

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 BERRYESSA GARBAGE SERVICE, INCORPORATED (hereinafter "BERRYESSA"), 6095 Steele Canyon Road, Napa, CA 94558.

I. RECITALS

- (1) 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, California Code of Regulations (CCR).
- (2) *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.
- (3) 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.
- (4) 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 which 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.
- (5) 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."
- (6) *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."

- (7) The ARB considers testing, measuring, recording, and recordkeeping to be critical components in reducing excessive smoke emissions from these heavy-duty vehicles.
- (8) ARB contends BERRYESSA failed to test, measure, record, and maintain records of smoke emissions from its fleet of heavy duty diesel vehicles for the years of 2010 and 2011 in violation of Title 13, CCR Sections 2190 et seq.
- (9) Under the authority of Health and Safety Code, Sections 39600 and 39601, the CCR, Title 13, Section 2020 et seq. requires the Solid Waste Collection Vehicle fleet owners to use best available control technology for each collection vehicle in the active fleet. Records of the installed diesel emission control strategy and corresponding compliance plan must be accessible at the terminal. Each Solid Waste Collection Vehicle must be affixed to the driver's side doorjamb, or another readily accessible location known to the driver, a legible and durable label with complete and accurate information filled in.
- (10) ARB contends BERRYESSA failed to install Best Available Control Technology to solid waste collection vehicles in its fleet according to the implementation schedule outlined in title 13, CCR section 2021.2.
- (11) Health and Safety Code, Sections 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 (\$1,000.00) or not to exceed ten thousand dollars (\$10,000.00) respectively, for each day in which the violation occurs.
- (12) BERRYESSA 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 ARB not filing a legal action against BERRYESSA for the alleged violations referred to above, and BERRYESSA's payment of the penalties set forth in Section 1 below, the ARB and BERRYESSA agree as follows:

- (1) Upon execution of this Agreement, BERRYESSA shall pay a civil penalty of \$11,000.00. Payment shall be made in check form as described below, and payments shall be made in 3 bimonthly payments beginning on March 8, 2013.

SETTLEMENT AGREEMENT AND RELEASE ARB AND BERRYESSA GARBAGE SERVICE:

Due Date	Check Made Out To: California Air Pollution Control Fund	Check Made Out To: Peralta Colleges Foundation
MARCH 8, 2013	-----	\$2,750.00
MAY 8, 2013	\$4,125.00	-----
JULY 8, 2013	\$4,125.00	-----

Please submit the signed settlement agreement and checks to:

Mr. Sidney Lau, Air Resources Engineer
Air Resources Board, Enforcement Division
9480 Telstar Avenue, Suite 4
El Monte, CA 91731

- (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, BERRYESSA 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 BERRYESSA, 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 BERRYESSA, 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 BERRYESSA, its subsidiary, or parent company, or a trustee in bankruptcy, custodian, receiver or agent is appointed or authorized to take charge of any of BERRYESSA'S, its subsidiary, or parent company's properties, or if any deposit account or other property of BERRYESSA, 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 BERRYESSA, 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 BERRYESSA 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 BERRYESSA by ARB arising from the facts described in recital paragraphs 1 – 11 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) BERRYESSA 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) BERRYESSA 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) BERRYESSA 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 one year 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 BERRYESSA 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, BERRYESSA 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) BERRYESSA 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 exhaust after treatment systems (EATS).
 - (a) BERRYESSA shall have the fleet maintenance manager (or equivalent) and all staff responsible for maintenance of EATS attend the CCDET II class. Proof of CCDET II completion shall be provided to ARB within one year 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 BERRYESSA uses a contractor for the maintenance of EATS, in addition to having the fleet maintenance manager (or equivalent) attend the CCDET II course, BERRYESSA shall obtain proof that the contractor's staff maintaining the EATS device(s) completed the CCDET II course within the last four years. This proof of the CCDET II completion shall be provided by BERRYESSA to the ARB within one

year of the date of this settlement and be maintained with the EATS installation and maintenance records.

- (8) BERRYESSA shall provide copies of all PSIP compliance records for 2013 and 2014 to the ARB by January 31 of the following year. Copies shall be addressed to the attention of Mr. Sidney Lau, ARB, Enforcement Division, 9480 Telstar Avenue, Suite 4, El Monte, CA 91731. The ARB reserves the right to visit any BERRYESSA fleet location at any time to conduct compliance audits for the HDVIP and PSIP, or any other applicable ARB program.
- (9) Each solid waste collection vehicle shall comply with the label requirements set forth in the title 13, CCR, section 2021.2(f) (2) within 30 days of this Agreement.
- (10) BERRYESSA shall retrofit solid waste collection vehicles with best available technology within 60 days of this Agreement. BERRYESSA shall keep records of installed diesel control strategies and update the compliance plan accordingly.
- (11) BERRYESSA shall submit an updated compliance plan demonstrating compliance with the Solid Waste Collection Vehicle Rule to Mr. Sidney Lau, ARB, Enforcement Division, 9480 Telstar Avenue, Suite 4, El Monte, CA 91731 or electronically at slau@arb.ca.gov within 60 days of this Agreement.
- (12) BERRYESSA shall complete Low NOx Software Upgrades (reflash) on all applicable heavy-duty diesel engines operating in California and report to the ARB within 45 days of this agreement.
- (13) Each 1974 or newer diesel powered heavy-duty commercial vehicle in BERRYESSA's fleet shall maintain compliance with the emission control label (ECL) requirements set forth in the CCR, Title 13, Section 2183(c), within 45 days of this agreement.
- (14) BERRYESSA shall instruct all employees who operate diesel fueled commercial vehicles to comply with the idling regulations set forth in CCR, Title 13, Section 2485, within 45 days of this Agreement.
- (15) This Agreement shall apply to and be binding upon BERRYESSA, 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 BERRYESSA, concerning the subject matter hereof, and supersedes and replaces all prior negotiations and agreements between ARB and BERRYESSA, 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 the ARB to provide information on the basis for the penalties it seeks (see Health and Safety Code section 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 Health and Safety Code sections 42403 and 43024.

Solid Waste Collection Vehicle Regulation Violations

The per vehicle penalty for the Solid Waste Collection Vehicle Regulation 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 Solid Waste Collection Vehicle Regulation violations for failing to install best available control technology by the implementation deadlines in this case is \$8,000, or \$1,000 per violation for 8 violations for an unspecified number of days.

Periodic Smoke Inspection Program 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 \$3,000 for 3 vehicles, or \$500 per vehicle per violation for two years.

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

Solid Waste Collection Vehicle Regulation Violations

The penalty provision being applied for the Solid Waste Collection Vehicle Regulation (Title 13, CCR, section 2020 et seq.) violations (including labeling) is Health and Safety Code section 39674. The Solid Waste Collection Vehicle Regulation is a Toxic Air Contaminant Control Measure adopted pursuant to authority contained in Health and Safety Code Sections 39660 and because BERRYESSA failed to use best available control technology on 3 vehicles by the implementation deadlines as required by the Solid Waste Collection Vehicle Regulation during the years 2006, 2007, 2008, 2009, 2010, and 2011 over an unspecified number of days.

Periodic Smoke Inspection Program Violations

The penalty provision being applied to the PSIP violations is Health and Safety Code section 43016 because BERRYESSA failed to test, measure, record, and maintain records of smoke emissions from its fleet of heavy duty diesel vehicles for the years 2010 and 2011 in violation of the PSIP regulation in Title 13, CCR Sections 2190 et seq, for 3 vehicles. 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.

The SWCV and 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 trucks involved and their individual emission rates are not known, it is not practicable to quantify the excess emissions.

- (22) BERRYESSA acknowledges that ARB has complied with SB 1402 in prosecuting or settling this case. Specifically, ARB has considered all relevant facts, including those listed at HSC section 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 consideration of past penalties in similar cases, and the potential costs and risk associated with litigating these particular violations. The penalty was discounted based

on the fact that the SWCV violations were first time violations and the violator made unusually diligent efforts to comply and to cooperate with the investigation. Penalties in further cases might be smaller or larger on a per unit basis.

- (24) The penalty was based on confidential settlement communications between ARB and BERRYESSA that ARB does not retain in the ordinary course of business either. The penalty is the product of an arms length negotiation between ARB and BERRYESSA and reflects ARB's assessment of the relative strength of its case against BERRYESSA, the desire to avoid the uncertainty, burden and expense of litigation, obtain swift compliance with the law and remove any unfair advantage that BERRYESSA may have secured from its actions.
- (25) Now, therefore, in consideration of the payment by BERRYESSA, in the amount of eleven thousand dollars (\$11,000.00), ARB hereby releases BERRYESSA and its principals, officers, directors, agents, subsidiaries, predecessors, and successors from any and all claims that ARB may have based on the facts and allegations described in recital paragraphs (1) – (11) above. The undersigned represent that they have the authority to enter into this Agreement.

California Air Resources Board

By: 

Name: James Ryden, Chief

Title: Enforcement Division

Date: 3/13/13

Berryessa Garbage Service, Incorporated

By: 

Name: Thomas W. Bomerz

Title: President

Date: 3/14/2013