## 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 CITY OF BANNING (hereinafter "BANNING"), 99 East Ramsey Street, Banning, California, 92220.

## 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 post-repair opacity tests, 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) 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) ARB considers testing, measuring, recording, and recordkeeping to be critical components in reducing excessive smoke emissions from these heavy-duty vehicles.

(8) ARB contends BANNING failed to test, measure, record, and maintain records of smoke emissions from its fleet of heavy-duty diesel vehicles for years 2009 and 2010 in violation of CCR, title 13, sections 2190 *et seq*.

(9) 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.

(10) Title 13, CCR sections 2022 and 2022.1 authorizes the Public Agencies and Utilities (PAU) Regulation, which applies to any municipality or utility that owns, leases, or operates on-road diesel-fueled heavy-duty vehicle with a 1960 to 2006 model-year medium heavy-duty or heavy heavy-duty engine and has a manufacturer's gross vehicle weight rating greater than 14,000 pounds. Compliance requires BACT installation on each applicable vehicle in its fleet as required by the implementation schedule.

(11) Under authority of Health and Safety Code, section 39600 and 39601 the CCR, Title 13, section 2022 et seq. requires the PAU fleet owner to use BACT for each applicable vehicle in the active fleet. Records of the compliance plan must be accessible at the terminal. Each applicable diesel PAU 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.

(12) ARB contends BANNING failed to install Best Available Control Technology to vehicles in its fleet according to the schedule outlined in Title 13, CCR Sections 2022.1, in violation of the Health and Safety Code, Section 39674.

(13) BANNING 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 BANNING, for the violations alleged above, ARB and BANNING agree as follows:

(1) Upon execution of this Agreement, BANNING shall pay a civil penalty of $23,000.00. Payment shall be made in check form as described below and the payments shall be submitted no later than February 16, 2012:

SETTLEMENT AGREEMENT AND RELEASE ARB AND CITY OF BANNING:

- **$ 17,250.00** made out to **California Air Pollution Control Fund**
- **$ 5,750.00** made out to **Peralta Community College District**

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

Mr. Randy M. Rhondeau, Air Pollution Specialist
Air Resources Board, Enforcement Division
PO Box 2815
Sacramento, CA 95812

(2) BANNING 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.

(3) BANNING shall comply with one or both of the following options to attend the California Council on Diesel Education and Technology (CCDET) class, as described on the ARB's webpage at http://www.arb.ca.gov/enf/hdvip/hdvip.htm. This class is conducted by various California Community Colleges and instructs attendees on compliance with the PSIP and the HDVIP.

(a) BANNING shall have at least one staff member responsible for compliance with the PSIP and the HDVIP attend the CCDET class. Proof of CCDET completion shall be provided to ARB within one year of the date of this Agreement and shall be maintained in each applicable employee's file for the term of his or her employment, or as provided by BANNING's rules, regulations, codes, or ordinances, whichever is longer.

(b) If BANNING uses a contractor to perform the annual smoke opacity testing required under the PSIP, BANNING shall obtain proof that the

contractor's staff conducting the smoke opacity tests completed the CCDET course within the past four years. This proof of CCDET completion shall be provided to ARB with PSIP records as required by this Settlement Agreement and shall be maintained with the annual PSIP records.

(4) BANNING 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 Compliance emission regulations and the proper care and maintenance of Verified Diesel Emission Control Strategies VDECS).

(a) BANNING shall have at least one staff member responsible for maintenance of VDECS 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 shall also be maintained in each applicable employee's file for the term of his or her employment, or as provided by BANNING, rules, regulations, codes, or ordinance, whichever is longer.

(b) In case BANNING uses a contractor for the maintenance of VDECS, BANNING shall obtain proof that the contractor's staff maintaining the VDECS completed the CCDET II course within the last four years. This proof of the CCDET II completion shall be provided by BANNING to the ARB within one year of the date of this settlement and shall also be maintained with VDECS maintenance records.

(5) BANNING shall submit copies of all PSIP compliance records for years 2012 and 2013 to the ARB by January 31 of the following year. Copies shall be addressed to the attention of Mr. Randy M. Rhondeau, at the California Air Resources Board, Enforcement Division, P.O. Box 2815, Sacramento, CA 95812. The ARB reserves the right to visit any BANNING fleet location at any time to conduct compliance audits for the HDVIP and PSIP, or any other applicable ARB program.

(6) BANNING shall complete Low NOx Software Upgrades (reflash) on all applicable heavy duty diesel engines operating in California no later than 45 days after an engine requiring reflash to comply with ARB emission standards is identified or included in its fleet, and return proof to Mr. Randy M. Rhondeau, ARB, Enforcement Division, PO Box 2815, Sacramento, CA 95812.

(7) Each 1974 or newer diesel powered heavy-duty commercial vehicle in BANNING's fleet shall comply with the emission control label (ECL)

requirements set forth in the CCR, Title 13, Section 2183(c), within 45 days of this agreement.

(8) BANNING shall retrofit the appropriate number of PAU vehicles with best available control technology as specified in CCR, Title 13, and Section 2022.1. BANNING shall keep the records of the installed diesel control strategy and update the compliance plan accordingly. BANNING shall affix to each PAU vehicle a legible and durable label with complete and accurate information documented. This label shall be affixed to the driver's side door-jamb, or any other readily accessible location known to the driver. Submit an updated compliance plan by February 16, 2012 to Mr. Randy M. Rhondeau, ARB, Enforcement Division, PO Box 2815, Sacramento, CA 95812. All vehicles shall be in compliance no later than March 16, 2012. Proof of compliance shall be sent to ARB contact no later than April 2, 2012.

(9) BANNING shall comply with all the requirements of the PAU vehicle rule set forth in CCR, Title 13, and Section 2022.1 et seq.

(10) BANNING 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.

(11) This Agreement shall apply to and be binding upon BANNING, 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.

(12) This Agreement constitutes the entire agreement and understanding between ARB and BANNING, concerning the subject matter hereof, and supersedes and replaces all prior negotiations and agreements between ARB and BANNING, concerning the subject matter hereof.

(13) 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.

(14) 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.

(15) 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.

(16) 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.

(17) Now, therefore, in consideration of the payment by BANNING, in the amount of twenty-three thousand dollars ($23,000.00), ARB hereby releases BANNING 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) – (12) above. The undersigned represent that they have the authority to enter into this Agreement.

(18) 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. The penalty obtained for the PSIP violations involved in this case is $13,500.00 for 14 vehicles, or $500.00 per vehicle per violation.

PAU Violations

The per vehicle penalty for the PAU 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 PAU violations involved in this case is $9,500, or

$500 per vehicle for 8 vehicles for an unspecified number of days. The penalties are based on the number of vehicles that were not in compliance at each regulatory deadline. The vehicles were in Group 2 and Group 3 of the regulation. (See Appendix B). 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.**

PSIP Violations

The penalty provision being applied to the PSIP violations is HSC section 43016 because BANNING failed to test, measure, record, and maintain records of smoke emissions from its fleet of heavy duty diesel vehicles for the years 2009 and 2010 in violation of the PSIP regulation in CCR, title13, sections 2190 et seq., for 14 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, HSC section 43016 is the applicable penalty provision.

PAU Violations

The penalty provision being applied for the Fleet Regulation for Public Agencies and Utilities (Title 13, CCR, section 2022 et seq.) violations (including labeling) is Health and Safety Code section 39674 because the PAU rule is a Toxic Air Contaminant Control Measure adopted pursuant to authority contained in Health and Safety Code Sections 39650 - 39675 and because BANNING failed to use best available control technology on 8 vehicles as required by the Public Agencies and Utilities rule, on vehicles at the BANNING's terminals located in Banning during the years of 2007, 2008, 2009 and 2010 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 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.

(19) BANNING acknowledges that ARB has complied with SB 1402 in prosecuting and 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.

(20) 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/vehicle basis.

(21) The penalty was based on confidential settlement communications between ARB and BANNING 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 BANNING and reflects ARB's assessment of the relative strength of its case against BANNING, the desire to avoid the uncertainty, burden and expense of litigation, obtain swift compliance with the law and remove any unfair advantage that BANNING may have secured from its actions.

**California Air Resources Board**

By: _____

Name: Ellen M. Peter

Title: Chief Counsel

Date: 3/27/2012

**City of Banning**

By: _____

Name: _____

Title: Public Works Director

Date: 3/21/12