84,000 tons of NO_x. Thus, the 12 million excess tons cited by the commenters refers to the past and future estimated excess emissions from existing and yet-to-be built engines minus the combined NO_x reductions attributable to the Low NOx Rebuild Program, the pull ahead of the 2.5 g/bhp-hr NOx plus NMHC standard, and the one year pull ahead of the nonroad standard.

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[44] After we filed the Consent Decrees, we provided the details of our calculations to interested members of the public.

APPENDIX I

IN THE UNTED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1:98CV02547

[Filed June 11, 1999]

UNITED STATES OF AMERICA,

Plaintiff,

v.

VOLVO TRUCK CORPORATION,

Defendant.

UNOPPOSED MOTION OF VOLVO CONSTRUCTION EQUIPMENT COMPONENTS AB FOR LEAVE TO INTERVENE FOR CERTAIN PURPOSES

Volvo Construction Equipment Components AB ("VCE"), by its counsel, moves, pursuant to Fed. R. Civ. P. 19 and 21, and the proposed Consent Decree in this action, with the consent of the parties (the United States of America and Volvo Truck Corporation ("VTC")) for leave to intervene as a defendant in this civil action for purposes of compliance with Section IX.A of the proposed Consent Decree and becoming subject to the jurisdiction of the Court with respect to the Consent Decree provisions pertaining to the nonroad combustion-ignited ("CI") Engine emission standards pull-ahead.

Statement of Points and Authorities in Support

On October 22, 1998, the United States filed a Complaint against VTC and a proposed Consent Decree in the above-captioned civil action. Among other provisions, the proposed Consent Decree pulls ahead, from January 1, 2006 to January 1, 2005, the new "Tier HI" emission standards for nonroad CI engines, e.g., engines used in farm and construction equipment, for all engines between 300 and 750 horsepower. Volvo Consent Decree, 60-63.

Defendant VTC does not manufacture or sell nonroad engines in the United States. VCE is the Volvo Group company that sells these engines in the United States. The Consent Decree provides:

> All Nonroad CI Engines manufactured by VTC or its affiliate, VCE, on or after January 1, 2005, with a horsepower equal to or greater than 300 but less than 750 shall meet 3.0 g/bhp-hr for NOx plus NMHC when measured on the applicable FTP for those engines. In addition, all Nonroad CI Engines manufactured by VCE or VTC on or after January 1, 2005, with a horsepower equal to or greater than 300 but less than 750 shall comply with all other requirements that would apply as if the engines were Model Year 2006 engines. . . .

Volvo Consent Decree, ¶ 60. The Consent Decree imposes the Tier III pull-ahead obligation on both VTC, the named defendant which has signed the proposed Consent Decree, and VCE.

To ensure that the proper Volvo Group company is subject to the jurisdiction of the Court for purposes of the Consent Decree requirements applicable to

Nonroad CI Engines, the Consent Decree provides that:

> VTC will seek to obtain the intervention of VCE for the purposes of enforcing the provisions of Section IX.A, and other Consent Decree provisions pertaining to the nonroad CI Engine emission standards pull-ahead, and shall so notify the Court of VCE's consent to intervention.

Pursuant to this provision, VCE has agreed to intervene in this action for the purposes set forth above.

Fed. R. Civ P. 19 provides for joinder of parties "if . . . in the [party's] absence complete relief cannot be accorded among those already parties." Fed. R. Civ. P. 21 provides that [p]arties may be . . added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just." Adding VCE as a party to this action will ensure that the Court will have before it the company responsible for compliance with the nonroad engine provisions in Section IX.A and other Consent Decree provisions pertaining to the nonroad CI Engine emission standards pull-ahead. Accordingly, the Court should grant this Motion and permit VCE to intervene as a party defendant for the limited purpose set forth above.

A proposed order granting the requested relief is attached hereto.

/s/ Michael Esher Yaggy

Michael Esher Yaggy (Bar No. 369458)
Julie R. Domike (Bar No. 416144)
Piper & Marbury LLP
1200 19th Street NW
Washington, D.C. 20036-2430
(202) 861-3900

Consented to:

/s/ Thomas P. Carroll

Thomas P. Carroll
Counsel for the United States

/s/ Michael Esher Yaggy

Michael Esher Yaggy
Julie R. Domike
Counsel for Volvo Truck Corporation

APPENDIX J

VOLVO

Company Name VOLVO POWERTRAIN, Volvo Division	Type of Document Report		
Name of Document Auditor Report of the 3rd Quarter 2006	Issue 1	Reg. No. 24410-60871	Page 1
Approved by (dept, name, phone, location) 24410, Lars Gustavsson, +46-31-3223078, L3	Sign	Date 2006-10-23	Info class

Introduction

During the 3rd quarter, I have audited Volvo's Powertrain's (VPT) progress in developing and implementing the technology needed to meet the Consent Decree requirements.

The task is presently limited to reporting only on the progress in meeting the nonroad CI engine standard pull ahead requirements.

The earlier reports are designated as VTC documents with registration numbers. 24410-91506, -00604, -00927, -01382, -10109, 10464, -10768, -11143, -20135, -20482, -20703, -21188, -30081, -30536, -30803, -31181, -40105, -40484, -40756, 41052, -50087, -50477, -50847, -51182, -60058, -60391 and -60605 respectively.

Assessment of progress to data in meeting requirements of paragraphs 17 and 20.

There is no change from the last quarter to report.

Nonroad CI Engine standard pull-ahead requirements

Hans Eriksson, Chief Project Manager for the MD16 engine, within the Tier 3 umbrella project (P3533) gave the following status report, supported by documentation such as minutes of meetings of the Steering Committee.

Originally, P3533 included the three engine families—MD9, D12 and MD16—that are subject to Tier 3 as of 1 January 2006.

MDS and D12

The projects are finalized. There is nothing to report.

MD16

The validation program, comprising of two Excavators and three Wheel Loaders in field tests, is completed and the MD16 Steering Committee made the End Gate decision on 12 October 2006.

Auditor Summary

With the closing of the MD16 project, all Compliance Auditing tasks defined in Consent Decree, paragraph 33 of Chapter 8, have been fulfilled. All the applicable On Road and Non Road Engines are in production and some of them have been on the market for a number of years. I have concluded that VPT has fulfilled all requirements for engine technology development under the Consent Decree, and that my duties as Compliance Auditor are thus concluded. I request the concurrence of the appropriate representatives of the U.S. Department of Justice, U.S. Environmental Protection Agency and California Air Resources Board.

Simultaneously, my assignment within Volvo Powertrain Sweden will be terminated by the end of this year.

APPENDIX K

U.S. Department of Justice
Environment and Natural Resources Division

[SEAL]

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BSG:lj
90-5-2-1-2256

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Environmental Enforcement Section
P.O. Box 7611
Ben Franklin Station
Washington, DC 20044-7611

Telephone (202) 514-4080
Facsimile (202) 514-2583

July 3, 2008

By Federal Express

Lars Gustaysson
Volvo Powertrain Corporation
Dept 91410, L2
SE-40508 Goteborg
Sweden

By Registered Mail

Steven Berry
Director
Government Relations
Volvo Powertrain North America
13302 Pennsylvania Ave.
Hagerstown, MD 21742

Re: Demand for Stipulated Penalties under July 1, 1999 Consent Decree in *United States v. Volvo Truck Corporation* (D.D.C.), Civil Action No. 98-02547 (HHK)

Dear Sirs:

This notice and demand for payment of stipulated penalties is provided by the *United States to Volvo Powertrain Corporation* ("Volvo"), pursuant to paragraph 119 of the *United States v. Volvo Truck Corporation Consent Decree* referenced above ("Consent Decree").[1] Volvo is required to pay a stipulated penalty of $72,006,337 (which includes $6,247,125 in interest) for Volvo Penta's 2005 manufacture and certification of 8354 nonroad CI engines that did not meet 2006 certification standards, as set forth in paragraph 60 of the Consent Decree.[2] The penalty figure was calculated pursuant to 1 116 of the Consent Decree using the non-conformance penalty ("NCP") values of 40 CFR Part 86. To the extent that Volvo argues that it was a related concluded that such behavior was forbidden by Section XI of the Consent Decree (Non-Circumvention Provisions).

The United States' stipulated penalty demand must be paid, in accordance with paragraph 119 of Consent Decree, within thirty days of this notice. Please contact the undersigned before making any payment,

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[1] According to your statements, Volvo Powertrain Corporation has assumed responsibility for complying with the Consent Decree obligations for Volvo Truck Corporation. Volvo's February 24, 2006 Response to Information Request at p. 2, Question 1.

[2] The United States is currently analyzing data provided by Volvo with regard to an additional 540 Penta engines. A subsequent demand for stipulated penalties may be made regarding these engines.

as some portion of the penalty must be paid to the California Air Resources Board.

Should Volvo dispute its obligation to pay part or all of the stipulated penalty, pursuant to paragraph 120 of the Consent Decree, Volvo must place the disputed amount requested by the United States in a commercial escrow account pending resolution of the matter and request that the matter resolved through the dispute resolution provisions of the Decree. If Volvo's dispute of its obligation causes the matter to be heard before the Court, the United States reserves its reserves its right to seek additional relief, including, but not limited to, recoupment of the NCP testing costs avoided by Volvo.

If you have any questions regarding this matter, please contract Leslie A. Kirby-Miles at (312)252-9443 or me at (202) 514-4080.

Sincerely,

/s/ Lori Jonas

Lori Jonas, Senior Attorney
Environment Enforcement Section

cc by fax and U.S. Mail:
Leslie Kirby-Miles, U.S. EPA
Aron Livington, California Air Resources Board
Julie Domike, Wallace King Domike & Branson

APPENDIX L

DECLARATION

1. I, Paul Geraci, make this declaration in support of Volvo Powertrain Corporation's dispute of the United States Department of Justice's July 3, 2008 Demand for Stipulated Penalties under July 1, 1999 Consent Decree *in United States v. Volvo Truck Corporation* (D.D.C.), Civil Action No. 98-02547 (HHK) and the California Air Resources Board's July 10, 2008 Demand for Stipulated Penalties under the California Settlement Agreement. I am currently General Manager, Industrial Diesel Sales, for Volvo Yenta of the Americas, Inc, and have been employed by Volvo Penta since 1987. I am familiar with the facts stated in this Declaration, either through personal knowledge or a review of relevant corporate and public records.

* * * *

12. Approximately 87 percent of the Penta nomad engines that are the subject of EPA's Demand were sold into export markets. In 2005, 1,092 Penta nonroad engines subject to this dispute were sold in the United States. Approximately 86% percent, or 936 Penta nonroad engines, were sold to Kohler Corporation. Kohler installed these engines in generators for sale throughout the world, including for export to non-U.S. markets. Penta sales information for 2005 is provided in Volvo Powertrain's April 25, 2008 Response to EPA's Request for Information.

13. Of the approximately l,092 engines subject to this dispute sold in the United States, including those installed by Kohler in generators for sale in non-U.S. markets, I estimate, based on sales data and typical usage, that approximately 167 were used in mobile

applications, such as mobile industrial sources or portable generator sets.

* * * *

Model Year 2005 Certification

22. Based on the negotiations with EPA and CARB, and on the language of the Consent Decree and Settlement Agreement, Penta understood that it was not a party to either agreement, and that its engines were not subject to the requirements for nonroad pull-aheads. Given this understanding, Penta took no steps to plan for or to comply with those requirements.

23. In 2005, Penta applied for and obtained certificates of conformity and executive orders for 13 nonroad engine families, certifying compliance with the EPA's Tier 2 standards. Penta's applications were reviewed, processed and approved by William Rutledge, of EPA's Office of Air Quality Planning and Standards. True and correct copies of Certificates of Conformity and Executive Orders received by Penta for model year 2005 nonroad engines are attached as Exh. 7.

24. To the best of my knowledge, at the time Penta sought its certificates of conformity and Executive Orders, no one in either EPA's or CARB's certification staffs ever stated to anyone at Penta that Penta's model year 2005 engines should have complied with Consent Decree requirements.

* * * *

Pursuant to 28 U.S.C. § 1746, I declare under penalty of pedury that the foregoing statements are true and accurate, to the best of my knowledge and recollection.

Dated: 11/05/08 /s/ Paul Geraci

Paul Geraci
General Manager, Industrial Diesel Sales
Volvo Penta of the Americas, Inc.

APPENDIX M

DECLARATION

1. I, John Klein, make this declaration in support of the Statement of Position of Volvo Powertrain Corporation disputing the United States Department of Justice's July 3, 2008 Demand for Stipulated Penalties under July 1, 1999 Consent Decree in *United States v. Volvo Truck Corporation* (D.D.C.), Civil Action No. 98-02547 (HHK) ("Consent Decree"). Until 2003, I served as Chief Engineer for Volvo Powertrain/ Mack Trucks, Inc. I am fully familiar with the facts stated herein, either through personal knowledge or a review of relevant corporate and public records.

2. In 1998, Mack Trucks, Inc. ("Mack") entered into a Consent Decree with the United States Environmental Protection Agency ("EPA") and a substantially-identical Settlement Agreement with the California Air Resources Board ("CARB"). At the time of the negotiation of the Consent Degree,[1] I held the position of Chief Engineer with Mack Trucks, Inc. I was one of the individuals who represented Mack in the negotiation of the 1999 consent decree between Mack and the United States and the1999 settlement agreement between Mack and the California Air Resources Board ("CARB"). I was involved in a majority of these negotiations.

3. Along with Mack, Detroit Diesel Corporation ("DDC"), Caterpillar, Cummins Engine Company, and Volvo Truck Corporation also were involved in

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[1] Because the Consent Decree and Settlement Agreement are substantially identical, I refer to them in this Declaration collectively as the Consent Decree, unless a distinction is necessary.

negotiations with the government. The companies met both individually and collectively with the government.

4. At one point in the negotiations, I recall that concerns were raised over the potential sale of an engine manufacturer which was subject to a consent decree, to a company that was not subject to a consent decree. The concern was that consent decree companies might avoid complying with the decrees by selling or transferring their assets to another company. This concern was prompted by rumors of the potential sale of D.D.C. by Penske Corporation to Mercedes Benz.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing statements are true and accurate, to the best of my knowledge and recollection.

Dated: November 4, 2008 /s/ John Klein

John Klein
Former Chief Engineer,
Mack Trucks, Inc.

APPENDIX N

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action 98-02547 (HHK)

UNITED STATES OF AMERICA,

Plaintiff,

v.

VOLVO POWERTRAIN CORPORATION,

Defendant.

MEMORANDUM IN SUPPORT OF MOTION FOR JUDICIAL REVIEW

* * * *

1. The Agencies Cannot Obtain Penalties under the Consent Decree for Nonroad Engines that Are Not Introduced into Commerce in the United States.

The Agencies demand penalties for 8,354 Penta engines covered by MY 2005 Certificates and Orders, without consideration of whether the engines were imported into the United States. However, the CAA and EPA's Part 89 regulations, and therefore the Consent Decree, apply only to nonroad engines that are imported into the United States or otherwise introduced into U.S. commerce.

EPA's authority to regulate nonroad engines is derived from § 213 of the CAA, 42 U.S.C. § 7547, and implemented though CAA §§ 202 and 203, 42 §§ 7521

and 7522, which specifically prohibit importation or introduction into U.S. commerce of uncertified engines or vehicles. *See id.* § 7522(1)(a). EPA subsequently promulgated 40 C.F.R. Part 89, which established a comprehensive regulatory regime for engines meeting the definition of nonroad engines at 40 C.F.R. § 89.2. Manufacturers of nonroad engines were required to obtain from EPA a certificate of conformity for each nonroad engine family "prior to selling, offering for sale, introducing to commerce, or importing into the United States the new nonroad compression-ignition engine for each model year." *Id.* § 89.1003. EPA further specified "prohibited acts" under Parts 89, including "the sale, or the offering for sale, or the introduction, or delivery for introduction into commerce" of such an engine unless it was covered by a certificate of conformity issued under Part 89. *Id.* § 89.1003. EPA confirmed in the preamble to the Part 89 regulations that the "prohibited acts" provision was intended to "prohibit introducing engines into commerce *in the U.S.* which are not covered by a certificate of conformity issued by EPA." 59 Fed. Reg. 31306, 31316 (June 17, 1994)(emphasis added). The relevant provisions of the CAA do not provide EPA with authority to seek penalties for failure to certify nonroad engines that are not imported or otherwise introduced into U.S. commerce.[8] Legislation is

[8] Congress clearly did not intend for the nonroad engine provisions of Title II of the Clean Air Act to have extraterritorial application. In CAA § 213(a)(1), 42 U.S.C. § 7547(a)(1), Congress directed EPA to complete a study of the effect of nonroad engine emissions on "public health and welfare" to determine whether regulation was justified. EPA restricted its study to pollution impacts within the United States: "EPA constructed national emissions inventories of nonroad sources, as well as local inventories for 19 ozone and 16 carbon monoxide (CO)

presumed to apply only within the territorial jurisdiction of the United States unless the contrary affirmative intention of Congress is clearly expressed. *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (citation omitted); *see also Small v. United States*, 544 U.S. 385, 388-89 (2005) (stating assumption that Congress legislates with knowledge of the presumption that statute is primarily concerned with domestic conditions).[9]

The parties did not reinvent the wheel when drafting the nonroad engine requirements in the Consent Decree. Those provisions of the Decree are derived from and effectively incorporate the

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nonattainment areas." USEPA, *Nonroad Engine and Vehicle Emission Study—Report*, Office of Air and Radiation, 21A-2001, Executive Summary, at vii (Nov. 1991) (emphasis added) (available at http://www.epa.gov/nonroad/nrstudy.pdf). Nonroad engines that do not enter the United States obviously do not impact national ambient pollution levels.

[9] Contrary to the United States' contention, US SOP, at 23, the selective enforcement auditing ("SEA") provisions of Part 89 do not reflect EPA extraterritorial enforcement authority over nonroad engines. The SEA provisions require manufacturers to locate testing and manufacturing facilities in jurisdictions where local law would not prohibit EPA inspections of these facilities. *See* 40 C.F.R. § 89.506(g). However, this provision is designed solely to allow EPA inspectors to verify that tests used by engine manufacturers to generate emissions data for purposes of obtaining a certificate of conformity are valid. The purpose is to ensure compliance for foreign-manufactured engines that are sold in the United States, not to expand EPA's enforcement authority to engines in foreign jurisdictions. If inspections and testing reveal a manufacturer's engines do not comply with a certificate of conformity, any corresponding enforcement action is still confined by the jurisdiction conferred on EPA by the Clean Air Act—namely, jurisdiction over engines imported or introduced into commerce in the United States.

obligations and limitations of 40 C.F.R. Part 89. The nonroad engines covered under the Decree are defined by reference to Part 89. CD ¶ 3 ("Nonroad CI Engine" is defined as "a compassion-ignition engine subject to the regulations in 40 C.F.R. Part 89."). Paragraph 60 describes the nonroad pull-ahead requirements by stating an emissions standard identical to the MY 2006 emission standard under Part 89, and then requiring compliance with "all other requirements that would apply as if the engines were MY 2006 engines."[10] Paragraph 61 provides that Truck Corp. and CE will be subject to all obligations, and preserve all available rights, as if the pull-ahead emission standards was applicable by statute. Paragraph 62 directly links EPA's authority under the Decree to its authority under the Decree to its "authority under its regulations found at 40 C.F.R. Part 89 or under the [CAA], including . . . taking enforcement action against prohibited acts that would be applicable if the

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[10] The Agencies contend that the reference in ¶ 60 to "[a]ll Nonraod CI Engines manufactured by VTC, or its affiliate, VCE,' should be read to expand coverage to all such engines sold anywhere in the world. This reading is inconsistent with ¶¶ 61-63 as explained below, as well as other provisions that further evidence the Decree's focus on addressing emissions in the U.S. *See* CD at 2("Whereas the United States has determined that the comprehensive relief set forth in the Consent Decree will provide protection of the health and welfare of the people of the United States"; CD ¶ 5 (alleging that "[Truck Corp.] has manufactured and sold, offered for sale, or introduced or delivered for introduction into commerce in the United States new motor vehicle engines. . . ."); CD ¶ 7 ("[Truck Corp.] has installed in engines manufactured for sale in the United States. . . ."). It is not reasonable to assume that Powertrain and CE, both significant manufacturers of engines sold outside the United States, would casually concede expanded EPA jurisdiction over non-U.S. engines without an express indiction of intent to do so.

limits specified in ¶ 60 of this Decree were emissions standards and procedures adopted under Section 213 of the Act." Finally, ¶ 63 expressly confirms that, other than specified changes associated with the pull-ahead requirements, the Consent Decree "does not modify, change, or limit in any way the rights and obligations of the Parties under the [Clean Air] Act and EPA's regulations with respect to the control of emissions from Nonroad CI Engines." The provisions make clear that, other than specified exceptions not relevant here, the Decree did not expand enforcement authority for nonroad engines beyond the limits of that authority under Part 89.[11]

[11] Similarly, the CARB Agreement does not expand enforcement authority for nonroad engines beyond the limits of the authority conferred upon CARB under California law. Paragraphs 60-63 of the CARB Agreement directly link CARB's authority to the California Health and Safety Code and Title 13 of the California Code of Regulations. The Health and Safety Code limits CARB's jurisdiction to the regulation of vehicles in California. *See* Cal. Health & Safety Code §§ 43150, 43151 (declaring the purpose of the law to regulate vehicles "used or registered in [California]" and making it a prohibited act to "import, deliver, purchase, rent, lease, acquire, or receive [an engine] for use, registration, or resale *in this state* unless such [engine] has been certified pursuant to this chapter.") (emphasis added).