

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
Washington, D.C.

In the matter of:)
CHOICE TRANSPORTATION) File No. MSEB/AED - 4698
))
 Respondent.) SETTLEMENT AGREEMENT
)
)

THIS AGREEMENT is made and entered into by and between the United States Environmental Protection Agency (EPA) and Choice Transportation of 400 15th Street, Brooklyn, New York, (Respondent).

Preliminary Statement

1. On June 23, 1997, a Notice of Violation (NOV) was issued to Respondent alleging that Respondent had violated § 211 of the Clean Air Act (the Act), 42 U.S.C. § 7545, and the regulations promulgated thereunder at 40 CFR Part 80. The NOV stated that on March 5, 1996, the diesel fuel in the propulsion tanks of four trucks in Respondent's fleet had visible evidence of dye and had a sulfur percentage, by weight, greater than 0.05 percent in violation of 40 CFR Part 80. The NOV further recited the statutory civil penalty maximum of Twenty-Five Thousand Dollars (\$25,000) per day for each violation, plus the amount of economic benefit or savings resulting from the violation pursuant to § 211(d) of the Act, 42 U.S.C. § 7545(d).

2. After considering the gravity of the violation and Respondent's history of compliance with the Clean Air Act, EPA proposed in the NOV a civil penalty of Six Thousand Dollars (\$6,000).

3. The parties, desiring to settle and resolve this matter, in consideration of the mutual covenants and agreements contained herein, which consideration is acknowledged by the parties to be adequate, agree as set forth herein.

Terms of Agreement

4. The parties agree that the settlement of this matter is in the public interest and that this Agreement is the most appropriate means of resolving the matter.

5. The parties stipulate and agree to the following facts. It is further agreed that these stipulations are applicable to this Agreement and any proceeding arising out of this Agreement or the subject matter of this Agreement.

a. On March 5, 1996, agents of the U.S. Environmental Protection Agency took samples of diesel fuel from the fuel tanks of four trucks owned by Choice Transportation, formerly d/b/a 2702 W. 16th Street, Brooklyn, New York.

b. EPA's laboratory analysis determined that in all four cases the diesel fuel had visible evidence of dye and had a sulfur percentage, by weight, greater than 0.05 percent in violation of 40 CFR 80.29 at the time of the inspection. This constitutes four violations of 40 CFR § 80.29(a).

c. Respondent concedes the violations and has paid \$8,000 to the IRS for unpaid diesel fuel tax, civil penalties, fines and interest arising from the same facts and circumstances.

d. Respondent understands the conditions that caused the misfueling violations and his duty to prevent future violations.

e. Jurisdiction to settle this matter exists pursuant to section 211 of the Act, 42 U.S.C. § 7545, 40 CFR Part 80, and other provisions of law.

6. After considering the gravity of the alleged violation, Respondent's history of compliance, the terms of this Agreement, and other facts presented by Respondent, EPA has determined to conditionally remit and mitigate the civil penalty to Two Thousand Dollars (\$2,000.00). Respondent agrees to pay Two Thousand Dollars (\$2,000.00) within thirty days of receipt of a signed settlement agreement from EPA. In the event Respondent does not receive a copy of this Agreement within thirty (30) days following its execution by EPA, the due date shall be thirty (30) days following the date of Respondent's receipt of an executed copy. In accordance with the Debt Collection Act of 1982, if the debt is not paid within thirty (30) days following the due date, interest will accrue from the due date at the rate of eight percent (8%) per annum, through the date of actual payment. A late payment handling charge of Twenty Dollars (\$20.00) will also be imposed if the amount due is not paid by the due date, with an additional charge of Ten Dollars (\$10.00) for each additional thirty (30) day period. Respondent agrees to pay this amount by cashier's check or certified check with the notation "AED/MSEB - 4698" payable to the "United States of America," and mailed to:

U.S. Environmental Protection Agency
Washington Accounting Operations
P.O. Box 306277M
Pittsburgh, Pennsylvania 15251
Attention: AED/MSEB - 4698

A copy of this check shall be forwarded to Angela E. Fitzgerald, at the following address:

Angela E. Fitzgerald, Attorney/Advisor
U.S. Environmental Protection Agency
401 M Street, SW (2242A)
Washington, D.C. 20460

7. Time is of the essence to this Agreement. Upon failure to timely perform pursuant to paragraph 6 of this Agreement, or upon default of or failure to comply with any terms of this Agreement by Respondent, the proposed penalty of Six Thousand Dollars (\$6,000) shall be due and owing. The parties agree that upon such default or failure to comply, EPA may commence an action to enforce this Agreement or to recover the civil penalty pursuant to § 205 of the Clean Air Act; or pursue any other remedies available to it. Respondent specifically agrees that in the event of such default or failure to comply, EPA may proceed in an action based on the original claim of violation of § 203 of the Act, 42 U.S.C. § 7522, and Respondent expressly waives its right to assert that such action is barred by 28 U.S.C. § 2462, other statutes of limitation, or other provisions limiting actions as a result of the passage of time.

8. This Agreement becomes effective upon the date accepted by EPA, at which time a copy will be returned to Respondent.

9. Respondent hereby represents that the individual or individuals executing this Agreement on behalf of Respondent are authorized to do so and that such execution intended and is sufficient to bind Respondent, its officers, agents, directors, owners, heirs, assigns, and successors.

10. Respondent waives its rights, if any, to a hearing, trial or any other proceeding on any issue of fact or law relating to matters consented to herein. Notwithstanding its agreement to settle or resolve this matter, Respondent neither admits or denies the findings of fact or conclusions of law contained herein.

11. The terms of this Agreement are contractual and not a mere recital. If any provision or provisions of this Agreement are held to be invalid, illegal or unenforceable, the remaining provisions shall not in any way be affected or impaired thereby.

12. The validity, enforceability and construction of all matters pertaining to this Agreement shall be determined in accordance with applicable federal law.

13. Upon completion of the terms of this Agreement, this matter shall be deemed terminated and resolved. Nothing herein shall limit the right of EPA to proceed against Respondent in the event of default or noncompliance with this Agreement; for violations of § 203 of the Clean Air Act, 42 U.S.C. § 7522, which are not the subject matter of this Agreement; or for other violations of law.

The following agree to the terms of this Agreement:

Choice Transportation

by: Yadie Nell Pries

Date: 7/24/97

**United States
Environmental Protection Agency**

by: Anne M. Fontenot

fr Bruce C. Buckheit
Director, Air Enforcement Division
Office of Enforcement and Compliance Assurance

Date: 8/15/97