

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF UTAH

UNITED STATES OF AMERICA

Plaintiff,

v.

PERFORMANCE DIESEL, INC.,

Defendant.

Civil Action No. 4:19-cv-00075-DN

**CONSENT DECREE**

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WHEREAS, Plaintiff United States of America, on behalf of the United States Environmental Protection Agency (“EPA”), has filed a Complaint in this action concurrently with this Consent Decree, alleging that Performance Diesel, Inc. (“PDI” or “Defendant”) violated Section 203 of the Clean Air Act (“Act” or “CAA”), as amended, 42 U.S.C. § 7522, by manufacturing, selling, offering for sale, or installing certain motor vehicle engine parts or components, the principle effect of which is to bypass, defeat, or render inoperative motor vehicle engine emission control devices or elements of design;

WHEREAS, Section 203(a)(3)(A) of the Act, 42 U.S.C. § 7522(a)(3)(A), prohibits any person from knowingly removing or rendering inoperative any device or element of design installed on or in a motor vehicle or motor vehicle engine in compliance with regulations under Title II of the Act after sale and delivery to the ultimate purchaser;

WHEREAS, Section 203(a)(3)(B) of the Act, 42 U.S.C. § 7522(a)(3)(B), prohibits any person from manufacturing, selling, offering for sale, or installing, any part or component intended for use with, or as part of, any motor vehicle or motor vehicle engine, where a principal effect of the part or component is to bypass, defeat, or render inoperative any device or element of design installed on or in a motor vehicle or motor vehicle engine in compliance with regulations under Title II of the Act, and where the person knows or should know that such part or component is being offered for sale or installed for such use or put to such use;

WHEREAS, the Complaint alleges that PDI manufactured, sold, or installed at least 5,549 Subject Products, the effect of which is to bypass, defeat, or render inoperative a device or element of design installed on or in motor vehicles or motor vehicle engines to control the emission of pollutants;

WHEREAS, the United States' Complaint seeks injunctive relief and the assessment of civil penalties;

WHEREAS, on September 13, 2018, PDI represented to the United States that, as of May 1, 2018, PDI had suspended sales of all Subject Products, except those that were covered by an Executive Order from the California Air Resources Board;

WHEREAS, the United States has reviewed Financial Information submitted by PDI and has determined that PDI has demonstrated a limited ability to pay a civil penalty in this matter;

WHEREAS, PDI does not admit to the allegations in the Complaint nor does it admit any liability arising out of the occurrences alleged in the Complaint; and

WHEREAS, the United States and PDI (the "Parties") recognize, and the Court by entering this Consent Decree finds, that this Consent Decree has been negotiated by the Parties in good faith and will avoid 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, without the adjudication or admission of any issue of fact or law except as provided in Section I (Jurisdiction and Venue), and with the consent of the parties, it is hereby ADJUDGED, ORDERED, AND DECREED as follows:

#### I. JURISDICTION AND VENUE

1. The Court has jurisdiction over the subject matter of this action and the Parties pursuant to 28 U.S.C. §§ 1331, 1345, 1355, and Sections 204 and 205 of the Act, 42 U.S.C. §§ 7523 and 7524.

2. Venue in this Court is proper pursuant to Sections 204 and 205 of the Act, 42 U.S.C. §§ 7523 and 7524, and 28 U.S.C. §§ 1391(b) and 1395(a). For purposes of this Consent Decree, or any action to enforce this Decree, PDI consents to the Court's jurisdiction over this Decree or such action and over PDI, and consents to venue in this judicial district. For purposes of this Consent Decree, PDI agrees that the Complaint states claims upon which relief may be granted pursuant to Sections 203, 204, and 205 of the Act, 42 U.S.C. §§ 7522, 7523, and 7524.

## II. APPLICABILITY

3. The obligations of this Consent Decree are binding upon the United States, and apply to and are binding upon PDI and any successors, assigns or other entities or persons otherwise bound by law.

4. No transfer of ownership or operation of the Defendant's business, whether in compliance with the procedures of this Paragraph or otherwise, shall relieve Defendant of its obligation to ensure that the terms of the Decree are implemented, unless (a) the transferee agrees to undertake the obligations required by this Decree and to be substituted for the Defendant as a Party under the Decree and thus be bound by the terms thereof, (b) the United States consents to relieve Defendant of its obligations, and (c) the Court approves the substitution. The United States may refuse to approve the substitution of the transferee for Defendant if it determines that the proposed transferee does not have the financial or technical ability to comply with the requirements of the Decree. At least 30 Days prior to any transfer of ownership or operation of Defendant's business, Defendant shall provide a copy of this Consent Decree to the proposed transferee and shall simultaneously provide written notice of the prospective transfer, together with a copy of the proposed written agreement to EPA and to the

United States in accordance with Section XIII (Notices). Any attempt to transfer ownership or operation of the Defendant's business, without complying with this Paragraph, constitutes a violation of this Decree.

5. Within 30 Days of the Effective Date, Defendant shall provide a copy of this Consent Decree (including all Appendices) to all officers, directors, employees and agents whose duties might reasonably include compliance with any provision of this Decree, as well as to any contractor retained to perform work required under this Consent Decree. Defendant shall condition any such contract upon performance of the work in conformity with the terms of this Consent Decree.

6. In any action to enforce this Consent Decree, Defendant shall not raise as a defense the failure by any of its officers, directors, employees, agents, or contractors to take any actions necessary to comply with the provisions of this Consent Decree.

### III. DEFINITIONS

7. Terms used in this Consent Decree that are defined in the Act or in regulations promulgated in accordance with the Act shall have the meanings assigned to them in the Act or such regulations, unless otherwise provided in this Decree. Whenever the terms set forth below are used in this Consent Decree, the following definitions shall apply:

- a. "Act" means the Clean Air Act, as amended, 42 U.S.C. § 7401 *et seq.*;
- b. "Authorized Dealer" means any unrelated third-party authorized by PDI to sell PDI's products;
- c. "CARB Executive Order" or "CARB EO" means an official exemption issued by the California Air Resources Board ("CARB") exempting an aftermarket product from the prohibitions of Section 27156 of the California Vehicle Code upon review by CARB that the aftermarket product has been found (i) not to reduce the effectiveness of the applicable

vehicle pollution control systems or (ii) not to result in emissions that exceed existing state and federal air quality standards;

- d. “Complaint” means the complaint filed by the United States in this action;
- e. “Consent Decree” or “Decree” means this Decree and all appendices attached hereto and identified in Section XXIII;
- f. “Day” means a calendar day unless expressly stated to be a business 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 business day;
- g. “Defendant” or “PDI” means Performance Diesel, Inc., a Utah corporation with its current principle place of business at 687 North Industrial Road, St. George, Utah 84770;
- h. “Diagnostic Trouble Code” or “DTC” means any malfunction code that sets when a malfunction is detected by the OBD;
- i. “Diesel Oxidative Catalyst” or “DOC” means exhaust aftertreatment devices that reduce emissions from diesel-fueled vehicles and equipment. DOCs generally consist of a precious-metal coated, flow-through honeycomb structure contained in a stainless-steel housing. As hot diesel exhaust flows through the honeycomb structure, the coating of precious metal causes a catalytic reaction that breaks down pollutants into less harmful components. The DOC includes all hardware, components, parts, sensors, subassemblies, software, auxiliary emission control devices (AECs), and calibrations that collectively constitute the system for implementing this strategy;
- j. “Diesel Particulate Filter System” or “DPF” means all hardware, components, parts, sensors, subassemblies, software, AECs, calibrations, and other Elements of Design that collectively constitute the system for controlling emissions of particulate matter by trapping such particulates in a filter and periodically oxidizing them through thermal regeneration of the filter;
- k. “Effective Date” shall have the definition provided in Section XIV;
- l. “Emissions-related Elements of Design” means:

- i. The On-board Diagnostic (“OBD”) system;
  - ii. Diagnostic Trouble Codes (“DTCs”);
  - iii. Rear oxygen sensors;
  - iv. The Exhaust Gas Recirculation (“EGR”) system;
  - v. Diesel Oxidation Catalysts (“DOCs”);
  - vi. The Selective Catalytic Reduction (“SCR”) system;
  - vii. Diesel Particulate Filters (“DPF”);
  - viii. Engine calibrations that affect engine combustion (e.g. fuel injection timing); and
  - ix. Any other device or element of design installed in compliance with Title II of the Act and its regulations.
- m. “EPA” means the United States Environmental Protection Agency and any of its successor departments or agencies;
- n. “Exhaust Gas Recirculation” or “EGR” means the strategy for controlling NO<sub>x</sub> emissions by recirculating a portion of engine exhaust gas into the cylinders of the engine, together with all hardware, components, parts, sensors, subassemblies, software, AECDs, and calibrations that collectively constitute the system for implementing this strategy and for adjusting the volume of exhaust gas in the engine cylinders;
- o. “Financial Information” means the following financial documents provided to the United States by PDI: (i) financial statements for 2016, 2017 and year-to-date 2018, (ii) U.S. Federal Income Tax Returns for 2016 and 2017, including all attachments and schedules thereto, and (iii) information about distributions made by PDI during the period 2016 through October 2018;
- p. “Identified Subject Products” means the motor vehicle parts and components designed and manufactured for use on Cummins, Detroit Diesel, Paccar, International, and Caterpillar heavy duty diesel engines, model years 1993-2020, identified in Appendix A;
- q. “Marketing Materials” means all information that is generated, published, circulated and/or maintained by the Defendant, in any form, that discusses, describes, or explains any of Defendant’s products, including but not limited to electronic and hardcopy information used in advertisements, marketing materials, training materials, online videos (e.g. YouTube), social media webpages (e.g. Facebook) and user manuals or guides;
- r. “On-Board Diagnostics” or “OBD” means the strategy for monitoring the functions and performance of the emission control system and all other

systems and components that must be monitored under 13 C.C.R. §§ 1968.1 and 1968.2, for identifying and detecting malfunctions of such monitored systems and components, and for alerting the driver of such potential malfunctions by illuminating the malfunction indicator light (“MIL”), together with all hardware, components, parts, sensors, subassemblies, software, AECDs, and calibrations that collectively constitute the system for implementing this strategy;

- s. “Original Equipment Manufacturer” or “OEM” means the manufacturer responsible for the design and production of a motor vehicle or motor vehicle engine;
- t. “Other Subject Products” means any motor vehicle or motor vehicle engine part or component, including, but not limited to, tunes, software, or programming (and devices on which such tunes, software or other programming are loaded), a principal effect of which is to bypass, defeat, or render inoperative a motor vehicle emission control device or Emission-related Element of Design. Other Subject Products include, but are not limited to, (a) delete tunes, which enable a motor vehicle or motor vehicle engine’s emission control device or Emissions-Related Element of Design to be removed, disabled or bypassed; and (b) calibration tunes, which affect one or more Emissions-related Elements of Design. Other Subject Products do not include products that are covered by a CARB Executive Order or a pending Complete Application for a CARB Executive Order pursuant to Paragraph 16;
- u. “Oxygen sensors” are elements of design in motor vehicles that monitor the oxygen concentration of exhaust gas or stoichiometry of combustion. The sensors measure differences between the amount of oxygen in the exhaust gas and the amount of oxygen in air;
- v. “Paragraph” means a portion of this Decree identified by an Arabic numeral;
- w. “Parties” means the United States and the Defendant;
- x. “Permanently Delete and/or Destroy” means (a) in the case of hardware, to crush the device and all of its parts or components to render them useless; and (b) in the case of software or firmware, to completely and permanently erase all programming and information;
- y. “Section” means a portion of this Decree identified by a roman numeral;

- z. “Selective Catalytic Reduction System” or “SCR” means all hardware, components, parts, sensors, sub-assemblies, software, AECDS, calibrations, and other elements of design that collectively constitute the system for controlling NOx emissions through catalytic reduction using an ammonia-based diesel exhaust fluid (“DEF”) as the reducing agent, including without limitation all hardware, components, parts, sensors, subassemblies, software, AECDS, calibrations, and other Elements of Design relating to (1) the DEF storage tank; (2) the DEF injectors, (3) the dosing control unit, and (4) the SCR catalysts assembly;
- aa. “Subject Product(s)” means, collectively, all “Identified Subject Product(s)” and all “Other Subject Product(s)”;
- bb. “United States” means the United States of America, acting on behalf of EPA;

#### IV. CIVIL PENALTY

8. Defendant shall pay a civil penalty to the United States in the amount of \$1,100,000, together with interest accruing from the Effective Date, at the rate specified in 28 U.S.C. § 1961 as of the Effective Date, in accordance with the following schedule:

- a. The first installment of \$370,000, plus interest, shall be due and payable no later than 30 Days after the Effective Date;
- b. The second installment of \$365,000, plus interest, shall be due and payable no later than one year after the Effective Date; and
- c. The third installment of \$365,000 shall be due and payable no later than two years after the Effective Date.

The amount of the civil penalty is based on the Financial Information, which demonstrates that Defendant has a limited ability to pay a civil penalty.

9. Defendant shall pay the civil penalty due by FedWire Electronic Funds Transfer (“EFT”) to the United States Department of Justice in accordance with written instructions to be

provided to Defendant, following entry of the Consent Decree, by the Financial Litigation Unit (“FLU”) of the United States Attorney’s Office for the District of Utah. The payment instructions provided by the FLU will include a Consolidated Debt Collection System (“CDCS”) number, which Defendant shall use to identify all payments required to be made in accordance with this Consent Decree. The FLU will provide the payment instructions to:

Richard J. Angell  
(Counsel for PDI)  
Parsons, Behle & Latimer  
201 South Main Street, Suite 1800  
Park City, Utah 84111

on behalf of Defendant. Defendant may change the individual to receive payment instructions on its behalf by providing written notice of such change to the United States and EPA in accordance with Section XIII (Notices).

10. At the time of payment, Defendant shall send notice that payment has been made: (i) to EPA via email at [cinwd\\_acctsreceivable@epa.gov](mailto:cinwd_acctsreceivable@epa.gov) or via regular mail at EPA Cincinnati Finance Office, 26 W. Martin Luther King Drive, Cincinnati, Ohio 45268; (ii) to the United States via email or regular mail in accordance with Section XIII (Notices); and (iii) to EPA in accordance with Section XIII. Such notice shall state that the payment is for the civil penalty owed pursuant to the Consent Decree in *United States v. Performance Diesel, Inc.*, and shall reference the civil action number, CDCS Number, and DOJ case number 90-5-2-1-11994.

11. Ability-to-Pay Settlement; Acceleration of Payments. The payment obligations in this Consent Decree are based on Defendant’s limited ability to pay. The Parties stipulate for the limited purposes specified in this Paragraph that but for Defendant’s limited ability to pay,

Defendant could be required to pay all amounts due immediately rather than over time as provided in this Consent Decree.

- a. Acceleration of Payment in the Event of Bankruptcy. In the event that Defendant voluntarily commences, or a third party commences, any case, proceeding, or other action (i) relating to bankruptcy, insolvency, or reorganization under 11 U.S.C. § 101, et seq.; (ii) seeking to have any order for relief of Defendant's debts, or seeking to adjudicate Defendant as bankrupt or insolvent; or (iii) seeking appointment of a receiver, trustee, custodian, or other similar official for Defendant or for all or any substantial part of Defendant's assets, Defendant's payment obligations under Paragraph 8 shall be accelerated and the remaining balance shall be due immediately.
- b. Acceleration of Payment in the Event of Sale or Merger. In the event of any sale, assignment, transfer, or other disposition (including by consolidation, merger, or reorganization) of all or substantially all of the assets of or a controlling interest in Defendant, unless Plaintiff has agreed in writing that Defendant's payment obligations under Paragraph 8 may be assumed in such transaction, Defendant's obligations to make payments under Paragraph 8 shall be accelerated and the remaining balance shall be due within 10 days of such disposition.

12. Defendant shall not deduct any penalties paid under this Decree in accordance with this Section or Section VII (Stipulated Penalties) in calculating its federal income tax.

V. COMPLIANCE REQUIREMENTS

13. Prohibitions Pertaining to All Subject Products. Defendant shall not manufacture, sell, offer to sell, or install any Subject Product. Notwithstanding this requirement, the following exceptions shall apply and are subject to the Reporting Requirements set forth in Section VI, below:

- a. Defendant may manufacture and maintain Subject Products for research and development purposes only. Defendant may also, for the limited purpose of testing directly related to research and development, install Subject Products on a motor vehicle or motor vehicle engine so long as that motor vehicle or motor vehicle engine is not operated on a public road. This subparagraph shall not be construed to permit Defendant to sell or offer to sell any Subject Product, or to transfer the design, technology, manufacturing process, or other intellectual property associated with any Subject Product.
- b. If, following the Effective Date, Congress amends the CAA, or EPA promulgates rules, or an EPA office with authority publishes guidance that expressly pertains to modifications to motor vehicles or motor vehicle engines and/or the sale of parts or software for the purpose of use in competition motorsports, Defendant shall be entitled to manufacture, sell, offer to sell, and install Subject Products consistent with such new statute, rule, or guidance.

14. Destruction of all Subject Products. No later than 30 Days after the Effective Date, Defendant shall Permanently Delete and/or Destroy all, if any, Subject Products in its possession and control, including those Subject Products forfeited by employees and officers of

PDI pursuant to Paragraph 24, except for any Subject Products covered by Paragraph 15. For purposes of this Paragraph, Subject Products shall not include components of electronic OEM software packages, hereinafter referred to as “OEM Software Packages.” PDI shall utilize such OEM Software Packages consistent with CAA requirements. All Subject Products manufactured or maintained pursuant to Paragraph 13(a) that are software items shall be stored in an encrypted format on cloud-based filing systems with restricted and logged access rights. Within 30 Days of the Effective Date, Defendant shall, as to hardware, provide a record of the serial number of each hardware device that was destroyed and the date of such destruction and, as to software, data or other information, provide a description of the software, data, or other information that was permanently erased or deleted and the date of such erasure or deletion.

15. Notwithstanding Paragraph 14, in the event Defendant elects to manufacture and/or maintain Subject Products pursuant to Paragraph 13(a), Defendant must submit, no later than 15 Days after the Effective Date, for EPA’s review, a list of Subject Products, including serial numbers, that Defendant proposes to retain, segregate, preserve, and use for research and development purposes only. Defendant’s submission shall describe the measures Defendant will take to segregate and protect these products and ensure that their use is limited to research and development. The Subject Products identified pursuant to this Paragraph, if any, shall be exempt from the requirements of Paragraph 14 only. Subject to Dispute Resolution (Section IX), EPA may require Defendant to make changes and/or additions to the measures it must take to segregate and protect these products to ensure that their use is limited to research and development.

16. Reasonable Basis for Sale of Products. Except as provided in Paragraph 13(a), Defendant shall demonstrate a reasonable basis that products manufactured, sold, offered for sale, or installed that would otherwise qualify as Subject Products do not adversely affect vehicle emissions and retain the full operation and functionality of the OBD System.

- a. New Tunes or Tuners. For new tunes and tuners, Defendant shall demonstrate a reasonable basis by obtaining a CARB EO prior to manufacture, sale, offering for sale, and installation.
- b. Existing Tunes. For Existing Tunes not covered by a CARB EO, Defendant shall demonstrate a reasonable basis by submitting a Complete Application to CARB that covers the tunes prior to manufacture, sale, offering for sale, and installation.
- c. “Complete Application” means an Exemption Application that includes a complete Form A vehicle/engine list by Test Group, complete device description, complete ECU Modification Info form, installation descriptions, and emission test results sufficient to satisfy CARB’s requirements for obtaining a CARB EO.
- d. An “Existing Tune” is a tuning product introduced into commerce before January 1, 2019.
- e. If CARB denies or Defendant withdraws any application for a CARB EO submitted under this Paragraph to demonstrate a reasonable basis for an Existing Tune, Defendant shall cease selling that Existing Tune immediately and must take reasonable efforts to remove that product from commerce. For purposes of this sub-paragraph, denial shall mean a letter from CARB officially denying and terminating an EO application.

f. Defendant shall diligently pursue the CARB EO application and provide any additional information required by CARB. For a given Existing Tune, no reasonable basis exists due to submission of an application to CARB if the application is still pending two or more years after submittal or CARB has not acted on the application because Defendant has failed to provide information. EPA may, in its unreviewable discretion, extend the deadline under this sub-Paragraph upon written request of the Defendant.

17. Prohibition on Technical Support for all Subject Products. Defendant shall not provide any technical support or other information (including Marketing Materials) pertaining to the installation, manufacture, sale, use, or repair of any Subject Product on a motor vehicle or motor vehicle engine, other than as provided for in Paragraph 13(b).

18. Instruction to Authorized Dealers to Refuse Technical Support. No later than 30 Days after the Effective Date, Defendant shall notify all Authorized Dealers that it is no longer supplying technical support pertaining to the installation, manufacture, sale, use, or repair of any Subject Product on a motor vehicle or motor vehicle engine. Defendant shall instruct all Authorized Dealers to refuse to supply any technical support or other information (including Marketing Materials) provided by or related to PDI pertaining to the installation, manufacture, sale, use, or repair of any Subject Product on a motor vehicle or motor vehicle engine.

19. Notwithstanding the requirements of Paragraphs 16 and 18, Defendant and its Authorized Dealers may assist customers in removing the Subject Products from motor vehicles or motor vehicle engines on which they were installed and returning such vehicles to the OEM settings. Nothing in this Decree prevents Defendant or its Authorized Dealers from providing

technical support to customers that does not involve the installation, manufacture, sale, use, or repair of Subject Products.

20. Prohibition on Transfer of Intellectual Property. Defendant shall not offer for sale, sell, convey, or otherwise transfer in any way the design, source code, technology, manufacturing process, or other intellectual property associated with any Subject Product, except (a) as part of an application for a CARB EO or (b) in connection with a sale of the Defendant's entire business in accordance with Paragraph 4.

21. Review and Revision of Marketing Materials. No later than 30 Days after the Effective Date, Defendant shall revise all Marketing Materials to ensure that such materials do not include any information, including but not limited to instructions or demonstrations, that pertains or relates in any way to deleting, bypassing, defeating, or rendering inoperative any emission control device or Emissions-related Element of Design, except for products that are covered by a CARB EO.

22. Notice to all Identified Subject Product Customers. No later than 30 Days after the Effective Date, Defendant shall transmit a notice that includes the language specified in Appendix B to (a) each Authorized Dealer and (b) each end-use customer to which an Identified Subject Product was sold on or after November 18, 2012, and for whom PDI has a mailing address. With respect to end-user customers, PDI shall transmit the notice via a postcard-type mailer (approximate dimensions 6 x 9 inches) with sufficient postage to the customer's last known address as identified in PDI's records. PDI shall provide a mock-up proof of the notice to EPA before sending to customers for EPA review and comment.

23. Notice to Employees. No later than 30 Days after the Effective Date, Defendant shall post a written notice of applicable Clean Air Act prohibitions incorporating language contained in Appendix C to this Decree. This notice must be posted in a conspicuous location where PDI officers and employees will regularly encounter it.

24. Requirement of Employees to Forfeit Subject Products. No later than 30 Days after the Effective Date, Defendant shall require each officer and employee of the Defendant to forfeit any Subject Product obtained from Defendant in his or her possession, or installed on any motor vehicle owned or operated by him or her or under his or her control, by returning such Subject Product to an individual designated by Defendant for such purpose.

25. Training of Employees. No later than December 31, 2019, and continuing on an annual basis thereafter, Defendant shall conduct a Clean Air Act Compliance Training Program for all its officers, employees, contractors and consultants (hereinafter, “trainees”). The Training Program shall:

- a. Include detailed information regarding:
  - i. The Compliance Requirements set forth in Section V of this Consent Decree;
  - ii. The acts prohibited by Section 203(a)(3) of the Act, 42 U.S.C. § 7522(a)(3), including the statutory language of Section 203(a)(3);
  - iii. The categories of potentially liable persons under the Act, including individuals; and
  - iv. The relevant maximum civil penalties for each violation of Section

203(a)(3)(A) and 203(a)(3)(B), as adjusted for inflation in  
40 C.F.R. Part 19.

- b. Be conducted in person;
- c. Provide the trainees with a written summary of all content, including the information required in Paragraph 25(a); and
- d. Require all employees to acknowledge, in writing or electronic signature, that they participated in the training session and received a written summary of all content as required in Paragraph 25(c). Alternatively, Defendant may certify, in accordance with Paragraph 30, that all employees participated in the training session and received a written summary of all content as required in Paragraph 25(c).

26. Defendant shall not imply in any way that, as a result of this Consent Decree, its products are covered by a compliance determination (or similar designation) from EPA.

#### VI. REPORTING REQUIREMENTS

27. By January 31<sup>st</sup> and July 31<sup>st</sup> of each year after the Effective Date, and continuing on a semi-annual basis until termination of this Decree, and in addition to any other express reporting requirements of this Decree, Defendant shall submit a semi-annual progress report for the preceding six months. The semi-annual progress report shall include, but is not limited to, the following:

- a. A statement regarding the status of the payment of (i) the Civil Penalty and associated Interest pursuant to Paragraph 8 (unless previously reported as paid in full) and (ii) any Stipulated Penalties owing pursuant to Section VII;

- b. A complete copy of any CARB EO application submitted during the reporting period, including all emission test data and any CARB EO application changes, denials, or withdrawals;
- c. A copy of any CARB EO obtained during the reporting period;
- d. For any product subject to Paragraph 13(a) that is manufactured or installed during the reporting period, (i) the product number and name (if any), (ii) the volume manufactured and/or installed, (iii) the Vehicle Identification Number (“VIN”) of each motor vehicle and/or the serial number of each motor vehicle engine such product is installed on, and (iv) a narrative description of how the product affects the motor vehicle or motor vehicle engine, including what engine parameters or other calibrations are affected and how the product affects the On-Board Diagnostic system;
- e. For any product authorized according to Paragraph 13(b) that is manufactured, sold, offered for sale, or installed during the reporting period, (i) the relevant new regulation or guidance; (ii) the product name, type, and manufacture volume and sales volume; and (iii) a narrative description of how the product affects the motor vehicle or motor vehicle engine, including what engine parameters or other calibrations are affected and how the product affects the On-Board Diagnostic system;
- f. As to Subject Products that were deleted or destroyed pursuant to Paragraph 14 during the reporting period, a list of all hardware products, including product names, type, serial numbers, and date of destruction; and a list of all software,

- data, or other information that was destroyed or deleted, including the type of software, data or other information and the date of destruction or deletion;
- g. A list of all Authorized Dealers to whom Defendant provided instructions pursuant to Paragraph 18 during the reporting period and a copy of any such instructions provided;
  - h. A list of all Authorized Dealers and end-use customers to whom Defendant provided a notification pursuant to Paragraph 22 during the reporting period and a copy of any such notification provided;
  - i. A copy of the written notice required to be posted pursuant to Paragraph 23 (unless already provided in an earlier report);
  - j. A list of all products forfeited in accordance with Paragraph 24 during the reporting period and documentation of the destruction or deletion of such products as set forth in Paragraph 27(f);
  - k. A list of all officers, employees, contractors and consultants who participated in the Clean Air Act Compliance Training Program during the reporting period, pursuant to Paragraph 25 and a copy of the employee acknowledgment form; and
  - l. A description of any noncompliance with the requirements of this Consent Decree (including all Appendices), including an explanation of the violation's likely cause and of the specific remedial steps taken, or to be taken, to resolve and/or minimize such violation, and the specific steps to be taken to prevent such further violations.

28. If Defendant violates, or has reason to believe that it may violate, any requirement of this Consent Decree, Defendant shall notify the United States of such violation and its likely duration, in writing, within 10 business Days of the Day Defendant first became aware of the violation, with an explanation of the violation's likely cause and of the specific remedial steps taken, or to be taken, to prevent or minimize such violation. If the cause of a violation cannot be fully explained at the time the report is due, Defendant shall so state in the report along with the reason(s) why the violation cannot be fully explained. Defendant shall investigate the cause of the violation and shall then submit an amendment to the report, including a full explanation of the cause of the violation, within 30 Days of the Day Defendant became aware of the cause of the violation. Nothing in this Paragraph relieves Defendant of its obligation to provide the notice required by Section VIII (Force Majeure).

29. All reports shall be submitted to the persons designated in Section XIII (Notices) and shall include the civil action number of this case and the DOJ case number, 90-5-2-1-11994.

30. Each report submitted by Defendant under this Section shall be signed by an official of the submitting party and include the following certification:

I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I have no personal knowledge that the information submitted is other than true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

31. This certification requirement does not apply to emergency or similar notifications where compliance would be impractical.

32. The reporting requirements of this Consent Decree do not relieve Defendant of any reporting obligations required by the Act or implementing regulations, or by any other federal, state, or local law, regulation, permit, or other requirement.

33. Any information provided in accordance with this Consent Decree may be used by the United States in any proceeding to enforce the provisions of this Consent Decree and as otherwise permitted by law.

#### VII. STIPULATED PENALTIES

34. Defendant shall be liable for stipulated penalties to the United States for violations of this Consent Decree as specified below, unless excused under Section VIII (Force Majeure), or reduced or waived by the United States pursuant to Paragraph 40. A violation includes failing to perform any obligation required by the terms of this Decree, including any work plan or schedule approved under this Decree, according to all applicable requirements of this Decree and within the specified time schedules established by or approved under this Decree.

a. Compliance Requirements.

Consent Decree Violation	Stipulated Penalty
Manufacture, sell, offer to sell, or install any Subject Product, in violation of the requirements of Paragraph 13	For the first 100 Subject Products, \$2,500 per Subject Product manufactured, sold, or installed. For each Subject Product thereafter, \$4,500 per Subject Product manufactured, sold, or installed.
Failure to comply with the requirements of Paragraph 14 (Destruction of All Subject Products)	\$350 per Day for the first 30 days of noncompliance; \$1,500 per Day thereafter.
Failure to comply with the requirements of Paragraph 16 (Prohibition on Technical	\$2,500 per violation.

Support for all Subject Products)	
Failure to comply with the requirements of Paragraph 18 (Instruction to Authorized Dealers to Refuse Technical Service)	\$350 per Day for the first 30 days of noncompliance; \$1,500 per Day thereafter.
Failure to comply with the requirements of Paragraph 20 (Prohibition on Transfer of Intellectual Property)	\$500,000 or two times the gross amount received from the transfer, whichever is greater.
Failure to comply with the requirements of Paragraph 21 (Review and Revision of Marketing Materials)	\$350 per Day for the first 30 days of noncompliance; \$1,500 per Day thereafter.
Failure to comply with the requirements of Paragraph 22 (Notice to all Identified Subject Product Customers)	\$350 per Day for each day of noncompliance.
Failure to comply with the requirements of Paragraph 23 (Notice to Employees)	\$350 per Day for the first 30 days of noncompliance; \$1,500 per Day thereafter.
Failure to comply with the requirements of Paragraph 24 (Requirement of Employees to Forfeit Subject Products)	\$350 per Day for the first 30 days of noncompliance; \$1,500 per Day thereafter.
Failure to comply with the requirements of Paragraph 25 (Training of Employees)	\$500 per person.

b. Periodic Reports.

Consent Decree Violation	Stipulated Penalty
Failure to submit a Semi-Annual Report or failure to submit a complete Semi-Annual Report as required by Paragraph 27	\$350 per Day for the first 30 days of noncompliance; \$1,500 per Day thereafter.

35. Late Payment of Civil Penalty. If Defendant fails to pay any portion of the civil penalty required to be paid under Section IV (Civil Penalty) when due, Defendant shall pay a stipulated penalty of \$1,000 per Day for each Day that the payment is late.

36. Stipulated penalties under this Section shall begin to accrue on the Day after performance is due or on the day a violation occurs, whichever is applicable, and shall continue to accrue until performance is satisfactorily completed or until the violation ceases. Stipulated penalties shall accrue simultaneously for separate violations of this Consent Decree.

37. Defendant shall pay stipulated penalties to the United States within 30 Days of a written demand by the United States, unless Defendant invokes the dispute resolution procedures under Section IX (Dispute Resolution) within the 30-Day period.

38. Stipulated penalties shall continue to accrue as provided in Paragraph 36 during any Dispute Resolution, but need not be paid until the following:

- a. If the dispute is resolved by agreement of the Parties or by a decision of EPA that is not appealed to the Court, Defendant shall pay accrued penalties determined to be owing, together with interest, to the United States within 30 Days of the effective date of the agreement or the receipt of EPA's decision or order.
- b. If the dispute is appealed to the Court and the United States prevails in whole or in part, Defendant shall pay all accrued penalties determined by the Court to be owing, together with interest, within 60 Days of receiving the Court's decision or order, except as provided in subparagraph c, below.
- c. If any Party appeals the District Court's decision, Defendant shall pay all accrued penalties determined to be owing, together with interest, within 15 Days of

receiving the final appellate court decision.

39. If Defendant fails to pay stipulated penalties within 30 Days after receiving the United States' written demand, Defendant shall pay interest on unpaid stipulated penalties, as provided for in 28 U.S.C. § 1961, as follows: (a) if Defendant has timely invoked dispute resolution such that the obligation to pay stipulated penalties has been stayed pending the outcome of dispute resolution, interest accrues from the date stipulated penalties are due pursuant to Paragraph 38 until the date of payment; and (b) if Defendant does not timely invoke dispute resolution, interest accrues from Defendant's receipt of the written demand pursuant to Paragraph 37 until the date of payment. Nothing in this Paragraph limits the United States from seeking any remedy otherwise provided by law for Defendant's failure to pay any stipulated penalties or interest.

40. The United States may, in the unreviewable exercise of its discretion, reduce or waive stipulated penalties otherwise due it under this Consent Decree.

41. Defendant shall pay stipulated penalties owing to the United States in the manner set forth and with the confirmation notices required by Paragraphs 9 and 10, except that the transmittal letter shall state that the payment is for stipulated penalties and shall state for which violation(s) the penalties are being paid.

42. The payment of stipulated penalties and/or interest pursuant to this Section shall not alter in any way Defendant's obligation to complete the performance of the requirements of this Consent Decree.

43. Stipulated penalties are not the United States' exclusive remedy for violations of this Consent Decree. Subject to the provisions of Section XI (Effect of Settlement/Reservation

of Rights), the stipulated penalties provided for in this Consent Decree shall be in addition to any other rights, remedies, or sanctions available to the United States for Defendant's violation of this Decree or applicable law. Where a violation of this Decree is also a violation of relevant statutory or regulatory requirements, Defendant shall be allowed a credit, for any stipulated penalties paid, against any statutory penalties imposed for such violation under the applicable federal requirement.

#### VIII. FORCE MAJEURE

44. "Force majeure," for purposes of this Consent Decree, is defined as any event arising from causes beyond the control of Defendant, of any entity controlled by Defendant, or of Defendant's contractors, which delays or prevents the performance of any obligation under this Consent Decree despite Defendant's best efforts to fulfill the obligation. The requirement that Defendant exercise "best efforts to fulfill the obligation" includes using best efforts to anticipate any potential force majeure event and best efforts to address the effects of any potential force majeure event (a) as it is occurring and (b) following the potential force majeure, such that the delay and any adverse effects of the delay are minimized. "Force Majeure" does not include Defendant's financial inability to perform any obligation under this Consent Decree.

45. If any event occurs or has occurred that may delay the performance of any obligation under this Consent Decree, whether or not caused by a force majeure event, Defendant shall provide notice by electronic transmission to EPA, within 72 hours of when Defendant first knew that the event might cause a delay to the addresses provided in Section XIII (Notices). Within seven Days thereafter, Defendant shall provide in writing to EPA 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 any measures to be taken to prevent or mitigate the delay or the effect of the delay; Defendant's rationale for attributing such delay to a force majeure event if it intends to assert such a claim; and a statement as to whether, in the opinion of Defendant, such event may cause or contribute to an endangerment to public health, welfare, or the environment. Defendant shall include with any notice all available documentation supporting the claim that the delay was attributable to a force majeure. Failure to comply with the above requirements shall preclude Defendant 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. Defendant shall be deemed to know of any circumstance of which Defendant, any entity controlled by Defendant, or Defendant's contractors knew or should have known.

46. If EPA agrees that the delay or anticipated delay is attributable to a force majeure event, the time for performance of the obligations under this Consent Decree that are affected by the force majeure event will be extended by EPA 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. EPA will notify Defendant in writing of the length of the extension, if any, for performance of the obligations affected by the force majeure event.

47. If EPA does not agree that the delay or anticipated delay has been or will be caused by a force majeure event, EPA will notify Defendant in writing of its decision.

48. If Defendant elects to invoke the dispute resolution procedures set forth in Section IX (Dispute Resolution), it shall do so no later than 15 Days after receipt of EPA's

notice. In any such proceeding, Defendant shall have the burden of demonstrating by a preponderance of the evidence that the delay or anticipated delay has been or will be caused by a force majeure event, that the duration of the delay or the extension sought was or will be warranted under the circumstances, that best efforts were exercised to avoid and mitigate the effects of the delay, and that Defendant complied with the requirements of Paragraphs 44 and 45. If Defendant carries this burden, the delay at issue shall be deemed not to be a violation by Defendant of the affected obligation of this Consent Decree identified to EPA and the Court.

#### IX. DISPUTE RESOLUTION

49. Unless otherwise expressly provided for in this Consent Decree, the dispute resolution procedures of this Section shall be the exclusive mechanism to resolve disputes arising under or with respect to this Consent Decree. Defendant's failure to seek resolution of a dispute under this Section shall preclude Defendant from raising any such issue as a defense to an action by the United States to enforce any obligation of Defendant arising under this Decree.

50. Informal Dispute Resolution. Any dispute subject to Dispute Resolution under this Consent Decree shall first be the subject of informal negotiations. The dispute shall be considered to have arisen when Defendant sends the United States a written Notice of Dispute. Such Notice of Dispute shall state clearly the matter in dispute. The period of informal negotiations shall not exceed 20 Days from the date the dispute arises, unless that period is modified by written agreement. If the Parties cannot resolve a dispute by informal negotiations, then the position advanced by the United States shall be considered binding unless, within 20 Days after the conclusion of the informal negotiation period, Defendant invokes formal dispute resolution procedures as set forth below.

51. Formal Dispute Resolution. Defendant shall invoke formal dispute resolution procedures, within the time period provided in the preceding Paragraph, by serving on the United States a written Statement of Position regarding the matter in dispute. The Statement of Position shall include, but need not be limited to, any factual data, analysis, or opinion supporting Defendant's position and any supporting documentation relied upon by Defendant.

52. The United States shall serve its Statement of Position within 45 Days of receipt of Defendant's Statement of Position. The United States' Statement of Position shall include, but need not be limited to, any factual data, analysis, or opinion supporting that position and any supporting documentation relied upon by the United States. The United States' Statement of Position shall be binding on Defendant, unless Defendant files a motion for judicial review of the dispute in accordance with the following Paragraph.

53. Defendant may seek judicial review of the dispute by filing with the Court and serving on the United States, in accordance with Section XIII (Notices), a motion requesting judicial resolution of the dispute. The motion must be filed within 30 Days of receipt of the United States' Statement of Position under the preceding Paragraph. The motion shall contain a written statement of Defendant's position on the matter in dispute, including any supporting factual data, analysis, opinion, or documentation, and shall set forth the relief requested and any schedule within which the dispute must be resolved for orderly implementation of the Consent Decree.

54. The United States shall respond to Defendant's motion within the time period allowed by the Local Rules of this Court. Defendant may file a reply memorandum, to the extent permitted by the Local Rules.

55. Standard of Review. Except as otherwise provided in this Consent Decree, in any dispute brought under Paragraph 51, Defendant shall bear the burden of demonstrating that its position complies with this Consent Decree, and that Defendant is entitled to relief under applicable principles of law. The United States reserves the right to argue that its position is reviewable only on the administrative record and must be upheld unless arbitrary and capricious.

56. The invocation of dispute resolution procedures under this Section shall not, by itself, extend, postpone, or affect in any way any obligation of Defendant under this Consent Decree, unless and until final resolution of the dispute so provides. Stipulated penalties with respect to the disputed matter shall continue to accrue from the first Day of noncompliance, but payment shall be stayed pending resolution of the dispute as provided in Paragraph 38. If Defendant does not prevail on the disputed issue, stipulated penalties shall be assessed and paid as provided in Section VII (Stipulated Penalties).

#### X. INFORMATION COLLECTION AND RETENTION

57. The United States and its representatives, including attorneys, contractors, and consultants, shall have the right of entry into any of Defendant's business facilities, at all reasonable times, upon presentation of credentials, to:

- a. monitor the progress of activities required under this Consent Decree;
- b. verify any data or information submitted to the United States in accordance with the terms of this Consent Decree;
- c. inspect records and any product(s) regulated under Title II of the Act or the regulations promulgated thereunder;
- d. obtain documentary evidence, including photographs, software, or other data or

information; and

- e. assess Defendant's compliance with this Consent Decree.

58. Until two years after the termination of this Consent Decree, unless otherwise specified herein, Defendant shall retain, and shall instruct its contractors and agents to preserve, all non-identical copies of all documents, records, or other information (including documents, records, or other information in electronic form) in its or its contractors' or agents' possession or control, or that come into its or its contractors' or agents' possession or control, and that relate in any manner to Defendant's performance of its obligations under this Consent Decree. This information-retention requirement shall apply regardless of any contrary corporate or institutional policies or procedures. At any time during this information-retention period, upon request by the United States, Defendant shall provide copies of any documents, records, or other information required to be maintained under this Paragraph.

59. At the conclusion of the information-retention period provided in the preceding Paragraph, Defendant shall notify the United States at least 90 Days prior to the destruction of any documents, records, or other information subject to the requirements of the preceding Paragraph and, upon request by the United States, Defendant shall deliver any such documents, records, or other information to EPA. Defendant may assert that certain documents, records, or other information is privileged under the attorney-client privilege or any other privilege recognized by federal law. If Defendant asserts such a privilege, it shall provide the following: (a) the title of the document, record, or information; (b) the date of the document, record, or information; (c) the name and title of each author of the document, record, or information; (d) the name and title of each addressee and recipient; (e) a description of the subject of the document,

record, or information; and (f) the privilege asserted by Defendant. However, no documents, records, or other information created or generated in accordance with the requirements of this Consent Decree shall be withheld on grounds of privilege.

60. Defendant may also assert that information required to be provided under this Section is protected as Confidential Business Information (“CBI”) under 40 C.F.R. Part 2. As to any information that Defendant seeks to protect as CBI, Defendant shall follow the procedures set forth in 40 C.F.R. Part 2.

61. This Consent Decree in no way limits or affects any right of entry and inspection, or any right to obtain information, held by the United States pursuant to applicable federal or state laws, regulations, or permits, nor does it limit or affect any duty or obligation of Defendant to maintain documents, records, or other information imposed by applicable federal or state laws, regulations, or permits.

#### XI. EFFECT OF SETTLEMENT/RESERVATION OF RIGHTS

62. This Consent Decree resolves the civil claims of the United States for the violations alleged in the Complaint filed in this action through the date of lodging.

63. The United States’ agreement to the amount of the civil penalty required by Paragraph 8 is based on the Financial Information. PDI certifies that the Financial Information is true, accurate, and complete and that there has been no material change in PDI’s financial condition between the time the Financial Information was submitted and the date of PDI’s execution of this Consent Decree. Notwithstanding any other provision of this Consent Decree, the United States reserves the right to reinstitute or reopen this action, or to commence a new action seeking relief other than as provided in this Consent Decree, if PDI’s Financial

Information is false, or in any material respect, inaccurate or incomplete. This right is in addition to any other rights and causes of action, civil or criminal, that the United States may have under law or equity in such event.

64. The United States reserves all legal and equitable remedies available to enforce the provisions of this Consent Decree. This Consent Decree does not limit the rights of the United States to obtain penalties or injunctive relief under the Act or implementing regulations, or under other federal laws, regulations, or permit conditions, except as expressly specified in Paragraphs 62 and 63. The United States further reserves all legal and equitable remedies to address any imminent and substantial endangerment to the public health or welfare or the environment arising as a result of Defendant's business or any of Defendant's products, whether related to the violations addressed in this Consent Decree or otherwise.

65. In any subsequent administrative or judicial proceeding initiated by the United States for injunctive relief, civil penalties, or other appropriate relief relating to the Defendant's operations, Defendant shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the United States in the subsequent proceeding were or should have been brought in the instant case, except with respect to claims that have been specifically resolved under Paragraph 62.

66. This Consent Decree is not a permit, or a modification of any permit, under any federal, State, or local laws or regulations. Defendant is responsible for achieving and maintaining complete compliance with all applicable federal, State, and local laws, regulations, and permits; and Defendant's compliance with this Consent Decree shall be no defense to any

action commenced under any such laws, regulations, or permits, except as set forth herein. The United States does not, by its consent to the entry of this Consent Decree, warrant or aver in any manner that Defendant's compliance with any aspect of this Consent Decree will result in compliance with provisions of the Act, or with any other provisions of federal, State, or local laws, regulations, or permits.

67. This Consent Decree does not limit or affect the rights of Defendant or of the United States against any third parties, not party to this Consent Decree, nor does it limit the rights of third parties, not party to this Consent Decree, against Defendant, except as otherwise provided by law.

68. This Consent Decree shall not be construed to create rights in, or grant any cause of action to, any third party not party to this Consent Decree.

## XII. COSTS

69. The Parties shall bear their own costs of this action, including attorneys' fees, except that the United States shall be entitled to collect the costs (including attorneys' fees) incurred in any action necessary to collect any portion of the civil penalty or any stipulated penalties due but not paid by Defendant.

## XIII. NOTICES

70. Unless otherwise specified in this Decree, whenever notifications, submissions, statements of position, or communications are required by this Consent Decree (referred to as "notices" in this section), they shall be made electronically or as described below, unless such notices are unable to be uploaded to the CDX electronic system (in the case of EPA) or transmitted by email in the case of any other party. For all notices to EPA, Defendant shall register for the CDX electronic system and upload such notices at <https://cdx.gov/epa-home.asp>.

Any notice that cannot be uploaded or electronically transmitted via email shall be provided in writing to the addresses below:

As to the United States by email: [eescdcopy.enrd@usdoj.gov](mailto:eescdcopy.enrd@usdoj.gov)  
Re: DJ # 90-5-2-1-11994

As to the United States by mail: EES Case Management Unit  
Environment and Natural Resources Division  
U.S. Department of Justice  
P.O. Box 7611  
Washington, D.C. 20044-7611  
Re: DJ # 90-5-2-1-11994

As to EPA: Director, Air Enforcement Division  
Office of Civil Enforcement  
US EPA Headquarters, MC 2242A  
1200 Pennsylvania Avenue, NW  
Washington, DC 20460

As to Defendant: Jerad Wittwer, President  
Performance Diesel, Inc.  
687 N. Industrial Road  
St. George, UT 84770

Richard J. Angell  
Jeffrey C. Corey  
Parsons Behle & Latimer  
201 South Main Street, Suite 1800  
Salt Lake City, UT 84111  
[rangell@parsonsbehle.com](mailto:rangell@parsonsbehle.com)  
[jcorey@parsonsbehle.com](mailto:jcorey@parsonsbehle.com)

71. Any Party may, by written notice to the other Parties, change its designated notice recipient or notice address provided above.

72. Notices submitted under this Section shall be deemed submitted upon mailing, unless otherwise provided in this Consent Decree or by mutual agreement of the Parties in writing.

#### XIV. EFFECTIVE DATE

73. The Effective Date of this Consent Decree shall be the date upon which this Consent Decree is entered by the Court or a motion to enter the Consent Decree is granted, whichever occurs first, as recorded on the Court's docket.

#### XV. RETENTION OF JURISDICTION

74. The Court shall retain jurisdiction over this case until termination of this Consent Decree, for the purpose of resolving disputes arising under this Decree or entering orders modifying this Decree, under Sections IX (Dispute Resolution) and XVI (Modification), or effectuating or enforcing compliance with the terms of this Decree.

#### XVI. MODIFICATION

75. The terms of this Consent Decree, including any attached appendices, may be modified only by a subsequent written agreement signed by all the Parties. Where the modification constitutes a material change to this Decree, it shall be effective only upon approval by the Court.

76. Any disputes concerning modification of this Decree shall be resolved under Section IX (Dispute Resolution), provided, however, that, instead of the burden of proof provided by Paragraph 55, the Party seeking the modification bears the burden of demonstrating that it is entitled to the requested modification in accordance with Federal Rule of Civil Procedure 60(b).

#### XVII. TERMINATION

77. After Defendant has: 1) completed the requirements of Paragraphs 14, 18, 21, 22, 23, and 24; 2) complied with Paragraphs 13, 16, 20, and 25 for at least four years after the Effective Date; 4) paid the civil penalty required by Section IV, including any accrued interest;

and 5) paid any accrued stipulated penalties not waived or reduced by the United States pursuant to Paragraph 40, Defendant may serve upon the United States a Request for Termination, stating that Defendant has satisfied these requirements, together with all necessary supporting documentation.

78. Following receipt by the United States of Defendant's Request for Termination, the Parties shall confer informally concerning the Request and any disagreement that the Parties may have as to whether Defendant has satisfactorily complied with the requirements for termination of this Consent Decree. If the United States agrees that the Decree may be terminated, the Parties shall submit, for the Court's approval, a joint stipulation terminating the Decree.

79. If the United States does not agree that the Decree may be terminated, Defendant may invoke Dispute Resolution under Section IX of this Decree. However, Defendant shall not seek Dispute Resolution of any dispute regarding termination until 90 Days after service of its Request for Termination.

#### XVIII. PUBLIC PARTICIPATION

80. This Consent Decree shall be lodged with the Court for a period of not less than 30 Days for public notice and comment in accordance with 28 C.F.R. § 50.7. The United States reserves the right to withdraw or withhold its consent if the comments regarding the Consent Decree disclose facts or considerations indicating that the Consent Decree is inappropriate, improper, or inadequate. Defendant consents to entry of this Consent Decree without further notice and agrees not to withdraw from or oppose entry of this Consent Decree by the Court or to

challenge any provision of the Decree, unless the United States has notified Defendant in writing that it no longer supports entry of the Decree.

#### XIX. SIGNATORIES/SERVICE

81. Each undersigned representative of Defendant and the Assistant Attorney General for the Environment and Natural Resources Division of the Department of Justice or his designee certifies 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 to this document.

82. This Consent Decree may be signed in counterparts, and its validity shall not be challenged on that basis. Defendant agrees to accept service of process by mail with respect to all matters arising under or relating to this Consent Decree and to waive the formal service requirements set forth in Rules 4 and 5 of the Federal Rules of Civil Procedure and any applicable Local Rules of this Court including, but not limited to, service of a summons. Defendant need not file an answer to the complaint in this action unless or until the Court expressly declines to enter this Consent Decree.

#### XX. INTEGRATION

83. This Consent Decree constitutes the final, complete, and exclusive agreement and understanding among the Parties with respect to the settlement embodied in the Decree and supersedes all prior agreements and understandings, whether oral or written, concerning the settlement embodied herein. Other than the deliverables that are subsequently submitted pursuant to this Consent Decree, no other document, nor any representation, inducement, agreement, understandings, or promise constitutes any part of this Decree or the settlement it represents.

XXI. FINAL JUDGMENT

84. Upon approval and entry of this Consent Decree by the Court, this Consent Decree shall constitute a final judgment of the Court as to the United States and Defendant.

XXII. 26 U.S.C. SECTION 162(f)(2)(A)(ii) IDENTIFICATION

85. For purposes of the identification requirement of Section 162(f)(2)(A)(ii) of the Internal Revenue Code, 26 U.S.C. § 162(f)(2)(A)(ii), performance of Section II (Applicability), Paragraph 5; Section V (Compliance Requirements), Paragraphs 14 – 16, 18 – 19, 21 – 25; Section VI (Reporting Requirements), Paragraphs 27, 28, 30; and Section X (Information Collection and Retention), Paragraphs 57 –59, is restitution or required to come into compliance with law.

XXIII. APPENDICES

86. The following Appendices are attached to and part of this Consent Decree:

“Appendix A” is a list of Identified Subject Products.

“Appendix B” is language to be included in the notice to customers referenced in Paragraph 22.

“Appendix C” is language to be included in the notice to employees referenced in Paragraph 23.

Dated and entered this \_\_\_\_ day of \_\_\_\_\_, 2019

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UNITED STATES DISTRICT JUDGE

We hereby consent to the entry of the Consent Decree in the matter of United States v. Performance Diesel, Inc., subject to public notice and comment.

FOR THE UNITED STATES OF AMERICA:

JONATHAN D. BRIGHTBILL  
Principal Deputy Assistant Attorney General  
Environment and Natural Resources Division  
U.S. Department of Justice

9/12/19  
Date



MARK C. ELMER  
Senior Counsel  
Environmental Enforcement Section  
Environment and Natural Resources Division  
U.S. Department of Justice  
Washington, DC 20044-7611

We hereby consent to the entry of the Consent Decree in the matter of United States v. Performance Diesel, Inc., subject to public notice and comment.

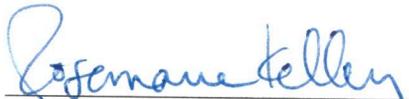
FOR THE U.S. ENVIRONMENTAL PROTECTION AGENCY:

Date: 9/6/19



SUSAN PARKER BODINE  
Assistant Administrator  
PATRICK D. TRAYLOR  
Deputy Assistant Administrator  
Office of Enforcement and Compliance Assurance  
U.S. Environmental Protection Agency  
Washington, DC 20460

Date: 8/30/2019



ROSEMARIE A. KELLEY  
Director, Office of Civil Enforcement  
Office of Enforcement and Compliance Assurance  
United States Environmental Protection Agency  
Washington, DC 20460

Date: 8/29/2019

  
for PHILLIP A. BROOKS

Director, Air Enforcement Division  
EVAN BELSER  
Associate Director (Acting), Air Enforcement Division  
Office of Civil Enforcement  
Office of Enforcement and Compliance Assurance  
United States Environmental Protection Agency  
Washington, DC 20460

Date: 8/29/2019

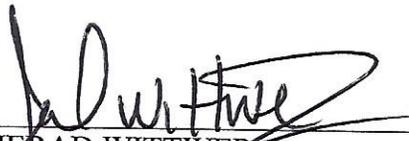


BRIANNA IDDINGS  
Air Enforcement Division  
Office of Civil Enforcement  
Office of Enforcement and Compliance Assurance  
United States Environmental Protection Agency  
Washington, DC 20460

We hereby consent to the entry of the Consent Decree in the matter of United States v. Performance Diesel, Inc.

FOR DEFENDANT PERFORMANCE DIESEL, INC.

Aug 3, 2019  
Date:

  
\_\_\_\_\_  
JERAD WITTWER  
President, Performance Diesel, Inc.

**APPENDIX A**<sup>1</sup>  
*Identified Subject Projects*

PDI Part No.	Engine Make	Model Year(s)
713001	Paccar	2010-2012
713001-1	Paccar	2010-2012
713101	Paccar	2013-2017
713101-1	Paccar	2013-2017
714001 <sup>2</sup>	Detroit Diesel	1997-2007
714001-1	Detroit Diesel	2004-2007
714001-2	Detroit Diesel	2004-2007
714002	Detroit Diesel	1993-2002
714003	Detroit Diesel	1993-2002
714101	Detroit Diesel	2003
714102	Detroit Diesel	2003
714103	Detroit Diesel	2003
714201	Detroit Diesel	2008-2010
714201-1	Detroit Diesel	2008-2010

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<sup>1</sup> The PDI products listed herein were designed and manufactured for use on Caterpillar, Cummins, Detroit Diesel, International, and Paccar heavy duty diesel engines model years 1993-2020.

<sup>2</sup> Part number 714001 is an Identified Subject Product except for use on the engines listed in Exhibit A of CARB EO D-773-5.

PDI Part No.	Engine Make	Model Year(s)
714201-2	Detroit Diesel	2008-2010
714501	Detroit Diesel	2003-2007
714501-1	Detroit Diesel	2003-2007
714501-2	Detroit Diesel	2003-2007
714601	Detroit Diesel	2010-2020
714601-1	Detroit Diesel	2010-2016
714601-2	Detroit Diesel	2010-2016
715001 <sup>3</sup>	Cummins	2003-2017
715001-1	Cummins	2003-2007
715001-2	Cummins	2003-2007
715001-3	Cummins	2008-2010
715001-4	Cummins	2008-2010
715001-5	Cummins	2011-2013
715001-6	Cummins	2011-2013
715002	Cummins	2003-2017
715002-1	Cummins	2003-2007
715002-2	Cummins	2003-2007

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<sup>3</sup> Part number 715001 is an Identified Subject Product except for use on the engines listed in Exhibit A of CARB EO D-773-3, EO D-773-4, and EO D-773-5.

PDI Part No.	Engine Make	Model Year(s)
715002-3	Cummins	2008-2010
715002-4	Cummins	2008-2010
715101	Cummins	2003-2010
715101-1	Cummins	2003-2007
715101-2	Cummins	2003-2007
715101-3	Cummins	2008-2010
715101-4	Cummins	2008-2010
716001 <sup>4</sup>	Caterpillar	1994-2009
7161201 <sup>5</sup>	Caterpillar	2005-2009
7161201-1	Caterpillar	2008-2009
7161201-2	Caterpillar	2008-2009
7161201-3	Caterpillar	2008-2009
7161201-4	Caterpillar	2005-2007
7161202	Caterpillar	2005-2009
7161202-1	Caterpillar	2008-2009
7161202-2	Caterpillar	2008-2009

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<sup>4</sup> Part number 716001 is an Identified Subject Product except for use on the engines listed in Exhibit A of CARB EO D-773-1, EO D-773-4 and EO D-773-5.

<sup>5</sup> Part number 7161201, superseded to 716001, is an Identified Subject Product except for use on the engines listed in Exhibit A of CARB EO D-773-1, EO D-773-4 and EO D-773-5.

PDI Part No.	Engine Make	Model Year(s)
7161202-3	Caterpillar	2008-2009
7161203	Caterpillar	2005-2009
716402	Caterpillar	1993.5-1999
716403	Caterpillar	1993.5-1999
716701-1	Caterpillar	2004
716702	Caterpillar	1999.5-2003
716703	Caterpillar	1999.5-2003
719001	International	2003-2016
719001-1	International	2008-2010
734001 <sup>6</sup>	Cummins and Caterpillar	1994-2017

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<sup>6</sup> Part number 734001 (ECM Tuner) is an Identified Subject Product except for use on the engines listed in Exhibit A of CARB EO D-773-4 and EO D-773-5.

**APPENDIX B – CONSENT DECREE IN UNITED STATES V. PERFORMANCE DIESEL, INC.**

[PDI LETTERHEAD]

[PDI Customer Name]

[PDI Customer Address Line 1]

[PDI Customer Address Line 2]

Dear [Customer Name]:

We are writing to make you aware of important changes in the type of products sold by Performance Diesel Inc. (“PDI”). According to our records, you purchased PDI tuning products that PDI marketed for use solely in vehicles to be used in competition. For purposes of this letter, these products are hereinafter referred to as “Subject Products.”

As you may already know, PDI suspended all manufacturing and sales of Subject Products in May 2018. PDI suspended those sales because EPA alleged that the manufacture and sale of Subject Products violated the Clean Air Act’s prohibition against motor vehicle parts or components that allow for bypassing, defeating or rendering inoperative any emissions control system or element of design on a vehicle. *See* 42 U.S.C. §7522(a)(3). Emissions control systems include the diesel particulate filter, exhaust gas recirculation system, catalysts, and onboard diagnostic system.

PDI recently entered into a civil judicial settlement with EPA to resolve disputes regarding its pre-May 2018 manufacturing, sale and installation of Subject Products. Although PDI has not admitted liability for violating the Clean Air Act, as part of the settlement it has agreed that, among other things, it will no longer (1) manufacture, sell, or install the Subject Products or (2) provide technical support (e.g., telephone support, online/chat support, warranty support) for the Subject Products. PDI has also agreed to provide you with this notice.

PDI’s settlement with EPA specifically allows for PDI to continue selling products covered by Executive Orders issued by the California Air Resources Board (“CARB”) or certain pending applications for CARB Executive Orders. PDI currently sells various CARB-certified tuning products, including the Big Boss Performance Tuner.® More information concerning these CARB-certified products are available on PDI’s website, [www.pdidiesel.com](http://www.pdidiesel.com).

Sincerely,

[PDI Representative TBD]

## APPENDIX C

### NOTICE OF CONSENT DECREE IN UNITED STATES v. PERFORMANCE DIESEL, INC.

TO: ALL OFFICERS, DIRECTORS, AND EMPLOYEES OF PERFORMANCE DIESEL, INC.

Performance Diesel, Inc. (“PDI”) has entered into a civil judicial settlement with the federal government regarding the manufacture, sale, and installation of ECM tunes, including those tunes identified in the attached list, that were not covered by Executive Orders issued by the California Air Resources Board (“CARB”). PDI voluntarily exited that business on May 1, 2018, and now only offers tuners that are covered by CARB Executive Orders.

The United States Environmental Protection Agency (“EPA”) has alleged that the manufacture, sale, and installation of any part or component intended for use with a motor vehicle or motor vehicle engine, where a principal effect of the part or component is to bypass, defeat, or render inoperative emission control devices or elements of design, such as diesel particulate filters, exhaust gas recirculation systems, and onboard diagnostic systems, is prohibited.

Anyone who undertakes any of the actions prohibited by Section 7522(a)(3)(A) or (B) of the Clean Air Act, or who offers for sale, sells, conveys, or otherwise transfers in any way the design, technology, or manufacturing processes or techniques used to manufacture the products identified above may be subject to a civil action under the Clean Air Act.

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#### 42 U.S. Code Section 7522

##### (a) Enumerated prohibitions

The following acts and the causing thereof are prohibited—

(3)(A) for any person to remove or render inoperative any device or element of design installed on or in a motor vehicle or motor vehicle engine in compliance with regulations under this subchapter prior to its sale and delivery to the ultimate purchaser, or for any person knowingly to remove or render inoperative any such device or element of design after such sale and delivery to the ultimate purchaser; or

(3)(B) for any person to manufacture or sell, or offer to sell, or install, any part or component intended for use with, or as part of, any motor vehicle or motor vehicle engine, where a principal effect of the part or component is to bypass, defeat, or render inoperative any device or element of design installed on or in a motor vehicle or motor vehicle engine in compliance with regulations under this subchapter, and where the person knows or should know that such part or component is being offered for sale or installed for such use or put to such use.