

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 BEAR VALLEY ELECTRIC SERVICE (hereinafter "BVES"), PO Box 1547, Big Bear Lake, California 92315.

I. RECITALS

- (1) California Health and Safety Code (HSC) 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) HSC 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 excessive smoke emissions.
- (3) Title 13 CCR, section 2190 *et seq.* was adopted under the authority of HSC 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 that operate on the streets or highways within the State of California.
- (4) Title 13 CCR, section 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.
- (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."

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- (6) HSC 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 BVES 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 title 13 CCR, sections 2190 *et seq.*
- (9) HSC section 39650-39675 mandates the reduction of the emission of substances that have been determined to be toxic air contaminants (TACs). In 1998, following an exhaustive 10-year scientific assessment process, the ARB identified particulate matter (PM) from diesel-fueled engines as a toxic air contaminant. Public Agency and Utility (PAU) trucks are controlled under the PAU Truck Regulation as codified in title 13 California Code of Regulation (CCR), sections 2020, 2022, and 2022.1.
- (10) Under authority of HSC section 39600 and 39601, title 13 CCR, section 2020 and 2022 *et seq.* requires PAU fleet owners to use Best Available Control Technology (BACT) on applicable on-road diesel-fueled heavy-duty vehicles. Applicable vehicles have a manufacturers gross vehicle rating greater than 14,000 pounds with a 1960 to 2006 model-year medium heavy-duty or heavy heavy-duty engine or 2007 model-year engine or newer certified to greater than 0.01 grams per brake horsepower-hour particulate emission standard. Records of the installed diesel emission control strategies and corresponding compliance plans must be accessible at the terminal. Each public agency and utility fleet vehicle must have 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.
- (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) The PAU regulation requires owners of public agency or utility vehicles to apply BACT to all vehicles in their fleet based on an implementation schedule outlined in title 13 CCR, section 2022.1 (c), to reduce diesel smoke from PAU vehicles.

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- (13) ARB contends BVES failed to install BACT to vehicles in its fleet according to the implementation schedule outlined in title 13 CCR, section 2022 *et seq.*
- (14) BVES self-reported the potential violations of the PAU in February 2012, submitted a PAU compliance plan on March 14, 2012, and promptly achieved PAU Rule compliance in September 2012.
- (15) In order to resolve these alleged violations, BVES has taken, or agreed to take, the actions enumerated below under "TERMS AND RELEASE". This Settlement Agreement does not constitute an admission by BVES to the alleged violations. Further, the ARB accepts this Agreement in termination and settlement of this matter.
- (16) 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 alleged violations, and voluntarily agree to resolve this matter by means of this Agreement. Specifically, the ARB and BVES agree as follows:

II. TERMS AND RELEASE

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

- (1) Upon agreement, the sum of fourteen-thousand, two-hundred and fifty dollars (\$14,250.00) shall be paid on behalf of BVES no later than thirty days (30) following the execution of this agreement, as follows:
 - \$10,700.00 to the **Air Pollution Control Fund**
 - \$3,550.00 to the **Peralta Colleges Foundation**

Please submit the signed settlement agreement and checks to:

Mr. Ryan M. Atencio, Air Resources Engineer
Air Resources Board, Enforcement Division
9480 Telstar Ave. No. 4
El Monte, CA 91731

- (2) 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 BVES 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

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that these penalties imposed on BVES by ARB arising from the facts described in recital paragraphs 1 – 13 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.

- (3) BVES shall not violate HSC sections 43701 et seq., 44011.6 et seq., and title 13 CCR, sections 2180 et seq., 2190 et seq., and 2485 et seq.
- (4) BVES 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) BVES 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 BVES 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, BVES 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.
- (5) BVES 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) BVES 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

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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 BVES uses a contractor for the maintenance of DEATS, in addition to having the fleet maintenance manager (or equivalent) attend the CCDET II course, BVES 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 BVES to the ARB within six months of the date of this settlement and be maintained with the DEATS installation and maintenance records.
- (6) BVES shall submit copies of all PSIP compliance records for the years 2013 and 2014 after the close of the audit to the ARB by January 31 of the following year. Copies shall be addressed to the attention of Mr. Ryan M. Atencio at the California Air Resources Board, Enforcement Division, 9480 Telstar Ave. No. 4, El Monte, CA 91731. The ARB reserves the right to visit any BVES fleet location at any time to conduct compliance audits for the HDVIP and PSIP, or any other applicable ARB program.
- (7) BVES shall complete Low NO_x Software Upgrades (reflash) on all applicable heavy-duty diesel engines operating in California and report to the ARB within 90 days of this agreement.
- (8) Each 1974 or newer diesel powered heavy-duty vehicle in the BVES fleet shall comply with the emission control label (ECL) requirements set forth in the title 13 CCR section 2183(c).
- (9) BVES shall instruct all employees who operate diesel-fueled vehicles to comply with the idling regulations set forth in title 13 CCR section 2485, within 45 days of this Agreement.
- (10) Each PAU vehicle shall continue to comply with the label requirements set forth in title 13 CCR, section 2022.1(f)(3).
- (11) BVES shall maintain compliance with the PAU and Truck and Bus Regulations by using best available control technology to meet the implementation schedules specified in title 13 CCR, sections 2022.1 and 2025. BVES will keep the records of the installed diesel control strategies and update the compliance plan accordingly.
- (12) BVES shall submit a compliance plan demonstrating compliance with the PAU Rule to Mr. Ryan M. Atencio, ARB, Enforcement Division, 9480

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Telstar Ave. No. 4, El Monte, CA 91731 or electronically at ratencio@arb.ca.gov on or before December 31, 2013.

- (13) This Agreement shall apply to and be binding upon BVES, 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.
- (14) This Agreement constitutes the entire agreement and understanding between ARB and BVES concerning the subject matter hereof, and supersedes and replaces all prior negotiations and agreements between ARB and BVES 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) 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 HSC sections 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 alleged PSIP violations involved in this case is \$3,750 for 10 vehicles, or \$375 per vehicle per violation.

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

PAU Violations

The per vehicle penalty for the PAU Rule 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 alleged PAU Rule violations for failing to install best available control technology by the implementation deadline(s) in this case is \$10,500, or \$750 per vehicle per violation.

The penalty was discounted based on the fact that this was a first time violation and BVES 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 section 43016 because the ARB alleges that BVES failed to test, measure, record, and maintain records of smoke emissions from its fleet of heavy duty diesel vehicles for the years 2010 and/or 2011 in violation of the PSIP regulation in title 13 CCR sections 2190 *et seq* for ten 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 section 43016 is the applicable penalty provision.

PAU Violations

The penalty provision being applied for the PAU Rule (title 13 CCR section 2022 *et seq.*) violations is HSC section 39674. The PAU Rule is a Toxic Air Contaminant Control Measure adopted pursuant to authority contained

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in HSC Sections 39660 et seq. and because the ARB alleges that BVES failed to use BACT on five vehicles by the implementation deadline(s) as required by the PAU Rule during the years of 2007, 2008, 2009, 2010 and 2011 over an unspecified number of days.

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 PSIP and PAU 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.

- (20) BVES 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 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.
- (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 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.
- (22) The penalty was based on confidential settlement communications between ARB and BVES 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 BVES and reflects ARB's assessment of the relative strength of its case against BVES, the desire to avoid the uncertainty, burden and expense of litigation, obtain swift compliance with the law and remove any unfair advantage that BVES may have secured from its actions.
- (23) Now therefore, in consideration of the payment on behalf of BVES to the California Air Pollution Control Fund and the Peralta Community College District, the ARB hereby releases BVES and their principals, officers, directors, receivers, trustees, employees, successors and assignees, subsidiary and parent corporations, from any and all claims, the ARB may

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have or have in the future based on the circumstances described in paragraph 1 through 16 of the Recitals. The undersigned represent that they have the authority to enter into this Agreement.

California Air Resources Board

By: 

Name: James R. Ryden

Title: Chief, Enforcement Division

Date: 12/18/13

Bear Valley Electric Service

By: 

Name: HARRY SCARBOROUGH

Title: Harry Scarborough
Director

Date: 11/25/13