

# 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 OTAY MESA SALES, INCORPORATED (hereinafter "OMSI"), 1596 Radar Road, San Diego, California 92154.

## I. RECITALS

- (1) California Health and Safety Code sections 39650-39675 (HSC §§ 39650-39675) mandate the reduction of the emission 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. In-use off-road diesel-fueled vehicles (off-road vehicles) are powered by diesel-fueled engines that emit toxic PM. Off-road vehicles are controlled under chapter 9, California Code of Regulations, title 13, section 2449 (13 CCR § 2449).
- (2) 13 CCR § 2449(b) states that, except as provided in § 2449(b)(2)(G), the Regulation for In-Use Off-Road Diesel-Fueled Fleets (Off-Road Regulation) "applies to any person, business, or government agency who owns or operates within California any vehicles with a diesel-fueled or alternative diesel fueled off-road compression-ignition engine with maximum power (max hp) of 25 horsepower (hp) or greater provided that the vehicle cannot be registered and driven safely on-road or was not designed to be driven on-road, even if it has been modified so that it can be driven safely on-road."
- (3) 13 CCR § 2449(f)(1) states that "Notwithstanding the requirements for vehicles used for emergency operations in section 2449(e)(3), if a fleet owner adds a vehicle to his California fleet or brings a vehicle into California from outside the State, the fleet owner has 30 days from the date of purchase or the date the vehicle enters California to apply to ARB for an equipment identification number (EIN) or, if the vehicle already has an EIN, to inform ARB of the purchase using forms approved by the Executive Officer for submittal of required reporting information. If the reporting date under section 2449(g)(2) occurs before 30 days after purchase, the annual reporting may serve as the application for an EIN."
- (4) 13 CCR § 2449(g)(4) states that "any person selling a vehicle with an engine subject to this regulation in California must notify ARB within 30 days from the date the vehicle was sold. If the reporting date under section 2449(g)(2) occurs within 30 days of the vehicle being sold, the annual reporting may serve as the notification to ARB that the vehicle was sold."

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- (5) ARB has documented that OMSI failed to notify ARB within 30 days after buying/selling vehicles with engines subject to the Off-Road Regulation.
- (6) Failure to report off-road vehicles and failure to notify ARB within 30 days of buying/selling off-road vehicles are violations of state law resulting in penalties. HSC § 39674 authorizes civil or administrative penalties not to exceed one thousand dollars (\$1,000) or ten thousand dollars (\$10,000) for each day that the violation occurs.
- (7) 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 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 PM. On-road vehicles are controlled under the Truck and Bus regulation, as codified in 13 CCR § 2025.
- (8) 13 CCR § 2025(r) sets forth the requirements for reporting all vehicles with engines subject to the regulation if the owner of a fleet has elected to utilize the compliance options of 13 CCR §§ 2025(f)(4), 2025(g)(3), 2025(g)(4), 2025(h), 2025(i), the credits of 13 CCR § 2025(j), and the agricultural provisions of 13 CCR § 2025(m), single-engine and two-engine street sweeper provisions of 13 CCR § 2025(n), extension or exemptions for vehicles used exclusively in NOx exempt areas of 13 CCR § 2025(p)(1), the extension for work trucks of 13 CCR § 2025(p)(2), and the low-use vehicle provision of 13 CCR § 2025(p)(4).
- (9) 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.
- (10) 13 CCR § 2025(e)(8) states: "All information specified in 13 CCR § 2025(r) must be reported to the Executive Officer."
- (11) OMSI has elected to utilize the compliance options/credits/provisions of section 2025(p)(4).
- (12) ARB has documented that OMSI failed to report all vehicles with engines subject to the regulation for which the fleet owner has elected to utilize the compliance options of 13 CCR § 2025(p)(4).

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- (13) In order to resolve these alleged violations, OMSI has taken, or agreed to take, the actions enumerated below under "RELEASE". Further, ARB accepts this Agreement in termination and settlement of this matter.
- (14) 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 OMSI agree as follows:

### II. TERMS AND RELEASE

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

- (1) Upon execution of this Agreement, the sum of four thousand dollars (\$4,000.00) shall be paid on behalf of OMSI no later than November 28, 2016, as follows:
- \$3,000.00 payable to the **Air Pollution Control Fund**
  - \$1,000.00 payable 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:**

**Mr. Christopher Patno  
Air Resources Engineer  
California Air Resources Board  
Enforcement Division  
9480 Telstar Avenue Suite 4  
El Monte, California 91731**

**Please send 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, California 95812-1436**

- (2) If the Attorney General files a civil action to enforce this settlement agreement, OMSI shall pay all costs of investigating and prosecuting the action, including expert fees, reasonable attorney's costs, and costs.

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- (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 OMSI 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 OMSI by ARB arising from the facts described in recital paragraphs (1) through (12) 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) OMSI shall not violate HSC § 44011.6 *et seq.*, 13 CCR §§ 2180 *et seq.*, and 2485 *et seq.*
- (5) OMSI shall comply with the requirements for off-road vehicles set forth in 13 CCR § 2449.
- (6) OMSI shall remain in compliance with the Emission Control Label (ECL) regulation as codified in 13 CCR § 2183.
- (7) OMSI 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.
- (8) OMSI shall not violate the Truck and Bus regulation as codified in 13 CCR § 2025.
- (9) This Agreement shall apply to and be binding upon OMSI, 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.
- (10) This Agreement constitutes the entire agreement and understanding between ARB and OMSI concerning the subject matter hereof, and supersedes and replaces all prior negotiations and agreements between ARB and OMSI concerning the subject matter hereof.
- (11) 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.

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- (12) 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.
- (13) 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.
- (14) 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.
- (15) 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.

#### Off-Road Vehicle Violations

The per vehicle penalty for the off-road vehicle 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 failure to notify ARB within 30 days of adding/selling off-road vehicles in this case is \$3,500.00 or \$500.00 per vehicle for seven vehicles.

#### Truck and Bus Violation

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 report all required information for one vehicle in the fleet is \$500.00.

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

Off-Road Vehicle Violations

The penalty provision being applied for the Off-Road Regulation (13 CCR § 2449) violations (including labeling) is HSC § 39674 because the Off-Road Regulation is an Airborne Toxic Control Measure adopted pursuant to authority contained in HSC §§ 39002 et seq., 39650-39675 and because OMSI failed to notify ARB within 30 days of adding/selling seven off-road vehicles, as required by the Off-Road Regulation.

Truck and Bus Violation

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 and because OMSI failed to report all required information for all vehicles in the fleet for which they have elected to utilize compliance options/credits/provisions as required in 13 CCR § 2025(r).

**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.**

Off-Road Vehicle Violations

The provisions cited above do not prohibit emissions above a specified level.

Truck and Bus Violation


The provisions cited above do not prohibit emissions above a specified level.

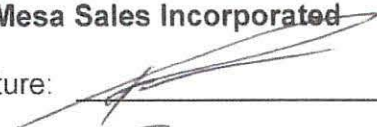

- (16) OMSI acknowledges that ARB has complied with Senate Bill 1402 in prosecuting or settling this case. Specifically, ARB has considered all relevant facts, including those listed at HSC § 43024, has explained the manner in which the penalty amount was calculated, has identified the provision of law 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.
- (17) 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.

- (18) The penalty was based on confidential settlement communications between ARB and OMSI that ARB does not retain in the ordinary course of business. The penalty is the product of an arms length negotiation between ARB and OMSI and reflects ARB's assessment of the relative strength of its case against OMSI, the desire to avoid the uncertainty, burden and expense of litigation, obtain swift compliance with the law and remove any unfair advantage that OMSI may have secured from its actions.
  
- (19) Now therefore, in consideration of the payment on behalf of OMSI to the Air Pollution Control Fund and the Peralta Colleges Foundation, ARB hereby releases OMSI 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 (12) 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: 11/03/16

**Otay Mesa Sales Incorporated**  
Signature:   
Print Name: Rick Handwick  
Title:   
Date: 11-31-2016