

## Air Quality – Mutual Facts

Biomassive, Inc. is the largest agricultural enterprise in the western United States. Among its products are almonds, rice, and walnuts. Because of its long history in the agricultural industry, Biomassive considers itself a steward of the environment. Company officials routinely donate to environmental causes, and they are particularly fond of Waterfowl Forever.

In addition to producing agricultural products, Biomassive owns and operates three power plants in California. Biomassive's three power plants are steam boiler designs. Biomassive's boilers burn fuel in a cell to heat water in tubes to make steam. The steam passes through a turbine to generate electricity.

Biomassive fuels the cells in its boilers by burning its agricultural byproducts, including rice hulls, almond and walnut shells, lopped branches from its orchards, and wood from downed trees. Biomassive also burns various urban wood wastes, including construction debris. Some contractors deliver construction debris to Biomassive for free as an alternative to paying landfill fees. Biomassive uses some of the energy it generates at its three plants to run the machines it uses to process its agricultural products. Under Biomassive's permit, it can burn its agricultural byproducts and urban wood waste as fuel, but it is not allowed to burn painted or treated wood or non-wood materials.

Biomassive makes more energy than it can use for its own processing needs. It sells the excess energy to a power company for resale to the public. In the late summer, when energy demand is high, the power company needs as much energy as it can get, and it will pay a premium price for Biomassive's late summer energy deliveries.

Last summer, energy demands were particularly high. During July and August Biomassive sold its excess energy to the power company at six to eight times normal prices. In order to maximize its energy generation, it ran the boilers at the three California facilities at their maximum permitted load. Biomassive wanted to generate as much energy as possible, not only because of the profit involved, but also to help California avoid any brown out (temporary reduction in total system capacity) or black out (complete interruption in power) conditions during peak energy demand.

During this time, when Biomassive ran short of available agricultural byproducts to use as fuel, it also accepted deliveries of urban wood waste, primarily construction debris. Sometimes Biomassive would pay for the wood waste; on other occasions, collectors would deliver the urban waste to Biomassive at its plants for free, in lieu of paying a tipping fee to dispose of the wood waste at a landfill. These deliveries came so frequently that Biomassive did not have enough staff to inspect the loads to ensure they were free of painted or treated woods and plastics.

The state Air Resources Board (ARB) began to receive complaints from residents in the vicinity of one of the Biomassive facilities in Ripon, California. The citizen complaints generally concerned the emission of a very dark plume from the stack and described black, greasy soot that was deposited on cars, backyard furniture, pet bowls, etc. This soot typically appeared in the mornings.

Dawn Trodden is a retired police officer who is a resident of Ripon. She has called ARB several times to complain about the soot, which she believes came from the Biomassive facility. Her home is on the street leading away from the large, open lot at the Biomassive site. The stack from the plant is approximately 200 yards from the edge of the lot. Ms. Trodden claims that last summer she saw a black plume coming from the facility on numerous occasions. In addition, she saw trucks entering the facility 24-7. The trucks were really noisy, and she saw trucks with uncovered loads, including plastics and painted wood, with dust blowing off of the loads and from the roads as the trucks arrived.

Ms. Trodden thinks that Biomassive is breaking some pollution law, and that does not sit well with her. In addition to making complaints to the ARB, she has several times confronted company officials from Biomassive about the soot on her car and yard furniture. Twice last summer, Biomassive's press officer offered to pay to have her car washed, although he has not repeated the offer since he learned she was also complaining to the ARB.

As a result of Ms. Trodden's complaints, the ARB conducted a surprise inspection of Biomassive's Ripon facility. During the inspection, there were no violations noted. Biomassive was burning agricultural byproducts, the emissions were within permit limits, and company officials stressed that they were in full compliance with all governmental requirements. One inspector, however, noted in the inspection report that "the employees seemed nervous."

Three days after the inspection, Biomassive officials learned for the first time that several employees had been tampering with emissions monitoring equipment at the Ripon facility to cause it to display and print a reading within permit limits although the actual emissions data showed a permit violation. One employee said that he was concerned that he would lose his job if he did not keep the facility operating within permit limits, but it was impossible to do so when the plant was burning urban wood waste instead of agricultural byproducts. In a meeting with the company president and vice-president, he claimed that he had told his supervisor that the urban waste was causing a problem with the boilers, but his supervisor had told him to shut up and do his job.

After the employees' confession, Biomassive conducted an immediate internal audit, interviewing all of its employees about the tampering with emissions monitoring equipment. As a result of its audit, Biomassive officials learned that employees had been tampering with emissions monitoring equipment at the Ripon facility. Within 48 hours of the confession, Biomassive contacted ARB and disclosed the tampering, hoping that its self-disclosure of the

tampering to the regulators would mitigate or avoid altogether any repercussions from that conduct. (See ARB enforcement policy, linked to Air Quality Negotiations Page on Canvas.)

Biomassive also immediately contacted local air pollution control officials. In dealing with occasional violations in the past, Biomassive would resolve the violation through negotiation of fines paid to whatever local air pollution control district its facility was located in. Biomassive negotiated a settlement with the local air district in the same way, paying a fine of \$75,000. The settlement agreement contained a non-admission provision with respect to any liability by Biomassive. Biomassive also fired several of the employees believed to be the ones who knew of and encouraged the tampering.

Since last summer, Biomassive has spent approximately \$20 million upgrading the equipment at its Ripon facility. With more modern, clean-burning equipment, the plant can now generate more energy without risk of violating its permit conditions. Having disclosed the tampering, fired the employees, upgraded its equipment, and paid a fine to the local air district, Biomassive officials believed its legal troubles were over.

Dawn Trodden was disgusted when she read in the paper that Biomassive paid what she considered a ridiculously small fine to the local air district. She decided to pursue legal action against the company and hired a local lawyer to represent her and other neighborhood residents in a lawsuit against Biomassive.

At the same time, the ARB concluded that Biomassive's behavior warranted far greater financial consequences to the company than the fines to the local air district. ARB ran a profit model and believes the company generated millions of dollars from \$17 to \$24 million in additional profits by selling excess energy to the power company last summer, and that it did so in violation of air pollution laws.

### **Round 1 - Trodden, et al. v. Biomassive**

Ms. Trodden and her neighbors scraped up enough cash to retain lawyers to sue Biomassive and signed an agreement waiving any potential conflicts of interest presented by collective representation by the same lawyers. There are 40 houses in the neighborhood near the Biomassive facility. The lawyers sent Biomassive a 60-day notice of intent to sue letter under the Clean Air Act. (See 42 U.S.C. § 7604, subd. (b); Link on Canvas). They also explained that separate from the Clean Air Act claim, the neighbors intend to pursue damages claims under various legal theories.

The 60 days are about to expire, and the neighbors are prepared to file suit against Biomassive. Biomassive's lawyers hope to avoid the negative publicity of a community-based lawsuit, and they have requested an early settlement meeting.

The neighbors contend that Biomassive's plant has violated its operating permit and the Clean Air Act, and that its operations created a nuisance under California state law. (See 42 U.S.C. § 7604, subds. (a)(1), (f); Civ. Code, §§ 3490-3495; *Venuto v. Owens Corning Fiberglass Corp.* (1971) 22 Cal.App.3d 116; CACI Nos. 2020-2022 [public & private nuisance and balancing harm], links on Canvas.)

Civil Code section 3479 provides: "Anything which is injurious to health, including, but not limited to, the illegal sale of controlled substances, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance."

Civil Code section 3480 provides: "A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal."

Civil Code section 3482 provides: "Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance."

One of the neighbors, Floyd Hawken, has just been diagnosed with lung disease. His doctor believes that the rare type of lung disease Hawken has could only be contracted from breathing pollutants from the plant. The neighbors want compensatory damages<sup>1</sup> not only for the sooty deposits on their property, but also for the air pollution and the emissions they have been breathing from living near the facility in Ripon. They also want Biomassive to implement measures to ensure the soot and permit violations will stop. They are willing to agree that some or all of any appropriate penalties may be diverted to projects towards this end. (See 42 U.S.C. § 7604, subd. (g), see also ARB and California Environmental Protection Agency webpages on Supplemental Environmental Projects; Links on Canvas.) In court, they will seek an injunction requiring Biomassive to operate at all times within its permit limits, cease burning urban waste, and install state-of-the-art pollution control and monitoring equipment to prevent sooty deposits on their property at any time in the future.

Biomassive believes that its Ripon facility upgrades may weaken the citizens' Clean Air Act claim if the citizens cannot allege facts indicating there is a continuing permit violation. See generally *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found.* (1987) 484 U.S. 49, 57 [to obtain Clean Water Act relief citizens must allege continuing violation; Clean Water Act provisions mirror Clean Air Act provisions], *Satterfield v. J.M. Huber Corp.* (N.D.Ga. 1994) 888 F.Supp. 1561, 1563-1565 [to obtain CAA relief citizens must allege continuing violation]; see

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<sup>1</sup> Compensatory damages and civil penalties are different types of relief that serve different purposes. Damages are designed to compensate an injured party for their loss or injury. Civil penalties, on the other hand, generally are designed to deter and/or penalize violations of laws and regulations, and are fines imposed for such violations.

also *Berry v. Farmland Indus.* (D. Kan. 2000) 114 F.Supp.2d 1150 [same, note also the analysis of related but not preclusive governmental settlement]; but see *Freid v. Sungard Recovery Services* (E.D. Pa. 1996) 916 F.Supp. 465, 467 [1990 Clean Air Act amendments “overruled *Gwaltney* with respect to wholly past violations”] (Links on Canvas.)

Biomassive was shocked to learn of the imminent lawsuit. Its officials believed that they had resolved the issues arising from the tampering. Moreover, Biomassive does not think that the sooty deposits on the neighbors’ property came from its facility. Instead, Biomassive thinks those deposits must have come from wildland fires or the neighbors’ own fireplace chimneys.

Biomassive has already retained a human health expert witness to review Floyd Hawken’s claims that emissions from its facility caused his lung damage. Biomassive’s expert has prepared a report stating that Hawken’s lung damage could not have possibly been caused by emissions from Biomassive’s facility, and in particular, would not have been caused by exposure to the several months of excess emissions during the summer. The report indicates Hawken likely has had the lung disease for many years.

Biomassive suspects that Trodden and her neighbors are not very well funded. If Biomassive is not able to reach a settlement with the citizens, it knows that it can afford to entrench in legal proceedings for several years, and that if it does, it will likely wear them down to where they may settle for less or dismiss their case. On the other hand, Trodden, Hawken, and their lawyers know that the ARB is investigating Biomassive as a result of the tampering disclosure, and they could be more motivated to support the ARB’s efforts and/or will be able to use any evidence uncovered in the ARB investigation. Biomassive is also aware of this possibility. Both parties are also aware that if the ARB files its suit, the citizens will not be able to file their own independent lawsuit for penalties under the Clean Air Act, but they could still pursue their nuisance claim. (See 42 U.S.C. § 7604, subd. (e).) In addition, to avoid negative publicity, Biomassive hopes to settle with the citizens before suit is filed.

One area where Biomassive believes the citizens group is off base is the urban waste. It believes that if clean urban waste is blended with enough agricultural products, it can burn that kind of waste while remaining within permit limits. It also believes strongly that when it does this, it provides a service to the community by disposing of waste that would otherwise take up space and rot in a landfill, where the emissions from that decomposing wood would contribute to formation of greenhouse gases. (See links to publications on Canvas regarding burning biomass.)

Although Biomassive has requested the early settlement meeting, it will not make an opening offer. The neighbors will have to make the first demand. In settlement discussions, the parties should attempt come to agreement on the terms of any settlement payment to the citizens, the payment if any to Hawken to monitor and treat his lung disease, and the terms of any mitigation projects and/or injunctive relief.

## Round 2 - ARB v. Biomassive

Separately, the ARB has conducted a complete investigation of all three of Biomassive's California facilities, interviewing all employees and reviewing the raw data from the continuous emissions monitoring systems (CEMS). Biomassive thinks the investigation was a waste of taxpayer resources, as it has already paid a fine to the local air district. Nevertheless, Biomassive cooperated with the investigation, believing that its disclosure of the tampering by the employees, coupled with its firing of the employees involved, will mitigate its obligations to the state, if any.

Biomassive contends that in the settlement reached with the local air district, it obtained a complete release of liability for the alleged violations. If the ARB files suit, it will argue that the settlement bars the state's lawsuit entirely. ARB strongly disagrees that the local settlement impacts the state's police power to prosecute the matter separately and believes that if this were the case, the agreement is void because it violates public policy. (See Civ. Code, §§ 1667-1668 (defining contracts that are against public policy), *Stewart v. Preston Pipeline, Inc.* (2005) 134 Cal. App. 4th 1565, 1585-1586 [settlement agreements are contracts]; *Rosen v. State Farm General Ins. Co.* (2003) 30 Cal.4th 1070 (conc. opn. of Moreno, J.) [courts look to Restatement factors to analyze whether a contract is against public policy; but see *Stephens v. Southern Pacific Co.* (1895) 109 Cal. 86, 89-90 ("unless it is entirely plain that a contract is violative of sound public policy, a court will never so declare.")].)

In any event, ARB is convinced that its initial investigation of the Biomassive facility in Ripon, several days before Biomassive's self-disclosure, was the catalyst that led to all the additional information coming out about Biomassive's violations.

In its initial investigation, ARB was able to decipher the CEMS data to show how many days of tampering occurred at the Ripon facility. The data showed that during July and August of last year, tampering occurred on at least 77% of the days. As a result, Biomassive potentially had numerous violations of its Ripon permit limits that were concealed by the tampering.

Additionally, through employee interviews, ARB identified at least one former employee at the Ripon facility who will testify that a shift supervisor routinely told employees to tamper with the emissions monitoring equipment. This employee will also testify that he sent email to upper management at Biomassive's headquarters about the tampering several times, although he has no record of that. Finally, he will also testify that employees were told to "really crank it up at night" when neighbors could not see the emissions from the plant's smokestack. He will testify that Biomassive burned mostly urban waste between 10 p.m. and 4 a.m.

Biomassive was not surprised about this particular employee's statements, because the company terminated him last year after conducting its internal audit. Biomassive contends his statements are retaliatory.

ARB believes Biomassive's disclosure of the tampering and its early, low-dollar settlement with the local air district was part of a calculated effort to head off a large penalty by ARB. It has let Biomassive know it wants a full accounting of Biomassive's profits last summer, and a penalty under the California Health and Safety Code (see links on Canvas) to deter similar conduct. ARB also wants injunctive relief requiring Biomassive to operate within its permit limits and install real-time emissions monitoring equipment that will broadcast Biomassive's emissions on the Internet. It also wants Biomassive to stop burning urban waste.

ARB is also aware that Biomassive is capable of litigating this matter for years. ARB believes that the risk is small that a court would find that the settlement with the local air district is a complete bar to the ARB's suit. Nevertheless, even though the risk is small, if that were to occur, the downside would be enormous. Under the circumstances, the ARB is willing to entertain settlement negotiations with Biomassive.

Biomassive thinks it has many strong defenses to the ARB's proposed suit. But to avoid the inevitable millions of dollars in litigation costs it would incur defending itself, as well as bad press, it is willing to meet to discuss ways to resolve the dispute. Moreover, Biomassive is particularly willing to settle with the ARB if a significant portion of the settlement proceeds can be put toward one or more supplemental environmental projects (SEPs). (See information about SEPs linked to Canvas.) For example, Biomassive might be willing to upgrade more of its equipment. ARB, on the other hand, has signaled it would consider SEPs that would have concrete benefit to the public and the environment.

Biomassive will make the opening offer.

## Negotiation Strategy Outline (Round 1)

Openers: JieQi, Danny

Closers: Sarah Roy, Sarah Rosenthal

1. Introductions
  - a. Introduce Biomassive as client
  - b. Recognize any hardships or distress Biomassive may have caused to the community
  - c. Reiterate that we are here today to negotiate an agreement that satisfies both parties without the need to go to court
2. Background and overview
  - a. Recognize the violations that were made and reiterate corrective actions that were taken on part of Biomassive:
    - i. Internal audit
    - ii. Firing of personnel that encouraged tampering of equipment
    - iii. Disclosed permit violation to ARB and paid fine to local air district
    - iv. \$20 million in equipment upgrades to generate more energy without risk of violating permit
  - b. Reassure the opposition that Biomassive does not intend to violate its permit in the future and fully committed to taking mitigation measures.
  - c. **Client Requirement:** Biomassive will not spend more than \$5 million in payouts to the community.
3. Biomassive views this negotiation around 3 key issues
  - a. Compensation for property damages
    - i. **Primary Offer:** Biomassive would like to resolve any damages to property from soot deposits during the time of its permit violation (e.g. repainting homes and carwash)
  - b. Compensation for health concerns
    - i. **Primary Offer:** Biomassive would like to provide monetary compensation to citizens who proved to have experienced any stress or hardship due to concerns of personal health during the violation time period.
      1. Address pre-existing conditions
      2. This includes compensation to Mr. Hawken
    - ii. **Client Requirement:** Biomassive requests release of liability from future citizen health claims through formal written agreement.
    - iii. **Exhibit A:** CalEnviroScreen Data



1. Demonstrates other potential causes of cancer due to long term exposure to pesticides, particulate matter, contaminated drinking water, and wildfire smoke.
    - iv. **Exhibit B: Inhalation exposure pathways for contaminants of concern**
      1. Demonstrates differences in health risks depending on exposure pathway (i.e. inhalation vs. ingestion)
  - c. Injunctive requests or other mitigation projects
    - i. **Primary Offer:** Biomassive is open to hearing feedback from community members on how it can improve its operations (e.g. limiting the number of truck deliveries per day).
      1. **Client Requirement:** Biomassive requests flexibility in its delivery hours during peak energy demand and that injunctive requests will not significantly impair operations
    - ii. **Primary Offer:** Biomassive is committed to hiring an independent inspector who will perform random inspections of urban waste loads entering the facility
      1. The goal is to continue burning waste as an alternative fuel in a safe and environmentally responsible way.
      2. **Client Requirement:** Biomassive does not agree to completely eliminating urban waste from its fuel supply.
    - iii. **Secondary Offer:** While not preferred, Biomassive is willing to invest resources in establishing a mechanism to make monitoring data public.
4. Reiterate that Biomassive's overarching goal is to improve its relationship with the community of Ripon
  - a. **Secondary Offer:** Biomassive is open to community projects in lieu of civil penalties
    - i. Includes any projects that would mitigate future wrongdoings or alleviate concerns of health or property damage (e.g. donation to community health clinic or providing air filters to homes and schools)

Description	Primary or Secondary Offer	Low-End Cost	High-End Cost	Notes
Property damages from soot for 40 houses. Payment would go towards cleanup of soot from property or any restoration due to damages (e.g. painting homes and cleaning cars).	Primary	\$300,000	\$500,000	Would be \$7,500 to \$12,500 per house
???	Secondary			
	<b>TOTAL</b>	\$300,000	\$500,000	
<b>Payment to Mr. Hawken for Treatment and Monitoring</b>				
Description	Primary or Secondary Offer	Low-End Cost	High-End Cost	Notes
Monetary payment to Mr. Hawken to cover any stress or hardship due to the cancer that may have been exacerbated by the violations that occurred. It is his discretion to use the money as he sees fit.	Primary	\$50,000	\$250,000	
Monetary payment to any remaining residents with health problems perceived to be caused by violation.	Primary	\$200,000	\$1,000,000	\$5,000 to \$25,000 per house
	<b>TOTAL</b>	\$250,000	\$1,250,000	
<b>Injunctive Relief</b>				
Description	Primary or Secondary Offer	Low-End Cost	High-End Cost	Notes
Limit on number of truck deliveries per day or other options for compromising in this area	Primary	N/A	N/A	Must allow Biomassive to expand 10-4 delivery hours during peak energy demand.
Payment assistance to household energy costs during peak energy demand.	Secondary			
Willing to hire independent inspector to perform random inspections of urban waste loads	Primary	\$180,000	\$300,000	Biomassive will not completely eliminate urban waste from its fuel supply. Inspector for 3-5 years at \$60,000 a year.
Invest resources in evaluating mechanism to make monitoring data public	Secondary			
	<b>TOTAL</b>	\$180,000	\$300,000	
<b>Mitigation Project</b>				
Description	Primary or Secondary Offer	Low-End Cost	High-End Cost	Notes
Donation to local health clinics to expand preventative healthcare services in Ripon	Secondary			
Air purifiers for homes and schools	Secondary	\$30,000	\$50,000	
	<b>TOTAL</b>	\$30,000	\$50,000	
<b>OVERALL TOTAL</b>		\$760,000	\$2,100,000	
Remaining Budget		\$4,240,000	\$2,900,000	

## Negotiation Strategy Outline (Round 2)

Openers: Kriti, Kelsie, and Junyan

Closers: Hannah and Federico

### 1. Introduction

- a. Introduce Biomassive as client
- b. Recognize hardships or distress Biomassive has caused to the community
- c. Reiterate that we are here today to negotiate an agreement that satisfies both parties without the need to go to court

#### **Opening by Kriti will include:**

**"Albert Einstein has said that a person who has never made a mistake has never tried anything new. Biomassive Inc had not made a mistake till it tried to provide for community needs by pushing to generate electricity when there was a dire need of it and learned the hard way that some mistakes have long term consequences that we can avoid if we don't overburden ourselves. Biomassive is and has been the steward of the environment**

- Information about how Biomassive is a corporation that has several branches and this issue has only occurred in the Ripon Facility: To<sup>1</sup> establish no viscous will or intention
- Mention that we are apologetic about what has happened, even if it happened without the understanding of the authoritative committee, the violation did occur and we are apologetic of it which is why we made a settlement with the local air quality to come clean and show to all the employees that we do not accept such behavior
- To further the same mindset, Biomassive installed new technology worth \$20 Mil and also fired employees who allowed the permit violations to occur on their watch instead of informing the management about it or taking any substantial steps themselves
- **Will mention that we are willing to show our financial records and to install an ambient air quality monitoring system that will be accessible to the public and to ARB whenever they desire.**
- Enlist the checklist on the things we intend to discuss

#### **Opening by Kelsie will include:**

- Go through CARB's 8 statutory factors one by one
  - ◆ Present facts and supporting arguments for each relevant and applicable statement regarding specific statutory factor provided in the enforcement policy
  - ◆ Use facts and supporting arguments in an effective manner to convey why the penalties should be lower
- 1st statutory factor: ***The extent of harm to public health, safety and welfare caused by the violation***

- ◆ Going into the negotiation knowing that it is very likely that CARB representatives will be aware of and potentially use the neighbors claims and impacts on health
  - ◆ Use information pulled from the local air pollution district - San Joaquin Valley Air Pollution Control District
    - Wildfire impacts
  - ◆ Present fact that Ripon has 2 fossil fuel generation plants; emission data can be found on CARBs “Hot Spots” Emission Inventory Criteria
    - AltaGas Ripon Energy Inc.
    - Modesto Irrigation District - Ripon Generation Station
- 2nd statutory factor: ***The nature and persistence of the violation, including the magnitude of the excess emissions***
- ◆ Penalties increase the longer a violation occurs and also increases when the nature of the violation is more severe, such as when it involves toxic air contaminants or was willful and intentional
  - ◆ The violation is the result of willful and intentional behavior from several dishonest employees who were fired immediately after this information was known to higher level company officials. The employees of Biomassive represent the company itself.
  - ◆ Company officials that are actually authorized to execute this kind of decision were not involved in any way. Despite the employee that was fired for conducting this offense willing to testify for CARB that higher level officials were informed via email, there is no record of such an event and is more than likely seeking retaliation against the company for his firing.
- 3rd statutory factor: ***The compliance history of the defendant, including the frequency of past violations***
- ◆ Biomassive has violated the permit twice before at the same facility
  - ◆ Circumstances of prior violations are very different; one from high moisture content of its fuel supply and the other from a batch of fuel that included black walnut byproducts
- 4th statutory factor: ***The preventative efforts taken by the defendant, including the record of maintenance and any program to ensure compliance***
- ◆ Biomassive took immediate action to prevent violations of this nature and magnitude immediately
    - Higher level company officials terminated the employment of the individuals that committed the actions that led to the violations
    - Higher level company officials voluntarily reported the permit violations to the local air pollution district and CARB
    - After the violation occurred, the company invested \$20 million to upgrade its equipment at the Ripon facility

- No violations have occurred since equipment was upgraded and responsible employees were fired
  - 5th statutory factor: ***The innovative nature and the magnitude of the effort required to comply, and the accuracy, reproducibility, and repeatability of the available test methods.***
    - ◆ <sup>2</sup>“Creative action being taken beyond efforts that are common in the industry”
      - Would spending \$20 million voluntarily and without any sort of legal requirement fall under being creative?
  - 6th statutory factor: ***The efforts of the defendant to attain, or provide for, compliance prior to violation***
    - ◆ Company had policy and procedures in place to ensure proper implementation, maintenance and operation of the emissions control mechanisms
  - 7th statutory factor: ***The cooperation of the defendant during the course of the investigation and any action taken by the defendant, including the nature, extent, and time of response of any action taken to mitigate the violation.***
    - ◆ Biomassive officials were more than happy to have CARB inspect the facility even when they were unaware of the fact that a violation had been committed by employees
    - ◆ Higher level company officials reported the violation within 48 hours of obtaining detailed information on the matter and firing the employees who took part in this action
  - 8th statutory factor: ***The financial burden to the defendant.***
    - ◆ Biomassive is willing and able to provide CARB with the full accounting of the company’s profits from last summer
      - Biomassive will also be able and willing to provide full accounting of overall profits
      - Biomassive overall profits have been low due to international competition and rising labor and transportation costs
2. First Offer by ARB:
- a. **Client Requirement:** Biomassive will not spend more than \$9.15 million to reach an agreement (highest \$75,000/day)
3. Here we mention Biomassive views this negotiation around 3 key issues
- a. Health and Safety Code Penalty
    - i. Recognize ARB is seeking \$9.15 million for the 122 days violated, but get this cost down
    - ii. Mention that the actions here were negligent and not willful and attempt to keep the penalty to a maximum of \$25,000 based on HSC 42402.1  
Negligence has 4 elements:

1. Legal Duty:  
Standard, reasonable care, foreseeability (Cannot be supported because Biomassive is not negligent in a way that a prudent person would do but it is something we failed to do)
  2. Breach (yes, a permit was violated so breach has taken place)
  3. Causation: Failure to maintain and inspect is included in causation (Careless conduct)
  4. Harm
- iii. If we are unable to prove negligence, attempt to keep the penalty at \$50,000 for it to be a max of \$6 million based on HSC 42402.3 (Reiterate the work already done and lack of funds, *Kelsie’s statutory explanation could be added here*)

**Client requirement:** Anything above \$6 million must be in SEPs

- iv. **Exhibit A:** ARB Enforcement Policy
  1. The extent of harm to public health, safety and welfare caused by the violation
  2. <sup>3</sup>The preventative efforts taken by the defendant including the record of maintenance and any program to ensure compliance
  3. The cooperation of the defendant during the course of the investigation and any action taken by the defendant, including the nature, extent and time of response of any action taken to mitigate violation
  4. The financial burden to defendant
  5. The frequency of past violations
- v. **Exhibit B:** California Health and Safety Code 42400.1, 42400.2, 42400.3

Penalty \$/day	Maximum Penalty \$ 122 days (June–September)	Penalty \$ based on Mutual Facts info 48 days – 62 days (77% – 100% of days in July–August)	CA HSC
25,000	3,050,000	1,200,000 – 1,550,000	42400.1
40,000	4,880,000	1,920,000 – 2,480,000	42400.2
75,000	9,150,000	3,600,000 – 4,650,000	42400.3

42400.1: Any person who negligently emits an air contaminant in violation of any provision [...]

42400.2: Any person who emits an air contaminant in violation of any provision [...], and **who knew of the emission and failed to take corrective** action within a reasonable period of time under the circumstances

42400.3: Any person who **willfully and intentionally** emits an air contaminant in violation of any provision of this part or any rule [...]

- b. Injunctive Relief
  - i. Stop burning urban waste
  - ii. Oversight costs
- c. SEPs
  - i. **Exhibit C:** Public Resources Code 71118
  - ii. **Exhibit D:** California EPA SEP Spreadsheet
  - iii. Thin forest in Quincy (and possibly other locations) to decrease wildfire risks (Quincy: \$358, 860)
  - iv. Asthma Impact Model
  - v. Air Filtration System in Schools
  - vi. Donate 500 acres if kept open to duck hunting (\$11,000 per acre)
    - 1. Keep this SEP in our back pocket as a last resort if extra \$ to spend
      - **Client Requirement:** No SEPs with ongoing administrative or labor costs
      - **Client Requirement:** No SEPs that fund future environmental investigations or prosecutions
      - **Client Requirement:** Would prefer SEP that benefits them, like upgrading more equipment
- d. Will not bring up local air district payment barring government police power because not believed to be a strong enough argument

Settlement Payment for Health and Safety Penalty					
Description	Low-End Cost	High-End Cost	Notes	Reasoning	
Health and Safety Penalty	\$3,050,000	\$9,150,000	Violated emissions over 122 day period. Low end of \$25,000/day and high end \$75,000/day	Get ARB down to low end through enforcement policy; 1) financial burden, 2) cooperation during investigation, 3) new equipment	
<b>TOTAL</b>	<b>\$3,050,000</b>	<b>\$9,150,000</b>			
Settlement Payment for Injunctive Relief					
Description	Low-End Cost	High-End Cost	Notes	Reasoning	
Provide full accounting of profits last year			Biomassive is willing to do this to cooperate	Will show ARB that Biomassive is struggling financially and didn't gain large amount of \$ from burning more urban waste following payment to local air district and new equipment	
Install real time monitoring equipment to broadcast to internet			Biomassive is willing to do this to earn trust back in community	Will show ARB we are willing to compromise and help amend wrong doings	
Burning urban waste			Biomassive wants to continue burning urban waste	Cheaper to obtain that ag products. Argue equipment, inspectors, and use of tree burning through Quincy tree thinning will ensure within permit emissions	
<b>TOTAL</b>					
Oversight Costs					
Description	Low-End Cost	High-End Cost	Notes	Reasoning	
Provide compensation for CARB oversight investigations	\$100,000	\$250,000	Don't want to go over \$250,000	Lower this cost as much as possible because there has been a lot of negative media coverage	
<b>TOTAL</b>	<b>\$100,000</b>	<b>\$250,000</b>			
SEPs					
Description	Low-End Cost	High-End Cost	Notes	Reasoning	Primary or Secondary Offer
Tree thinning in Quincy	\$358,860	\$1,794,300	Can perform in other areas as well (potentially Tracy, CA due to its fire hazard severity)	Prevent wildfire spreading and also provide clean biomass	Primary
Asthma Impact Model	\$80,000	\$320,000	1) home assessment 2) asthma education 3) home remediation 4) receive formal asthma diagnosis 5) see primary care physician about asthma 5) follow up on proper medication usage	Previous SEP by Central California Asthma Collaborative to expand to 50 low income clients, \$80,000	Primary
Air Filtration systems in schools	\$2,000,000	\$2,500,000	Air filtration systems target fine and ultrafine particulate matter and black carbon found in railroad locomotives and trucks associated with goods movement activities in the region, and other toxic air contaminants.	7 schools in Ripon, CA. Previous SEP in El Centro for \$1,500,000 for another community of lower income communities	Primary
Donate 500 (or less) acres of Bay-Delta ag land for open space	\$1,100,000	\$5,500,000	If waterfowl hunting still allowed and can choose what land to designate. \$11,000/acre	Will give land over for protection in an important habitat area	Secondary
<b>TOTAL</b>	<b>\$3,538,860</b>	<b>\$10,114,300</b>			
		Low-End Cost	High-End Cost		
	<b>OVERALL TOTAL</b>				
	<b>Remaining Bud</b>	<b>\$6,588,860</b>	<b>\$19,264,300</b>	<b>\$9,150,000 is max total amount</b>	
				Anything over \$6,000,000 must be for SEP	
				SEP can only offset 50% of penalty costs	