

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 TUFESA USA, LLC (hereinafter "TUFESA"), 1614 North 27th Avenue, Phoenix, Arizona 85009.

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

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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) 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.
- (9) ARB has documented that TUFESA 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.
- (10) ARB has documented that TUFESA failed to demonstrate that installed engines of heavy-duty diesel vehicles in its fleet met emission standards at least as stringent as applicable federal emission standards for the model year of the engine in violation of 13 CCR § 2183, *et seq.* Civil penalties have been set per 13 CCR § 2185(a)(3)(A) at \$500 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 (TAC). In 1998, following an exhaustive ten-year scientific assessment process, ARB identified particulate matter (PM) from diesel-fueled engines as a toxic air contaminant. In-use On-Road diesel vehicles are powered by diesel fueled engines that emit toxic particulate matter. On-Road vehicles are controlled under 13 CCR § 2025.
- (12) 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).”
- (13) 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 TACs not to exceed one thousand dollars (\$1,000) or ten thousand dollars (\$10,000), respectively, for each day in which the violation occurs.

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- (14) TUFESA has elected to meet the requirements of the Engine Model Year Compliance Schedule provided for in 13 CCR § 2025(g).
- (15) 13 CCR § 2025(g) requires that owners of diesel vehicles with a GVWR greater than 26,000 lbs. meet PM BACT requirements for all 2005 through 2006 engine model years by January 1, 2014.
- (16) ARB has documented that TUFESA failed to meet PM BACT requirements for all 2005 through 2006 engine model years by January 1, 2014.
- (17) In order to resolve these alleged violations, TUFESA has taken, or agreed to take, the actions enumerated below under "RELEASE". Further, ARB accepts this Agreement in termination and settlement of this matter.
- (18) 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 TUFESA agree as follows:

II. TERMS AND RELEASE

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

- (1) Upon execution of this Agreement, the sum of twenty eight thousand dollars (\$28,000.00) shall be paid on behalf of TUFESA no later than December 4, 2014, as follows:
 - \$21,000.00 to the **Air Pollution Control Fund**
 - \$7,000.00 to the **Peralta Colleges Foundation**

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

**Ms. Kristen Boberg
Air Pollution Specialist
California Air Resources Board
Enforcement Division
P.O. Box 2815
Sacramento, CA 95812**

Please submit the payment along with the attached “Settlement Agreement Payment Transmittal Form” (Attachment A) to:

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

- (2) If the Attorney General files a civil action to enforce this settlement agreement, TUFESA shall pay all costs of investigating and prosecuting the action, including expert fees, reasonable attorney’s costs, and costs.
- (3) 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 TUFESA 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 TUFESA through by ARB arising from the facts described in recital paragraphs (1) through (16) 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.
- (4) TUFESA shall not violate HSC §§ 43701 *et seq.*, 44011.6 *et seq.*, and 13 CCR §§ 2180 *et seq.*, 2190 *et seq.*, and 2485 *et seq.*
- (5) TUFESA 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.
- (6) Each 1974 or newer diesel powered heavy-duty vehicle in TUFESA’s fleet shall comply with the ECL regulation as codified in 13 CCR § 2183. Within 60 days of the execution of this Agreement, Tufesa shall **submit the proof of compliance to Ms. Kristen Boberg at the California Air Resources Board, Enforcement Division, P.O. Box 2815, Sacramento, CA 95812.**
- (7) TUFESA 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.

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- (8) TUFESA shall comply with the Truck and Bus regulation as codified in 13 CCR § 2025. Within 60 days of the execution of this Agreement, TUFESA shall submit the proof of compliance to **Ms. Kristen Boberg at the California Air Resources Board, Enforcement Division, P.O. Box 2815, Sacramento, CA 95812.**
- (9) TUFESA shall not violate the Truck & Bus regulation as codified in 13 CCR § 2025.
- (10) This Agreement shall apply to and be binding upon TUFESA, 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.
- (11) This Agreement constitutes the entire agreement and understanding between ARB and TUFESA concerning the subject matter hereof, and supersedes and replaces all prior negotiations and agreements between ARB and TUFESA concerning the subject matter hereof.
- (12) 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.
- (13) 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.
- (14) 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.
- (15) 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.
- (16) 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.

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 per vehicle per violation. The penalty obtained for the ECL violations involved in this case is \$1,125.00 for 5 vehicles, or \$225.00 per vehicle.

The per vehicle penalty for operating a heavy-duty vehicle with an installed engine that does not meet emission standards at least as stringent as applicable federal emission standards for the model year of the engine is a maximum of \$500 per vehicle per violation. The penalty obtained for the violations involved in this case is \$1,875.00 for 5 vehicles, or \$375.00 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.

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 \$ 25,000.00 or \$500.00 per month of violation for 5 vehicles with a 2005 through 2006 model year engine (10 months in 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.

ECL Violations

The penalty provision being applied to the ECL requirements is 13 CCR § 2185(a)(2) because TUFESA failed to provide evidence that 5 of their engines have ECL labels attached as required.

The penalty provision being applied to the engine emission standards requirements is 13 CCR § 2185(a)(3) because TUFESA failed to provide evidence that 5 of their engines met emission standards at least as stringent as applicable federal emission standards for the model year of the engine.

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 a Toxic Air Contaminant Control Measure adopted pursuant to authority contained in HSC §§ 39002 et seq., 39650-39675 and because TUFESA failed to bring their diesel fleet into compliance by the deadlines set forth in 13 CCR § 2025(g).

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.

ECL Violations

The provision cited above, pertaining to ECL labels, is not being assessed under a provision of law that prohibits the emission of pollution at a specified level.

The provision cited above, pertaining to engine emission standards, does 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.

Truck and Bus Violations

The provisions cited above do prohibit emissions above a specified 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.

- (17) TUFESA 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.
- (18) Penalties were determined based on the unique circumstances of this matter, considered together with the need to remove any economic benefit from

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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.

- (19) The penalty was based on confidential settlement communications between ARB and TUFESA that ARB does not retain in the ordinary course of business. The penalty is the product of an arms length negotiation between ARB and TUFESA and reflects ARB's assessment of the relative strength of its case against TUFESA, the desire to avoid the uncertainty, burden and expense of litigation, obtain swift compliance with the law and remove any unfair advantage that TUFESA may have secured from its actions.
- (20) Now therefore, in consideration of the payment on behalf of TUFESA to the Air Pollution Control Fund and the Peralta Colleges Foundation, ARB hereby releases TUFESA 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 (16) of the Recitals. The undersigned represent that they have the authority to enter into this Agreement.

California Air Resources Board

Signature: *Ellen M. Peter*
Print Name: Ellen M. Peter
Title: Chief Counsel
Date: 12/9/2014

Tufesa USA, LLC

Signature: *Arturo Morije*
Print Name: Arturo Morije
Title: General Manager
Date: 12/01/2014