

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 BRUIN EXPRESS INTERMODAL LLC (hereinafter "BEI") 12631 E. Imperial Highway, Suite F-102, Santa Fe Springs, California 90670.

I. RECITALS

- (1) *H&SC* Sections 39650-39675 mandate 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. Drayage trucks are powered by diesel fueled engines that emit toxic particulate matter. Drayage trucks are controlled under the Drayage Truck Regulation as codified in Title 13, CCR, Section 2027.
- (2) Title 13, CCR, Section 2027 (d) (5) (A) 2 requires drayage truck motor carriers only dispatch drayage trucks that meet emission standards and compliance deadlines set forth in Phases 1 and 2 in Section 2027 (d). Section 2027 (d) (5) (A) 3 requires motor carriers only dispatch drayage trucks that are registered and in good standing with the Drayage Truck Registry (DTR).
- (3) The ARB Enforcement Division staff has documented that BEI, as a motor carrier, dispatched drayage trucks that are not compliant with the emission standards set forth in the Drayage Truck Regulation.
- (4) *H&SC* 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) or not to exceed ten thousand dollars (\$10,000) respectively, for each day in which the violation occurs.
- (5) ARB contends that if the facts described in recital paragraphs (1) – (4) were proven civil penalties could be imposed against BEI, as provided in *H&SC* Sections 43016 and 39674.
- (6) BEI 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 BEI, for the violations alleged above, ARB and BEI agree as follows:

(1) Upon execution of this Agreement, BEI shall pay a civil penalty of \$17,000.00. Payment shall be made in check form as described below and the full amount shall be submitted as per agreed payment schedule.

- \$12,750.00 to the **California Air Pollution Control Fund**.
- \$4,250.00 to the **Peralta Community College District**.

ARB to receive by:

08/30/2012	First Payment
09/30/2012	Second Payment
10/30/2012	Third Payment
11/30/2012	Fourth Payment
12/30/2012	Fifth Payment
01/30/2013	Sixth Payment
02/28/2013	Seventh Payment
03/30/2013	Eighth Payment
04/30/2013	Ninth Payment
05/30/2013	Tenth Payment
06/30/2013	Eleventh Payment
07/30/2013	Twelfth Payment

- First payment is due on August 30, 2012 and shall be made in form of a check payable to the **Peralta Community College District** in the amount of \$1,416.67.

- Second payment is due on September 30, 2012 and shall be made in form of a check payable to the **Peralta Community College District** in the amount of \$1,416.67.
- Third payment is due on October 30, 2012 and shall be made in form of a check payable to the **Peralta Community College District** in the amount of \$1,416.66.
- Fourth payment is due on November 30, 2012 and shall be made in form of a check payable to the **California Air Pollution Control Fund** in the amount of \$1,416.67.
- Fifth payment is due on December 30, 2012 and shall be made in form of a check payable to the **California Air Pollution Control Fund** in the amount of \$1,416.67.
- Sixth payment is due on January 30, 2013 and shall be made in form of a check payable to the **California Air Pollution Control Fund** in the amount of \$1,416.67.
- Seventh payment is due on February 28, 2013 and shall be made in form of a check payable to the **California Air Pollution Control Fund** in the amount of \$1,416.67.
- Eighth payment is due on March 30, 2013 and shall be made in form of a check payable to the **California Air Pollution Control Fund** in the amount of \$1,416.67.
- Ninth payment is due on April 30, 2013 and shall be made in form of a check payable to the **California Air Pollution Control Fund** in the amount of \$1,416.67.
- Tenth payment is due on May 30, 2013 and shall be made in form of a check payable to the **California Air Pollution Control Fund** in the amount of \$1,416.67.
- Eleventh payment is due on June 30, 2013 and shall be made in form of a check payable to the **California Air Pollution Control Fund** in the amount of \$1,416.67.
- Twelfth payment is due on July 30, 2013 and shall be made in form of a check payable to the **California Air Pollution Control Fund** in the amount of \$1,416.64.

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

Dr. Xiangyi Li, Ph.D., ARE
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, BEI 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 BEI, 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 BEI, 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 BEI, its subsidiary, or parent company, or a trustee in bankruptcy, custodian, receiver or agent is appointed or authorized to take charge of any of BEI's, its subsidiary, or parent company's properties, or if any deposit account or other property of BEI, 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 BEI, 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 BEI for violations of state environmental statutes, and these penalties are payable to and for the benefit of ARB, a government unit. Therefore, it is agreed that these penalties imposed on BEI by the ARB arising from the facts described in recital paragraphs (1) – (4) are nondischargeable 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.
- (5) BEI shall not dispatch drayage trucks that are not compliant with the emission standards set forth in the Drayage Truck Regulation or trucks that are not registered with the DTR. The ARB reserves the right to audit

the dispatch records of BEI for compliance with Title 13, CCR, Section 2027 (d) (5) any time in the future.

- (6) BEI shall not violate the Drayage Truck Regulation, as codified in Title 13, CCR, Section 2027.
- (7) This Agreement shall apply to and be binding upon BEI, 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.
- (8) This Agreement constitutes the entire agreement and understanding between ARB and BEI, concerning the subject matter hereof, and supersedes and replaces all prior negotiations and agreements between ARB and BEI, concerning the subject matter hereof.
- (9) 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.
- (10) 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.
- (11) 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.
- (12) 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.
- (13) **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 *H&SC* 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 *H&SC* sections 42403 and 43024.

The per vehicle penalty for the drayage 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 pursuant to *H&SC* section 39674. The penalty obtained for the drayage motor carrier violations involved in this case is \$17,000.00 for 422 dispatches of non-compliant vehicles by BEI or approximately \$40 per violation after considering the factors specified in *H&SC* section 43024. This penalty was reduced because this was a first time violation and the violator took exceptional efforts to come into compliance and cooperate with the investigation, and the violator's financial hardship was taken into consideration.

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

The penalty provision being applied for the Drayage Truck Regulation (Title 13, CCR, section 2027) violations in this case is *H&SC* section 39674 because the Drayage Truck Regulation is a Toxic Air Contaminant Control Measure adopted pursuant to authority contained in *H&SC* sections 39650 - 39675 and because BEI, as a motor carrier, dispatched drayage trucks that were not compliant with the emission standards set forth in the Drayage Truck Regulation.

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 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.

- (14) BEI 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 *H&SC* 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.

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- (15) 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. The penalty was discounted based on the fact that the drayage violations were first time violations and the violator made unusually diligent efforts to comply and to cooperate with the investigation. The penalty was also discounted based on the violator's financial hardship. Penalties in future cases might be smaller or larger on a per unit basis.
- (16) The penalty was based on confidential settlement communications between ARB and BEI 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 BEI and reflects ARB's assessment of the relative strength of its case against BEI, the desire to avoid the uncertainty, burden and expense of litigation, obtain swift compliance with the law and remove any unfair advantage that BEI may have secured from its actions.
- (17) Now, therefore, in consideration of the payment by BEI, in the amount of seventeen thousand dollars (17,000.00), ARB hereby releases BEI 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) – (4) above. The undersigned represent that they have the authority to enter into this Agreement.

California Air Resources Board

By: 

Name: Ellen M. Peter

Title: Chief Counsel

Date: 8/30/2012

Bruin Express Intermodal LLC

By: 

Name: DAVID ANTONSON

Title: Vice President

Date: 8/10/12