

STATE OF NEW YORK
DEPARTMENT OF LAW

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**In the Matter of an Investigation by the
Attorney General of the State of New York of
Alleged Illegal Engine Idling of Diesel-Powered
Trucks at the Hunts Point Cooperative Market, Inc.,
Bronx, New York.**

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**ASSURANCE OF DISCONTINUANCE
PURSUANT TO EXECUTIVE LAW § 63(15)**

Pursuant to provisions of Executive Law § 63, Eliot Spitzer, Attorney General of the State of New York, investigated alleged repeated violations by, among others, Hunts Point Cooperative Market, Inc. (the Market Cooperative) of **applicable restrictions on the idling of diesel-powered motor vehicle engines set forth in 6 New York Code Rules and Regulations (NYCRR) § 217-3.2 (the State Idling Regulation) at the Hunts Point Cooperative Market (the Meat Market).**

The Market Cooperative has denied any breach of the State Idling Regulation, and has cooperated with the Attorney General in this investigation. The Market Cooperative and the Attorney General have agreed to resolve the investigation and to settle the violations alleged by the Attorney General, without litigation and without any admission of liability, in accordance with the terms and conditions of this Assurance of Discontinuance (Assurance).

I. INVESTIGATIVE FINDINGS

The Attorney General makes the following findings:

1. Engine idling is running a motor vehicle engine when the motor vehicle is not operating in traffic. The idling of diesel-powered motor vehicle engines is subject to limitations under the State Idling Regulation.

2. The State Idling Regulation provides that:

No person who owns, operates or leases a bus or truck, the motive power for which is provided by a diesel engine or who owns, leases or occupies land and has the actual or apparent dominion or control over the operation of a bus or truck present on such land, the motive power for which said bus or truck is provided by a diesel engine, shall allow or permit the diesel engine of such bus or truck to idle for more than five consecutive minutes when the bus or truck is not in motion, except as otherwise permitted by section 217-3.3 of this Subpart.

6 NYCRR § 217-3.2(b). The exceptions include, among others, when:

- (a) A bus or truck is forced to remain motionless because of traffic conditions over which the operator has no control;
- (b) Regulations adopted by federal, state or local agencies having jurisdiction require the maintenance of a specific temperature for passenger comfort, subject to limitation;
- (c) Operation of the engine is required for the purpose of maintenance; and
- ...
- (f) A truck is to remain motionless for a period exceeding two hours, and during which period the ambient temperature is continuously below 25° F.

6 NYCRR § 217-3.3(a)-(c).

3. The State Idling Regulation was promulgated under authority granted by Article 19 of the New York State Environmental Conservation Law (ECL). Any person who violates any such rule or regulation "shall be liable, in the case of a first violation, for a penalty not less

than two hundred fifty dollars nor more than ten thousand dollars In the case of a second or any further violation, the liability shall be for a penalty not to exceed fifteen thousand dollars”

ECL § 71-2103(1).

4. Because the Meat Market is located within New York City, motor vehicles at the Meat Market, including but not limited to diesel-powered trucks, are also subject to the idling restriction in the New York City Air Code, NYC Administrative Code § 24-163 (the City Idling Regulation).

5. The City Idling Regulation provides that:

No person shall cause or permit the engine of a motor vehicle, other than a legally authorized emergency motor vehicle, to idle for longer than three minutes while parking ... standing ... or stopping ... unless the engine is used to operate a loading, unloading or processing device.

NYC Admin. Code § 24-163.

6. Each violation of the City Idling Regulation is subject to a minimum civil penalty of two hundred fifty dollars (\$250) and a maximum penalty of eight hundred seventy five dollars (\$875). NYC Admin. Code § 24-178(b)(5)(Table of Civil Penalties).

7. Illegal diesel engine idling degrades air quality and creates noise pollution, thereby impairing the quality of life. Illegal engine idling also wastes fuel.

8. The Market Cooperative is a corporation organized under the laws of New York State, and has a principal place of business at the Meat Market, 355 Food Center Drive, Bronx, New York. The Market Cooperative operates the Meat Market pursuant to (i) a lease with the City of New York, (ii) subleases with tenants, and (iii) the rules and regulations of the Meat Market.

9. The Meat Market is a large terminal market. The tenants at the Meat Market receive and distribute meat, seafood and other food in the New York City metropolitan area.

10. Much of the meat and other food handled by the Meat Market arrives at and leaves the market in trucks with diesel-powered engines. The trucks entering and leaving the Meat Market include long-haul tractor-trailers and a wide range of smaller, straight trucks. The average number of tractor-trailer truck entries into the Meat Market on a monthly basis is between 3,000 and 4,000, and the monthly average for straight trucks is approximately 5,000 entries. Those entries are made by a combination of trucks based at the Meat Market (Market Trucks), comprised of approximately 150 tractor-trailer and 300 straight trucks, and trucks based elsewhere (Non-Market Trucks)(Market Trucks and Non-Market Trucks together are Meat Market Trucks). While the ratio of Market Trucks to Non-Market Trucks inside the Meat Market varies at any given time, over the course of a day the number of Market Trucks generally either exceeds by more than three times (3X) the number of Non-Market Trucks or, during the 6:00 a.m. to 2:00 p.m. time period, is roughly equal.

11. The Market Cooperative controls entry to the Meat Market, and controls or has the ability to control conduct within the Meat Market. The Market Cooperative charges Non-Market Trucks a twenty-five dollar (\$25) entry fee to enter the Meat Market.

12. The Attorney General alleges that the Market Cooperative has engaged in repeated and persistent illegality in the conduct of business within the meaning of Executive Law § 63(12), by allowing or permitting diesel-powered trucks to idle within the Meat Market in violation of the State Regulation. In particular, the Attorney General alleges that personnel from

his office documented forty-five (45) instances of idling in violation of the State Idling Regulation during three days in 2002.

13. Preceding the Attorney General's investigation, the Market Cooperative voluntarily agreed to permit the installation and operation of IdleAire truck electrification bays within the Meat Market to reduce truck idling. The electrification bays provide truck cabs with temperature control, accessory power and other amenities which otherwise are dependent on the diesel-powered engine to operate. As of February, 2004, electrification bays to accommodate up to twenty-eight (28) trucks at one time have been installed within the Meat Market.

II. ENTRY INTO ASSURANCE

14. The Market Cooperative has cooperated with the Attorney General's examination of the facts, and with his requests for remedial action. The Market Cooperative is willing to enter into this Assurance by its duly authorized officer for settlement purposes only. The Market Cooperative denies the Attorney General's allegations of fact and law, and denies that it violated the State Idling Regulation. The Attorney General is willing to accept this Assurance pursuant to Executive Law § 63(15) in lieu of commencing a statutory proceeding.

III. ASSURANCE

IT IS HEREBY STIPULATED AND AGREED as follows:

A. COMPLIANCE PROGRAM

15. The Market Cooperative shall take all reasonable actions within its ability to prevent and control idling of diesel-powered trucks on the Meat Market premises in violation of the City and State Idling Regulations. At a minimum, these actions shall include the obligations set forth in paragraphs 16 through 20, and in paragraphs 22 through 24, below.

Market Idling Rule

16. The Market Cooperative shall, within thirty (30) days from the date that the Market Cooperative signs this Assurance, adopt and implement a Meat Market rule or regulation applicable to all motor vehicles on the Meat Market premises that, at a minimum, prohibits all Proscribed Idling¹ (the Market Idling Rule).

Anti-Idling Education

17. To the extent not already undertaken, the Market Cooperative shall, within forty-five (45) days from the date that the Market Cooperative signs this Assurance, develop and implement an anti-idling education campaign including, but not limited to, signs, brochures (or other written materials) and other reasonably available means of informing the Meat Market tenants and operators of motor vehicles entering and operating within the Meat Market of (i) the existence of the Market Idling Rule, (ii) the City and State Idling Regulations and mechanisms for their enforcement, (iii) the availability of the IdleAire electrification bays as an alternative to idling and (iv) the health and environmental effects of diesel exhaust.

¹ For purposes of this Assurance, "Proscribed Idling" means all idling that is prohibited under the State and City Idling Regulations, as they now exist and as they may be amended or modified in the future, subject to (1) the exceptions set forth in 6 NYCRR § 217-3.3 as they now exist and as they may be amended or modified in the future, and (2) to the extent, but only to the extent, that idling is necessary to (i) comply with applicable federal or state law or regulations concerning the operation of a motor vehicle or (ii) build air pressure to the level required to operate the motor vehicle safely.

Idling Monitoring

18. The Market Cooperative shall, within sixty (60) days from the date that the Market Cooperative signs this Assurance, begin performing idling compliance monitoring with its security personnel, on a twenty-four hour a day, every day of the year basis (the Idling Monitoring). The Idling Monitoring shall, at a minimum, include the following elements:

(A) Cover the entire Meat Market premises to monitor for idling trucks or other motor vehicles twelve (12) times during every 24-hour period. The monitoring shall be unannounced and shall be performed at random times.

(B) Upon observing an idling truck or other motor vehicle, monitoring the idling vehicle for at least six (6) minutes, unless the idling ends before that amount of time elapses, including without limitation, at the direction or request of the observer.

(C) Legibly completing an Illegal Idling Observation Form, in the form annexed as Exhibit A, for each observed idling in excess of three (3) minutes.

Reporting

19. The Cooperative Market shall report the results of its Idling Monitoring as follows:

(A) If the vehicle to which a completed Form pertains is owned or operated by a tenant of the Meat Market, a copy of the Form shall be provided to that tenant, with proof of delivery retained by the Cooperative Market, within ten (10) days of the observed idling.

(B) For a period of one year following the commencement of the Idling Monitoring, copies of all completed Illegal Idling Observation Forms shall be transmitted to the New York City Department of Environmental Protection (NYCDEP) and to the Attorney

General's Office on a monthly basis. The Forms completed during the preceding month shall be transmitted on or before the 15th day of each month. If there are no completed Forms for the preceding month, the Market Cooperative shall so inform the NYCDEP and the Attorney General's Office, in writing, on or before the transmittal date.

(C) For a period of two years following the period described in paragraph 19(B), copies of all completed Illegal Idling Observation Forms shall be transmitted to the NYCDEP and the Attorney General's Office on a quarterly basis. The Forms completed during the preceding quarter shall be transmitted on or before the 15th day of the month following the end of the quarter. If there are no completed Forms for the preceding quarter, the Market Cooperative shall so inform the NYCDEP and the Attorney General's Office, in writing, on or before the transmittal date.

Enforcement Access

20. Upon the presentation of office identification or other credentials, the Cooperative Market shall allow personnel from the Attorney General's office, the New York State Department of Environmental Conservation, the NYCDEP, and from any other law enforcement department or agency with jurisdiction, to access all outdoor areas of the Meat Market at any time for purposes of enforcing the State Idling Regulation or the City Idling Regulation, or to monitor compliance with the requirements of this Assurance.

B. CIVIL PENALTY

21. (A) The Attorney General contends that the Market Cooperative is subject to a civil penalty under the State Idling Regulation for allowing or permitting diesel engines to idle within the Meat Market. The Market Cooperative denies any such liability. To resolve that

dispute, the parties agree that the Market Cooperative will not be subject to a civil penalty provided the Market Cooperative complies with the terms and conditions of this Assurance. The parties further agree that a civil penalty shall be payable to the State of New York in the amount of twenty-two thousand five hundred dollars (\$22,500) if the Market Cooperative does not comply with the terms and conditions of this Assurance, subject to paragraph 21(B).

(B) If the Attorney General determines that the Market Cooperative is not in material compliance with a term or condition of this Assurance, the Attorney General shall provide written notice of the determination to the Market Cooperative (the Notice of Non-Compliance). The Notice of Non-Compliance shall describe with reasonable particularity the factual basis for the alleged non-compliance with the Assurance, and shall provide the Market Cooperative forty-five (45) days from receipt of such Notice to cure the alleged non-compliance. In the event the Market Cooperative fails to cure the non-compliance within the forty-five (45) day period, the penalty set forth in paragraph 21(A) shall be due on the forty-sixth (46th) day and shall be paid within five (5) business days from that date by delivering to the Attorney General, by Assistant Attorney General Lemuel M. Srolovic, at the address specified below, a certified or bank check payable to the "State of New York."

C. TRUCK IDLING MITIGATION

22. The Market Cooperative shall implement a truck idling mitigation project to improve air quality in the South Bronx by reducing engine idling by diesel-powered trucks in that area (the Mitigation Project). The Project shall permit a total of five thousand four hundred (5,400) truck entries of trucks from the Hunts Point Produce Market (Produce Market) into the Meat Market, without paying any Meat Market entry fee, for the sole purpose of using the

IdleAire electrification bays within the Meat Market. The Market Cooperative shall issue free entry tickets to the **Hunts Point Terminal Produce Cooperative Association, Inc. (the Produce Cooperative)** for distribution to trucks making deliveries or pickups at the Produce Market (Produce Market Trucks) at a rate that would permit the electrification bays to be fully utilized by Meat Market Trucks and Produce Market Trucks, taking into account any electrification bays that are then in use. In providing the entry tickets to the Produce Cooperative, and providing free entry to Produce Market Trucks to use the IdleAire electrification bays, the Market Cooperative may give preference to Meat Market Trucks to the extent that they are actually using the electrification bays. The Market Cooperative may also require reasonable proof of payment of the entry fee at the Produce Market before admitting a truck to the Meat Market pursuant to this paragraph. The Market Cooperative shall create and maintain a record of each Produce Market Truck admitted to the Meat Market pursuant to this project.

23. The Market Cooperative shall consult and cooperate with the Produce Cooperative and, if necessary, with the City of New York and other entities with jurisdiction, as reasonably necessary to implement the Mitigation Project.

24. In the event that the Mitigation Project is not fully implemented within three (3) years from the effective date of this Assurance for reasons outside the responsibility of the Market Cooperative under the terms of this Assurance, the Market Cooperative agrees to fund another idling mitigation project, or other air quality improvement project in the South Bronx. The amount of funding shall equal the number of free truck entries that were not utilized within the two year period, multiplied by \$12.50 per entry. The project or projects shall be approved by

the Attorney General before implementation, and shall be subject to reasonable reporting requirements on costs and implementation.

C. SETTLEMENT AND RESERVATION OF RIGHTS

25. The Attorney General agrees not to institute a judicial action or proceeding against the Market Cooperative regarding any breach of the State or City Idling Regulations preceding the date on which this Assurance is signed on behalf of the Attorney General, provided that the Market Cooperative fulfills all of its obligations under, and complies fully with, this Assurance. The Attorney General reserves his rights to commence and prosecute a judicial action or proceeding against the Market Cooperative to enforce the provisions of this Assurance, and the Market Cooperative reserves its rights and defenses to such an action or proceeding.

26. Nothing in this Assurance shall limit or prevent the Attorney General from imposing penalties or taking other enforcement action for any violation of the ECL or other applicable laws that is not addressed and resolved by this Assurance.

D. OTHER PROVISIONS

27. The Market Cooperative shall maintain all documents that it generates in implementing the requirements of this Assurance for a period of four (4) years following their generation. Subject to applicable attorney client, work product or other privilege, the Market Cooperative shall make those documents available to the Attorney General for inspection and copying within twenty (20) days of a written request for such access.

28. The Market Cooperative's obligations under paragraph 18 of this Assurance shall end on the fifth anniversary of the date on which both parties have executed this Assurance. In the event that the Market Cooperative fails to perform any of its obligations under paragraph 18 prior to that date, the Attorney General may enforce the terms of this Assurance during or after that performance period, or both, subject to the applicable statute of limitations.

29. All written communications, notices, reports, or other documents required to be submitted under this Assurance shall be served by facsimile transmission (with a confirmation copy sent by First Class U.S. Mail), hand delivery or overnight courier as follows:

If to the Attorney General, to:

Lemuel M. Srolovic
Assistant Attorney General
Section Chief, Affirmative Litigation
New York State Attorney General's Office
Environmental Protection Bureau
120 Broadway, 26th Floor
New York, New York 10271
Fax: (212) 416-6007

If to the Market Cooperative, to:

Bruce Reingold
General Manager
355 Food Center Drive, C101
Bronx, New York 10474
Fax: (718) 589-5018

-and-

Warren J. Karp, Esq.
James W. Perkins, Esq.
Greenberg Traurig, LLP
885 Third Avenue
New York, New York 10022
Fax: (212) 688-2449

Upon notice to the other party, each party may change the recipient(s) of service identified above.

Copies of Idling Observation Forms, or notices to NYCDEP pursuant to paragraph 19, shall be transmitted to Geraldine Kelpin, Director, Environmental Compliance, New York City

Department of Environmental Protection, 59-17 Junction Boulevard, 8th Floor, Corona, New York 11368-5107 or such other address as NYCDEP may designate.

30. This Assurance sets forth the entire agreement of the parties and may be modified only by the subsequent execution of a written agreement by the parties.

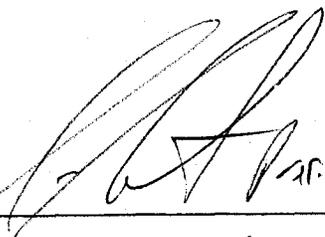
31. Each undersigned representative of the parties certifies that he or she is fully authorized to enter into the terms and conditions of this Assurance and to sign this Assurance on behalf of the party.

32. This Assurance shall be governed by, construed and enforced in accordance with the laws of the State of New York.

33. This Assurance may be signed in counterparts, each of which shall be deemed to be an original but all of which shall together constitute one instrument.

WHEREFORE, the parties have caused this Assurance to be signed by their duly authorized representatives.

HUNTS POINT COOPERATIVE MARKET, INC.

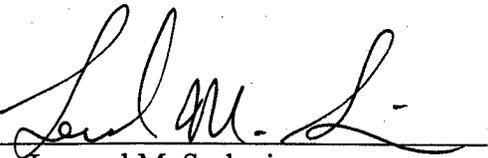
By:  _____

Date: 3/14/04

Print Name: S. Schwartz, Pres

Title: President

ELIOT SPITZER
ATTORNEY GENERAL OF THE STATE OF NEW YORK

By:  Date: 3/23/2004
Lemuel M. Srolovic
Assistant Attorney General
Section Chief - Affirmative Litigation
Environmental Protection Bureau