# 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 WEST CENTRAL PRODUCE, INC. (hereinafter WCP), 2020 East 7th Place, Los Angeles, California 90021.

## 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 HDVIP, 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 old or 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 WCP failed to test, measure, record, and maintain records of smoke emissions from its fleet of heavy-duty diesel vehicles for years 2013 and 2014 in violation of 13 CCR § 2190 *et seq*.

(9) 13 CCR § 2183(c) states that "No 1974 or newer diesel powered heavy-duty commercial vehicle shall operate in California without evidence that, at the time of manufacture, the installed engine met emission standards at least as stringent as applicable federal emission standards for the model year of the engine. ARB shall base its determination on whether an engine meets the above requirements by inspecting the Emission Control Label (ECL) affixed to the vehicle's engine.

(10) ARB has documented that WCP failed to provide evidence that their vehicles have ECLs attached to the engines of heavy-duty diesel vehicles in its fleet in violation of HSC § 44011.6, and 13 CCR § 2183, *et seq*. Civil penalties for violation of the regulation covering ECLs have been set per 13 CCR § 2185(a)(2)(B) at $300 per vehicle per violation.

(11) HSC §§ 39650-39675 mandate the reduction of the emissions of substances that have been determined to be toxic air contaminants. In 1998, following an exhaustive 10-year scientific assessment process, ARB identified particulate matter (PM) from diesel-fueled engines as a toxic air contaminant. Transport Refrigeration Units (TRU) are powered by diesel fueled engines that emit this toxic PM. TRUs are regulated under the Airborne Toxic Control Measure for In-Use Diesel-Fueled Transport Refrigeration Units and TRU Generator Sets, and Facilities Where TRUs Operate (TRU ATCM) as codified in 13 CCR § 2477.1 through 2477.21.

(12) 13 CCR § 2477.5(a) provides that no owner/operator shall operate a TRU or TRU generator (gen) set in California unless it meets in-use performance standards established in § 2477.5.

(13) ARB Enforcement Division has documented that WCP failed to bring the TRUs it operates in California into compliance with the in-use performance standards before the deadlines set forth in the regulation.

(14) 13 CCR § 2477.6(a)(2) states that the Operator Report shall be updated within 30 days when any changes to information occur.

(15) 13 CCR § 2477.6(a)(3) states that failure to report or submittal of false information is a violation of state law subject to civil penalty.

(16) The ARB Enforcement Division has documented that WCP failed to update its Operator Report within 30 days of changes to its TRU fleet information, resulting in false information.

(17) Failure to bring the TRU fleet in compliance with applicable in-use performance standards and failure to update Operator Report are violations of state law resulting in penalties. HSC § 39674 authorizes civil penalties of up to ten thousand dollars ($10,000) for each day that the violation occurs.

(18) In-use on-road diesel vehicles are powered by diesel fueled engines that emit toxic PM. On-road vehicles are controlled under the Truck and Bus regulation, as codified in 13 CCR § 2025.

(19) 13 CCR § 2025(e)(1)(B) states: "Starting January 1, 2012, for all vehicles with GVWR greater than 26,000 lbs, excluding school buses, fleets must meet the requirements of 13 CCR § 2025(g) or fleets that report may instead comply with the phase-in option of 13 CCR § 2025(i)."

(20) Failure to comply with the requirements of 13 CCR § 2025 is a violation of state law resulting in penalties. HSC §§ 39674(a) and (b) authorize civil penalties for the violation of the programs for the regulation of toxic air contaminants not to exceed one thousand dollars ($1,000) or ten thousand dollars ($10,000), respectively, for each day in which the violation occurs.

(21) WCP must comply with the requirements of the Engine Model Year Compliance Schedule provided for in 13 CCR § 2025(g).

(22) 13 CCR § 2025(g) requires that owners of diesel vehicles with a GVWR greater than 26,000 lbs. meet PM Best Available Control Technology (BACT) requirements for all 1996 through 1999 engine model years by January 1, 2012.

(23) ARB has documented that WCP failed to meet PM BACT requirements for all 1996 through 1999 engine model years by January 1, 2012.

(24) 13 CCR § 2025(w), Disclosure of Regulation Applicability, requires that any person residing in California selling a vehicle with an engine subject to this regulation provide the specified disclosure in writing to the buyer on the bill of sale, sales contract addendum, or invoice.

(25) ARB has documented that WCP failed to include the Disclosure of Regulation Applicability on the bill of sales, contract addendums, or invoices, in violation of 13 CCR § 2025(w).

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

(27) 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 WCP agree as follows:

## II. TERMS AND RELEASE

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

(1) Upon execution of this Agreement, WCP shall pay a civil penalty of $23,400.00. Payment shall be made in eight monthly payments as described below, beginning on **January 29, 2016**.

2/5/16

| Payment Due Date: | In the Amount of and Payable to: | |
|---|---|---|
| ~~January~~ 29, 2016 | **$2,925.00** | **the Peralta Colleges Foundation** |
| February 29, 2016 | **$2,925.00** | **the Peralta Colleges Foundation** |
| March 29, 2016 | **$2,925.00** | **the Air Pollution Control Fund** |
| April 29, 2016 | **$2,925.00** | **the Air Pollution Control Fund** |
| May 29, 2016 | **$2,925.00** | **the Air Pollution Control Fund** |
| June 29, 2016 | **$2,925.00** | **the Air Pollution Control Fund** |
| July 29, 2016 | **$2,925.00** | **the Air Pollution Control Fund** |
| August 29, 2016 | **$2,925.00** | **the Air Pollution Control Fund** |

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

**Mr. Eric Bissinger**
**Air Pollution Specialist**
**California Air Resources Board**
**Enforcement Division**
**P.O. Box 2815**
**Sacramento, California 95812**

**Please submit each payment by the applicable payment due date along with the corresponding 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, WCP 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 WCP, 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 WCP, 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 WCP, its subsidiary, or parent company, or a trustee in bankruptcy, custodian, receiver or agent is appointed or authorized to take charge of any of WCP's, its subsidiary, or parent company's properties, or if any deposit account or other property of WCP, 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 WCP, 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 WCP 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 WCP by ARB arising from the facts described in recital paragraphs (1) through (25) 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.

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

(6) WCP 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) WCP 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 WCP 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, WCP 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.

(7) WCP 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) WCP 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 WCP uses a contractor for the maintenance of DEATS, in addition to having the fleet maintenance manager (or equivalent) attend the CCDET II course, WCP 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 WCP to ARB within six months of the date of this settlement and be maintained with the DEATS installation and maintenance records.

(8) WCP shall submit copies of all PSIP compliance records for the years 2015 and 2016 to ARB by January 31 of the following year. **Copies shall be addressed to the attention of Mr. Eric Bissinger at the California Air Resources Board, Enforcement Division, P.O. Box 2815, Sacramento, California 95812**. ARB reserves the right to visit any WCP fleet location at any time to conduct compliance audits for the HDVIP and PSIP, or any other applicable ARB program.

(9) WCP 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.

(10) WCP shall comply with the ECL regulation as codified in 13 CCR § 2183. Within 45 days of the execution of this Agreement, WCP shall **submit the proof of compliance to Mr. Eric Bissinger, Air Pollution Specialist, California Air Resources Board, Enforcement Division, P.O. Box 2815, Sacramento, California 95812**.

(11) WCP 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.

(12) WCP shall not violate TRU ATCM as codified in 13 CCR § 2477.

(13) Within 45 days of the execution of this Agreement, WCP shall bring its fleet of TRUs operating in California in compliance with the applicable in-use performance standards as required by 13 CCR § 2477.5(a).

(14) WCP shall not violate the Truck and Bus regulation as codified in 13 CCR § 2025.

(15) WCP shall submit proof of compliance with the Truck and Bus regulation (as codified in 13 CCR § 2025), within 45 days of the execution of this Agreement, to **Mr. Eric Bissinger, Air Pollution Specialist, California Air Resources Board, Enforcement Division, P.O. Box 2815, Sacramento, California 95812.**

(16) This Agreement shall apply to and be binding upon WCP, 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.

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

(18) 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.

(19) 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.

(20) 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.

(21) 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.

(22) 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 $500.00 per vehicle per violation per year. The penalty obtained for the PSIP violations involved in this case is $9,000.00 for 30 violations, or $300.00 per vehicle per violation per year.

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.

ECL Violations

The per vehicle penalty for the labeling violations involved in this case is a maximum of $300.00 per vehicle per violation. The penalty obtained for the ECL violations involved in this case is $675.00 for three vehicles, or $225.00 per vehicle.

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.

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 HSC § 39674. The penalty

obtained for the TRU violations involved in this case is $4,500.00 for six noncompliant TRUs operated by WCP or $750.00 for each violation. An additional penalty of $675.00 was obtained for submitting false information for three TRUs, or $225.00 for each 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.

Truck and Bus Violations

The per unit penalty for the Truck and Bus violations involved in this case is a maximum of $1,000 per vehicle per day for strict liability violations or $10,000 per vehicle per day for negligent or intentional violations.

The penalty obtained for the Truck and Bus violations involved in this case for failure to meet the requirements of the Engine Model Year Compliance Schedule is $8,100.00 or $225 per month of violation for one vehicle with a 1996 model year engine (36 months in violation).

The penalty obtained for the Truck and Bus violations involved in this case for failure to disclose appropriate language on the bills of sales, sales contract addendums, or invoices is $450.00 or $225.00 per vehicle per violation for two vehicles.

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 WCP failed to test, measure, record, and maintain records of smoke emissions from its fleet of heavy-duty diesel vehicles for the years 2013 and 2014 in violation of the PSIP regulation in 13 CCR § 2190 *et seq.*, for 24 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.

ECL Violations

The penalty provision being applied to the ECL requirements is 13 CCR § 2185(a)(2) because WCP failed to provide evidence that three of their vehicles have ECLs attached as required.

TRU Violations

The penalty provision being applied for the TRU ATCM (13 CCR § 2477) violations (including registration and labeling) is HSC § 39674 because the TRU rule is an Air Toxic Control Measure adopted pursuant to authority contained in HSC §§ 39002 et seq., 39650-39675 and WCP, 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 correctly report three TRUs.

Truck and Bus Violations

The penalty provision being applied for the Truck and Bus regulation (13 CCR § 2025) violations in this case is HSC § 39674 because the Truck and Bus regulation is an Airborne Toxic Control Measure adopted pursuant to authority contained in HSC §§ 39002 et seq., 39650-39675, because WCP failed to bring their diesel fleet into compliance by the deadlines set forth in 13 CCR § 2025(g) and failed to include the Disclosure of Regulation Applicability on the bill of sales, contract addendums, or invoices.

**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 noncompliant units involved and their individual emission rates are not known, it is not practicable to quantify the excess emissions.

ECL Violations

The penalty is not being assessed under a provision of law that prohibits the emission of pollution at a specified level.

TRU Violations

The provisions cited above do prohibit emissions above a specified level of

g/hp-hr for failure to meet in-use performance standards. However, since the hours of operation of the noncompliant units involved and their individual emission rates are not known, it is not practicable to quantify the excess emissions.

Truck and Bus Violations

The provisions cited above do prohibit emissions above a specified level of g/hp-hr for failure to meet PM BACT requirements. However, since the hours of operation of the noncompliant truck involved and its individual emission rate is not known, it is not practicable to quantify the excess emissions.

(23) WCP 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.

(24) 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.

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

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

**California Air Resources Board**

Signature: _____

Print Name: Dr. Todd P. Sax

Title: Chief, Enforcement Division

Date: TPS 2/12/16

**West Central Produce, Inc.**

Signature: _____

Print Name: Jamie Purcell

Title: CFO

Date: 2/4/16