

SETTLEMENT AGREEMENT AND RELEASE

This SETTLEMENT AGREEMENT AND RELEASE (hereinafter "Agreement") is entered into between the STATE OF CALIFORNIA AIR RESOURCES BOARD (hereinafter "ARB") 1001 I Street, Sacramento, California 95814, and A & B PRODUCE, INC. (hereinafter "A & B PRODUCE"), 125 Terminal Court, 40 C, D & E, South San Francisco, California 94080.

I. RECITALS

- (1) Health and Safety Code, Section 39650-39675 mandates the reduction of the emissions of substances that have been determined to be toxic air contaminants (TACs). In 1998, following an exhaustive 10-year scientific assessment process, the Air Resources Board identified particulate matter (PM) from diesel-fueled engines as a toxic air contaminant. Transport Refrigeration Units (TRUs) are powered by diesel fueled engines that emit toxic particulate matter. TRUs are controlled under section 2477.
- (2) CCR, Title 13, section 2477 (e) (1) (A) (1) states: No owner/operator shall operate a TRU or TRU generator (gen) set in California unless it meets the in-use emission category performance standard.
- (3) The ARB Enforcement Division has documented that A & B PRODUCE, failed to bring their fleet of TRUs in compliance with the in-use performance standard.
- (4) CCR, Title 13, section 2477 (f) (1) (A) (1) (c) require all operators to submit an Operator Report to ARB by January 31, 2009 (delayed until July 31, 2009) which includes TRU and TRU gen set inventory information for each TRU and TRU gen set based in California that is owned or leased by the operator.
- (5) CCR, Title 13, section 2477 (e) (1) (E) (1) (a) & (b) require that on or before January 31, 2009 (delayed until July 31, 2009), owner/operators of all California-based TRUs and TRU gen sets subject to this regulation shall apply for an ARB identification number for all California-based TRUs or TRU gen sets operated by the operator by submitting an application to ARB.
- (6) CCR, Title 13, section 2477 (e) (1) (E) (1) (f) requires that within 30 days of receipt of the ARB-issued IDN, owners/operators of California-based TRUs and TRU gen sets permanently affix the IDN to both sides of the TRU housing. Title 13, California Code of Regulations (CCR) section 2477 (e) (1) (E) (1) requires owner/operators of all California-based TRUs and TRU gen set subject to the regulation to apply for an ARB identification number (IDN) for all California-based TRUs or TRU gen sets.

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- (7) ARB Enforcement Division has documented that A & B PRODUCE failed to submit a TRU Operator Report, failed to register their TRUs in the ARBER database, and failed to affix the ARB IDN to both sides of the TRUs in their fleet by the July 31, 2009 deadline.
- (8) Failure to bring the TRU fleet in compliance with applicable in-use emission standards, failure to apply for and affix ARB IDNs and failure to submit an operator report are violation of state law resulting in penalties. Health and Safety Code, Section 39674, authorize civil or administrative penalties not to exceed one thousand dollars (\$1,000) or ten thousand dollars (\$10,000) for each day that the violation occurs.
- (9) California Health and Safety Code (H&SC) Section 44011.6 established the Heavy Duty Vehicle Inspection Program (HDVIP). It authorizes ARB to inspect on-road heavy-duty vehicles for excessive smoke emissions and engine tampering and to issue citations, accordingly. The program also requires the vehicle owner to repair its engines that exceed the prescribed ARB smoke opacity standards, perform a post-repair opacity test, and submit proof of repairs and any assessed penalties under the Regulations of the Heavy-Duty Smoke Inspection Program, Chapter 3.5, Sections 2180-2188, Title 13 CCR.
- (10) H&SC Section 43701 provides that ARB shall adopt regulations that require owners or operators of heavy-duty diesel motor vehicles to perform regular inspections of their vehicles for excess smoke emissions.
- (11) Title 13, CCR sections 2190 et seq. were adopted under the authority of H&SC section 43701 and, with limited exceptions which are not applicable here, apply to all heavy-duty diesel powered vehicles with gross vehicle weight ratings greater than 6,000 pounds which operate on the streets or highways within the State of California.
- (12) Title 13, CCR sections 2190 et seq. authorize the Periodic Smoke Inspection Program (PSIP) which requires the owners and operators of California based vehicle fleets of two or more heavy duty diesel motor vehicles with gross vehicle weight ratings greater than 6,000 pounds that operate on the streets or highways within the State of California to conduct annual smoke opacity inspections of their vehicles that are four years older than the model year of the vehicle's engine.
- (13) Title 13, CCR section 2192 (a) requires inter alia that the owner of the vehicle "[t]est the vehicle for excessive smoke emissions periodically according to the inspection intervals specified in section 2193 (a), (b), and (c)", "[m]easure the smoke emissions for each test...", "[r]ecord the smoke test opacity levels and other required test information as specified in

section 2194..." and "[k]eep the records specified in section 2194 for two years after the date of inspection."

- (14) The ARB considers testing, measuring, recording, and recordkeeping to be critical components in reducing excessive smoke emissions from these heavy-duty vehicles.
- (15) ARB contends A & B PRODUCE failed to test, measure, record, and maintain records of smoke emissions from its fleet of heavy duty diesel vehicles for 2008 and 2009 in violation of Title 13, CCR Sections 2190 et seq.
- (16) H&SC Section 43016 states, "Any person who violates any provision of this part, or any order, rule, or regulation of the state board adopted pursuant to this part, and for which violation there is not provided in this part any other specific civil penalty or fine, shall be subject to a civil penalty of not to exceed five hundred dollars (\$500.00) per vehicle."
- (17) ARB contends that if the facts described in recital paragraphs (1) – (16) were proven civil penalties could be imposed against A & B PRODUCE, as provided in H&SC sections 39674.
- (18) A & B PRODUCE is willing to enter into this Agreement solely for the purpose of settlement and resolution of this matter with ARB. ARB accepts this Agreement in termination of this matter. Accordingly, the parties agree to resolve this matter completely by means of this Agreement, without the need for formal litigation, and therefore agree as follows:

II. TERMS & RELEASE

In consideration of the ARB not filing a legal action against A & B PRODUCE for the violations referred to above, the ARB and A & B PRODUCE agree as follows:

- (1) Upon execution of this Agreement, A & B PRODUCE shall pay a civil penalty of eighteen thousand five hundred dollars (\$18,500.00). Payment shall be made in check form as described below and the full amount shall be submitted as per agreed payment schedule.
 - \$13,875.00 to the **California Air Pollution Control Fund**
 - \$4,625.00 to the **Peralta Community College District**

ARB to receive by:

February 5, 2012	1 st Payment
March 5, 2012	2 nd Payment
April 5, 2012	3 rd Payment
May 5, 2012	4 th Payment
June 5, 2012	5 th Payment
July 5, 2012	6 th Payment
August 5, 2012	7 th Payment
September 5, 2012	8 th Payment
October 5, 2012	9 th Payment
November, 2012	10 th Payment
December 5, 2012	11 th Payment
January 5, 2013	12 th Payment

- The first and second payments shall be made in the form of checks payable to the **Peralta Community College District** in the amount of \$1,541.67 each.
- The third payments shall be made in the form of a check payable to the **Peralta Community College District** in the amount of \$1,541.66 each.
- The fourth through ninth payments shall be made in the form of checks payable to **California Air Pollution Control Fund** in the amount of \$1,541.67 each.
- The tenth through twelfth payments shall be made in the form of checks payable to **California Air Pollution Control Fund** in the amount of \$1,541.66 each.

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- All payments and documents shall be sent to the attention of:

Mr. Brad Penick, Air Pollution Specialist
Air Resources Board, Enforcement Division
P.O. Box 2815
Sacramento, CA 95812

- (2) Effect of Untimely Payment or Performance. If any payment is more than 15 days late, the entire remaining balance becomes immediately due and payable. In addition, if the Attorney General files a civil action to enforce this settlement agreement, A & B PRODUCE shall pay all costs of investigating and prosecuting the action, including expert fees, reasonable attorney's fees, and costs.
- (3) It is agreed that if A & B PRODUCE, including its subsidiary or parent company, at any time becomes insolvent, or makes an assignment for the benefit of creditors or similar action adversely involving A & B PRODUCE, its subsidiary, or parent company, or a proceeding or petition under any bankruptcy, reorganization, arrangement of debt, insolvency, readjustment of debt, or receivership law or statute is filed by or against A & B PRODUCE, its subsidiary, or parent company, or a trustee in bankruptcy, custodian, receiver or agent is appointed or authorized to take charge of any of A & B PRODUCE, its subsidiary, or parent company's properties, or if any deposit account or other property of A & B PRODUCE, its subsidiary, or parent company be attempted to be obtained or held by writ of execution, garnishment, attachment, condemnation, levy, forfeiture or other legal process, or A & B PRODUCE, its subsidiary, or parent company takes any action to authorize any of the foregoing, the entire remaining balance becomes immediately due and payable without notice or demand.
- (4) It is further agreed that the penalties described in terms and release paragraph 1 are punitive in nature, rather than compensatory. Furthermore, the penalty is intended to deter and punish A & B PRODUCE for violations of state environmental statutes, and these penalties are payable to and for the benefit of ARB, a governmental unit. Therefore, it is agreed that these penalties imposed on A & B PRODUCE by ARB arising from the facts described in recital paragraphs (1) – (16) are non-dischargeable under 11 U.S.C § 523 (a)(7), which provides an exception from discharge for any debt to the extent such debt is for a fine, penalty or forfeiture payable to and for benefit of governmental unit, and is not compensation for actual pecuniary loss, other than certain types of tax penalties.

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- (5) A & B PRODUCE shall not violate Health and Safety Code Sections 43701 et seq. and 44011.6 et seq., Title 13, CCR, Sections 2180 et seq., 2190 et seq., and 2485 et seq.
- (6) A & B PRODUCE shall have all staff responsible for compliance with the Periodic Smoke Inspection Program (PSIP) and the Heavy Duty Vehicle Inspection Program (HDVIP) attend the California Council on Diesel Education and Technology (CCDET) I and II classes, as described on the ARB's webpage at www.arb.ca.gov/msprog/hdvip/hdvip.htm and <http://www.arb.ca.gov/enf/hdvip/ccdet/ccdet.htm>
These classes are conducted by various California Community Colleges and instruct attendees on compliance with the PSIP and the HDVIP and include a Diesel Exhaust After-Treatment and Maintenance Training Course. Proof of CCDET completion shall be provided to ARB within one year of the date of this Agreement and shall also be maintained in each applicable employee's file for the term of his or her employment. In case A & B PRODUCE uses a contractor to perform the annual smoke opacity testing required under the PSIP, A & B PRODUCE shall obtain proof that the contractor's staff conducting the smoke opacity tests completed the CCDET I & II courses within the last four years. This proof of the CCDET completion shall be provided by A & B PRODUCE to the ARB within one year of the date of this settlement and shall also be maintained with the annual PSIP records.
- (7) A & B PRODUCE shall provide copies of all PSIP compliance records for calendar years 2012 and 2013 to ARB by January 31 of the following year. Copies shall be addressed to the attention of Mr. Brad Penick, Air Pollution Specialist, ARB Enforcement Division, P.O. Box 2815, Sacramento, CA 95812. The ARB reserves the right to visit any A & B PRODUCE fleet location at any time during business hours to conduct compliance audits for the TRU, HDVIP, PSIP, or any other applicable ARB program.
- (8) A & B PRODUCE shall complete Low NOx Software Upgrades (reflash) on all applicable heavy duty diesel engines operating in California and report back to the ARB, within 45 days of this Agreement.
- (9) Each 1974 or newer diesel powered heavy-duty commercial vehicle in the A & B PRODUCE fleet shall comply with the emission control label (ECL) requirement set forth in the CCR, Title 13, Section 2183 (c) and report back to ARB, within 45 days of the execution of this agreement.
- (10) A & B PRODUCE shall instruct all employees who operate diesel fueled commercial vehicles to comply with the commercial vehicle idling regulations set forth in CCR, Title 13, Section 2485, within 45 days of the execution of this agreement.

- (11) Within 45 days of the execution of this Agreement, A & B PRODUCE shall bring its fleet of TRUs operating in California in compliance with the applicable in-use emission standards as required by Title 13, CCR, section 2477 (e) (1) (A) (1) and apply for an ARB IDN for each of the California-based TRUs or TRU gen sets that it owns and/or operates as required by Title 13, CCR, section 2477 (e) (1) (E) (1) and affix the IDN to both sides of each TRU or TRU gen set within 30 days of receiving the number from ARB as required by Title 13, CCR section 2477 (e) (E) (1) (f). A & B PRODUCE shall submit the proof of registration in the Air Resources Board Equipment Registration (ARBER) system to Mr. Brad Penick, Air Pollution Specialist, ARB Enforcement Division, P.O. Box 2815, Sacramento, CA 95812.
- (12) A & B PRODUCE shall submit a TRU Operator Report as required by Title 13, CCR section 2477 (f) (1) (A) within 45 days of execution of this Agreement to Mr. Brad Penick, Air Pollution Specialist, ARB Enforcement Division, P.O. Box 2815, Sacramento, CA 95812.
- (13) A & B PRODUCE shall not violate the TRU ATCM, as codified in CCR, Title 13 section 2477.
- (14) This Agreement constitutes the entire agreement and understanding between ARB and A & B PRODUCE concerning the subject matter hereof, and supersedes and replaces all prior negotiations and agreements between ARB and A & B PRODUCE concerning the subject matter hereof.
- (15) No agreement to modify, amend, extend, supersede, terminate, or discharge this Agreement, or any portion thereof, is valid or enforceable unless it is in writing and signed by all parties to this Agreement.
- (16) Severability. Each provision of this Agreement is severable, and in the event that any provision of this Agreement is held to be invalid or unenforceable, the remainder of this Agreement remains in full force and effect.
- (17) This Agreement shall be interpreted and enforced in accordance with the laws of the State of California, without regard to California's choice-of-law rules.
- (18) This Agreement is deemed to have been drafted equally by the Parties; it will not be interpreted for or against either party on the ground that said party drafted it.

(19) SB 1402 Statement

Senate Bill 1402 (Dutton, Chapter 413, statutes of 2010) requires the ARB to provide information on the basis for the penalties it seeks (see Health and Safety Code section 39619.7). This letter includes this information, which is also summarized here.

The manner in which the penalty amount was determined, including a per unit or per vehicle penalty.

Penalties must be set at levels sufficient to discourage violations. We consider all relevant circumstances in determining penalties, including the eight factors specified in Health and Safety Code (H&SC) sections 42403 and 43024.

TRU Violations

The per unit penalty for the TRU violations involved in this case is a maximum of \$1,000 per unit per day for strict liability violations or \$10,000 per vehicle per day for negligent or intentional violations pursuant to H&SC section 39674. The penalty obtained for the TRU violations involved in this case is \$4,000.00 for 4 non-compliant TRUs operated by A & B PRODUCE or \$1,000.00 for each violation. The penalty obtained for A & B PRODUCE failing to register TRUs it owns in the ARBER database is \$5,500.00 for 11 non-registered TRUs or \$500.00 for each violation.

PSIP Violations

The per vehicle penalty for the PSIP violations involved in this case is a maximum of \$500 per vehicle per year. The penalty obtained for the PSIP violations involved in this case is \$9,000.00 for 18 violations over two years or \$500.00 per violation

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

TRU Violations

The penalty provision being applied for the Air Toxic Control Measure for In-Use Diesel-Fueled Transport Refrigeration Unit and TRU Generator Set (Title 13, CCR, section 2477 et seq.) violations (including registration and labeling) is H&SC section 39674 because the TRU rule is an Air Toxic Control Measure adopted pursuant to authority contained in H&SC section 39650-39675. A & B PRODUCE, as an owner of TRUs, failed to bring all TRUs in its fleet into compliance by the deadlines set forth in the TRU ATCM and failed to register the TRUs in its fleet in the ARBER database.

PSIP Violations

The penalty provision being applied to the PSIP violations is Health and Safety Code section 43016 because A & B PRODUCE failed to test, measure, record, and maintain records of smoke emissions from its fleet of heavy duty diesel vehicles for years 2008, and 2009 in violation of the PSIP regulation in Title 13, CCR Sections 2190 et seq, for 18 violations. Since the PSIP regulation was adopted pursuant to authority granted in Part 5 of Division 26 of the Health and Safety Code and since there is no specific penalty or fine provided for PSIP violations in Part 5, Health and Safety Code section 43016 is the applicable penalty provision.

Is the penalty being assessed under a provision of law that prohibits the emission of pollution at a specified level, and, if so a quantification of excess emissions, if it is practicable to do so.

TRU Violations

The provisions cited above do prohibit emissions above a specified level of g/hp-hr. However, since the hours of operation of the non-compliant TRUs involved and their individual emission rates are not known, it is not practicable to do so.

PSIP Violations

The provisions cited above do prohibit emissions above a specified percentage of smoke opacity. However, since the hours of operation of the non-compliant vehicles involved and their individual emission rate are not known, it is not practicable to quantify the excess emissions.

- (20) A & B PRODUCE acknowledges that ARB has complied with SB 1402 in prosecuting and settling this case. Specifically, ARB has considered all relevant facts, including those listed at HSC sections 42403 and 43024, has explained the manner in which the penalty amount was calculated (including a per unit or per vehicle penalty, if appropriate), has identified the provision of law under which the penalty is being assessed and has considered and determined that this penalty is being assessed under a provision of law that prohibits the emission of pollutants at a specified level. However, since the hours of operation of the non-compliant units involved and their individual emission rates are not known, it is not practicable for ARB to quantify the excess emissions.
- (21) Penalties were determined based on the unique circumstances of this matter, considered together with the need to remove any economic benefit from noncompliance, the goal of deterring future violations and obtaining

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swift compliance, the consideration of past penalties in similar cases negotiation, and the potential costs and risk associated with litigating these particular violations. The penalty reflects violations extending over a number of days considered together with the complete circumstances of this case. Penalties in future cases might be smaller or larger on a per unit basis.

- (22) The penalty was based on confidential settlement communications between ARB and A & B PRODUCE that ARB does not retain in the ordinary course of business either. The penalty is the product of an arm's length negotiation between ARB and A & B PRODUCE and reflects ARB's assessment of the relative strength of its case against A & B PRODUCE, the desire to avoid the uncertainty, burden and expense of litigation, obtain swift compliance with the law and remove any unfair advantage that A & B PRODUCE may have secured from its actions.
- (23) Now therefore, in consideration of the payment by A & B PRODUCE, in the amount of eighteen thousand five hundred dollars (\$18,500.00), ARB hereby releases A & B PRODUCE and its principals, officers, agents, predecessors and successors from any and all claims that ARB may have based on the facts and allegations described in recital paragraphs (1) – (16) above. The undersigned represent that they have the authority to enter into this Agreement.

California Air Resources Board

By: 

Name: Ellen M. Peter

Title: ARB Chief Counsel

Date: 3/7/2012

A & B Produce, Incorporated

By: 

Name: Brett Besser

Title: President

Date: 2-14-2012