# 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 CHARCY COMPANY INC. (hereinafter "CHARCY"), 5173 Waring Road #616, San Diego, California 92120.

## I. RECITALS

(1) California Health and Safety Code section 44011.6 (HSC § 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, California Code of Regulations, title 13, sections 2180-2188 (13 CCR §§ 2180-2188).

(2) HSC § 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 excessive smoke emissions.

(3) 13 CCR § 2190 *et seq.* were adopted under the authority of HSC § 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 that operate on the streets or highways within the State of California.

(4) 13 CCR § 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 equipped with engines that are four years and older.

(5) 13 CCR § 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."

(6) HSC § 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 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."

(7) ARB considers testing, measuring, recording, and recordkeeping to be critical components in reducing excessive smoke emissions from these heavy-duty vehicles.

(8) ARB contends CHARCY failed to test, measure, record, and maintain records of smoke emissions from its fleet of heavy-duty diesel vehicles for 2013 in violation of 13 CCR § 2190 *et seq.*

(9) HSC § 44275 et seq. establishes the Carl Moyer Memorial Air Quality Standards Attainment Program (Carl Moyer Program). The Carl Moyer Program provides incentive grants for cleaner-than-required engines, equipment and other sources of pollution providing early or extra emission reductions.

(10) HSC § 44288 states that Carl Moyer Program funds "shall be awarded in conjunction with the execution of a contract that obligates the state board or a participating district to make the grant and obligates the grantee to take the actions described in the grant application." Such contract shall contain recapturing provisions to ensure and enhance the effectiveness of the Carl Moyer Program.

(11) HSC § 44287 requires ARB establish grant criteria and guidelines for the Carl Moyer Program. The Carl Moyer Program Guidelines states that non-compliance with the Carl Moyer Agreement or Guidelines may result in the cancellation of the Agreement, recapturing of voucher funds, or any other remedy available under law.

(12) CHARCY signed a Moyer application affirming they were in compliance with all federal, state, and local air quality regulations and would stay in compliance. Based on the application, CHARCY is the recipient of a California ARB Carl Moyer vouchers in the amount of $35,000, issued through the ARB Voucher Incentive Program (VIP) in 2012.

(13) In order to resolve these alleged violations, CHARCY has taken, or agreed to take, the actions enumerated below under "RELEASE". Further, ARB accepts this Agreement in termination and settlement of this matter.

(14) In consideration of the foregoing, and of the promises and facts set forth herein, the parties desire to settle and resolve all claims, disputes, and obligations relating to the above-listed violations, and voluntarily agree to resolve this matter by means of this Agreement. Specifically, ARB and CHARCY agree as follows:

## II. TERMS AND RELEASE

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

(1) Upon execution of this Agreement, the sum of two thousand two hundred fifty dollars ($2,250.00) shall be paid on behalf of CHARCY, as follows:

| Payment Due Date: | | In the Amount of and Paid to: |
|---|---|---|
| (1) January 30, 2015 | **$ 281.00** | paid to the order of **Peralta Colleges Foundation** |
| (2) February 28, 2015 | **$ 844.00** | paid to the order of **Air Pollution Control Fund** |
| (3) March 28, 2015 | **$1,125.00** | paid to the order of **South Coast Air Quality Management District** |

**Please send the signed Settlement Agreement, by December 23, 2014 and any future mailings or documents required per the terms of this Settlement Agreement to:**

**Robbie Morris**
**Air Pollution Specialist**
**California Air Resources Board**
**Enforcement Division**
**P.O. Box 2815**
**Sacramento, California 95812**

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

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

(2) Effect of Untimely Payment. 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, CHARCY shall pay all costs of investigating and prosecuting the action, including expert fees, reasonable attorney's fees, and costs.

(3) CHARCY shall pay all costs of investigating and prosecuting the action, including expert fees, reasonable attorney's fees, and costs.

(4) It is agreed that if CHARCY, 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 CHARCY, 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 CHARCY, its subsidiary, or parent company, or a trustee in bankruptcy, custodian, receiver or agent is appointed or authorized to take charge of any of CHARCY, its subsidiary, or parent company's properties, or if any deposit account or other property of CHARCY, 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 CHARCY, 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.

(5) 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 CHARCY 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 CHARCY through by ARB arising from the facts described in recital paragraphs (1) through (12) are non-dischargeable under 11 United States Code § 523 (a)(7), which provides an exception from discharge for any debt to the extent such debt is for a fine, penalty or forfeiture payable to and for benefit of governmental unit, and is not compensation for actual pecuniary loss, other than certain types of tax penalties.

(6) CHARCY shall not violate HSC §§ 43701 *et seq.*, 44011.6 *et seq.*, and 13 CCR §§ 2180 *et seq.*, 2190 *et seq.*, and 2485 *et seq.*

(7) CHARCY shall comply with one or both of the following options to attend the California Council on Diesel Education and Technology (CCDET I) class, (SAE J1667 Snap Acceleration Smoke Test Procedure for Heavy-Duty Diesel Powered Vehicles) as described on the ARB webpage at http://www.arb.ca.gov/enf/hdvip/ccdet/ccdet.htm. This class is conducted by various California Community Colleges and instructs attendees on compliance with the PSIP, ECL and the HDVIP.

(a) CHARCY shall have the fleet maintenance manager (or equivalent) and all staff performing opacity tests for compliance with PSIP and the HDVIP attend the CCDET I class. Proof of CCDET I completion shall be provided to ARB within six months of the date of this Agreement and be maintained in each applicable employee's file for the term of his or her employment.

(b) If CHARCY uses a contractor to perform the annual smoke opacity testing required under the PSIP, in addition to having the fleet maintenance manager (or equivalent) attend the CCDET I course, CHARCY shall obtain proof that

the contractor's staff conducting the smoke opacity tests completed the CCDET I course within the past four years. This proof of CCDET I completion shall be provided to ARB with PSIP records as required by this Agreement and be maintained with the annual PSIP records.

(8) CHARCY shall comply with one or both of the following options to attend the CCDET II class (Diesel Exhaust After Treatment and Maintenance), described on the ARB's webpage http://www.arb.ca.gov/enf/hdvip/ccdet/ccdet.htm. This class is conducted by various California Community Colleges and instructs attendees on California's emission regulations and the proper care and maintenance of diesel exhaust after-treatment systems (DEATS).

(a) CHARCY shall have the fleet maintenance manager (or equivalent) and all staff responsible for maintenance of DEATS attend the CCDET II class. Proof of CCDET II completion shall be provided to ARB within six months of the date of this Agreement and also be maintained in each applicable employee's file for the term of his or her employment.

(b) In case CHARCY uses a contractor for the maintenance of DEATS, in addition to having the fleet maintenance manager (or equivalent) attend the CCDET II course, CHARCY shall obtain proof that the contractor's staff maintaining the DEATS device(s) completed the CCDET II course within the last four years. This proof of the CCDET II completion shall be provided by CHARCY to ARB within six months of the date of this settlement and be maintained with the DEATS installation and maintenance records.

(9) As is typically required, CHARCY shall submit copies of all PSIP compliance records for the two years (2014 and 2015) after the close of the audit to ARB by January 31 of the following year. ARB acknowledges that CHARCY has already submitted copies of all PSIP compliance records for year 2014 and has therefore complied with that requirement. CHARCY must still submit copies of all PSIP compliance records for year 2015 to ARB by January 31 of the following year. **Copies shall be addressed to the attention of Robbie Morris at the California Air Resources Board, Enforcement Division, P.O. Box 2815, Sacramento, CA 95812**. ARB reserves the right to visit any CHARCY fleet location at any time to conduct compliance audits for the HDVIP and PSIP, or any other applicable ARB program.

(10) CHARCY shall complete Low NOx Software Upgrades (reflash) on all applicable heavy-duty diesel engines operating in California and report to ARB within 45 days of this agreement.

(11) Each 1974 or newer diesel powered heavy-duty vehicle in CHARCY's fleet shall remain in compliance with the ECL regulation as codified in 13 CCR § 2183.

(12) CHARCY shall instruct all employees who operate diesel-fueled vehicles to comply with the idling regulations set forth in 13 CCR § 2485, within 45 days of this Agreement.

(13) CHARCY shall not violate the Truck & Bus regulation as codified in 13 CCR § 2025.

(14) CHARCY, by December 31, 2014, shall submit proof of compliance with the January 1, 2015 Truck & Bus deadline, for all regulated heavy-duty diesel vehicles, to **Robbie Morris, Air Pollution Specialist, California Air Resources Board, Enforcement Division, P.O. Box 2815, Sacramento, CA 95812**

(15) This Agreement shall apply to and be binding upon CHARCY, and its officers, directors, receivers, trustees, employees, successors and assignees, subsidiary and parent corporations and upon ARB and any successor agency that may have responsibility for and jurisdiction over the subject matter of this Agreement.

(16) This Agreement constitutes the entire agreement and understanding between ARB and CHARCY concerning the subject matter hereof, and supersedes and replaces all prior negotiations and agreements between ARB and CHARCY concerning the subject matter hereof.

(17) 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.

(18) 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.

(19) 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.

(20) 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.

(21) Senate Bill 1402 (Dutton, Chapter 413, statutes of 2010) requires ARB to provide information on the basis for the penalties it seeks (HSC § 39619.7). This information, which is provided throughout this settlement agreement, is summarized here:

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

Penalties must be set at levels sufficient to discourage violations. The penalties in this matter were determined in consideration of all relevant circumstances, including the eight factors specified in HSC §§42403 and 43024.

PSIP Violations

The per vehicle penalty for the PSIP violations involved in this case is a maximum of $500 per vehicle per violation per year. The penalty obtained for the PSIP violations involved in this case is $1,125.00 for three violations involving three vehicles, or $375.00 per vehicle per violation.

The penalty was discounted based on the fact that this was a first time violation and the violator made diligent efforts to comply and to cooperate with the investigation.

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

PSIP Violations

The penalty provision being applied to the PSIP violations is HSC § 43016 because CHARCY failed to test, measure, record, and maintain records of smoke emissions from its fleet of heavy duty diesel vehicles for the years 2012 and 2013 in violation of the PSIP regulation in title13 CCR § 2190 *et seq.*, for three vehicles. Since the PSIP regulation was adopted pursuant to authority granted in Part 5 of Division 26 of the HSC and since there is no specific penalty or fine provided for PSIP violations in Part 5, HSC § 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.**

PSIP Violations

The PSIP provisions cited above do prohibit emissions above a specified opacity or level of g/hp-hr. However, since the hours of operation of the non-compliant units involved and their individual emission rate are not known, it is not practicable to quantify the excess emissions.

(22) CHARCY acknowledges that ARB has complied with Senate Bill 1402 in prosecuting or settling this case. Specifically, ARB has considered all relevant facts, including those listed at HSC § 43024, has explained the manner in which the penalty amount was calculated, has identified the provision of law under which the penalty is being assessed and has considered and determined that this

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

(23) Penalties were determined based on the unique circumstances of this matter, considered together with the need to remove any economic benefit from noncompliance, the goal of deterring future violations and obtaining swift compliance, the consideration of past penalties in similar cases, and the potential costs and risk associated with litigating these particular violations. Penalties in future cases might be smaller or larger on a per unit basis.

(24) The penalty was based on confidential settlement communications between ARB and CHARCY that ARB does not retain in the ordinary course of business. The penalty is the product of an arms length negotiation between ARB and CHARCY and reflects ARB's assessment of the relative strength of its case against CHARCY, the desire to avoid the uncertainty, burden and expense of litigation, obtain swift compliance with the law and remove any unfair advantage that CHARCY may have secured from its actions.

(25) Now therefore, in consideration of the payments on behalf of CHARCY to the Air Pollution Control Fund, the Peralta Colleges Foundation and South Coast Air Quality Management District, ARB hereby releases CHARCY and their principals, officers, agents, predecessors and successors from any and all claims, the ARB may have or have in the future based on the circumstances described in paragraph (1) through (12) of the Recitals. The undersigned represent that they have the authority to enter into this Agreement.

| **California Air Resources Board** | | **CHARCY COMPANY INC.** | |
|---|---|---|---|
| Signature: | | Signature: | |
| Print Name: | James R. Ryden | Print Name: | Charles VanDen Abeelen |
| Title: | Chief, Enforcement Division | Title: | Pres. |
| Date: | 12/19/14 | Date: | 12-16-14 |