

SETTLEMENT AGREEMENT

This Settlement Agreement is entered into between the State of California Air Resources Board ("CARB") 1001 I Street, Sacramento, California 95814, and Electra Cruises, Inc. ("Electra Cruises") with its principal place of business located at 3439 Via Oporto, Newport Beach, CA 92663 (collectively, the "Parties").

RECITALS

- (1) Health and Safety Code (H&SC), Section 39650-39675 mandates the reduction of the emission of substances that have been determined to be toxic air contaminants (TACs). In 1998, following an exhaustive 10-year scientific assessment process, CARB identified particulate matter (PM) from diesel-fueled engines as a TAC.
- (2) Commercial Harbor Craft (CHCs) are powered by diesel fueled engines that emit toxic PM. CHCs are controlled under Title 17, California Code of Regulations (CCR), section 93118.5 (hereinafter the "CHC Regulation").
- (3) The purpose of this regulation is to reduce diesel PM, oxides of sulfur (SOx), and oxides of nitrogen (NOx) from diesel propulsion and auxiliary engines on CHCs that operate in Regulated California Waters (RCW). This section implements provisions of the Goods Movement Emission Reduction Plan, adopted by CARB in April 2006, to reduce emissions and health risk from ports and the movement of goods in California.
- (4) The CHC Regulation applies to any person who conducts business in California, who sells, supplies, offers for sale, purchases, owns, operates, leases, charters, or rents any new or in-use diesel fueled CHC that is operated in any of the RCW.
- (5) Sections 93118.5 (e)(1) thru (6) of the CHC Regulation sets forth the various fuel and emission requirements for CHCs subject to this regulation and section 93118.5(6)(C) of the CHC Regulation sets forth the compliance methods for meeting in-use engines and vessels schedules for Tier 2 and Tier 3 standards.
- (6) Failure to comply with the requirements of the CHC Regulation is a violation of state law that may result in penalties. H&SC sections 39674, 39675, 42400 et seq., 42402 et seq., and 42410 authorize civil penalties for the violation of the programs for the regulation of TACs not to exceed ten thousand dollars (\$10,000.00), respectively, per engine for each day in which the violation occurs.
- (7) CARB, with the cooperation of Electra Cruises, has documented that Electra Cruises located in Newport Beach, conducts business in California and operates new or in-use diesel fueled CHC in RCW.

- (8) CARB alleges that Electra Cruises failed to have non-resettable hour meter per, initially report and submit a compliance plan, or meet in-use engine standards, and failed to keep records per the CHC Regulation.
- (9) CARB alleges that if the allegations described in the above recitals were proven, civil penalties could be imposed against Electra Cruises as provided in H&SC sections 39674, 39675, 42400 et seq., 42402 et seq., and 42410 for each and every engine involved in the violation each day.
- (10) Electra Cruises admits to recital paragraphs 1 through 8, but denies any liability resulting from said allegations.
- (11) In order to resolve these violations, Electra Cruises has taken, or agreed to take, the actions enumerated under "Terms, Conditions, and Release" below. CARB accepts this Settlement Agreement in termination and settlement of this matter.
- (12) 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 Settlement Agreement.

TERMS, CONDITIONS, AND RELEASE

In consideration of CARB not filing a legal action against Electra Cruises for the violations referred to above, CARB and Electra Cruises agree as follows:

- (13) Upon execution of this Settlement Agreement, Electra Cruises shall pay the sum of **one hundred thirty-seven thousand five hundred dollars (\$137,500.00 USD)** by June 6, 2019 as follows:
 - \$68,750.00 USD to the Air Pollution Control Fund
 - \$68,750.00 USD to the Coalition for Clean Air
- (14) Electra Cruises shall submit payment to the **Air Pollution Control Fund** in the amount of **sixty-eight thousand, seven hundred fifty dollars (\$68,750.00 USD)** along with the enclosed Settlement Agreement Payment Transmittal Form (Attachment A) to:

California Air Resources Board
Accounting Office
P.O. Box 1436
Sacramento, California 95812-1436
- (15) Electra Cruises has agreed to undertake a Supplemental Environmental Project (SEP) to fund the **Kids Making Sense Youth Education, Southern California**

SEP (Kids Making Sense SEP) as described in the "Supplemental Environmental Project Agreement" (Attachment B) (SEP Agreement), to offset a portion of the penalty, consistent with CARB's SEP Policy. Electra Cruises shall enter into the SEP Agreement with the Coalition for Clean Air by June 6, 2019.

- (16) Electra Cruises shall submit payment in the amount of **sixty-eight thousand, seven hundred fifty dollars (\$68,750.00 USD)** to the Coalition for Clean Air by sending the payment along with the attached "Supplemental Environmental Project Payment Transmittal Form" (Attachment A- 2) to:

Coalition for Clean Air
For: Kids Making Sense Youth Education, Southern California
660 S. Figueroa Street, Suite 1140
Los Angeles, CA 90017

- (17) Electra Cruises has agreed that by funding the Kids Making Sense SEP, it will not receive any direct or indirect financial benefit.
- (18) Upon agreeing to the terms set forth in the SEP Agreement, and funding the Kids Making Sense SEP, Electra Cruises is released of all liabilities as they relate to the Kids Making Sense SEP as reflected in this underlying Settlement Agreement.
- (19) In the event the Kids Making Sense SEP is not fully implemented in accordance with the terms of the SEP Agreement, CARB (as the third party beneficiary) shall be entitled to recover the full amount of the SEP from the SEP implementer, less any amount waived based on the timely and successful completion of any previously agreed upon interim milestone(s). CARB will deposit any such recovery into the Air Pollution Control Fund. Accordingly, Electra Cruises assigns any and all rights against the SEP implementer to CARB.
- (20) Electra Cruises shall mail the (a) original fully executed and dated Settlement Agreement, (b) a copy of the Settlement Agreement Payment Transmittal Form (Attachment A), (c) a copy of the check or wire transfer to the Air Pollution Control Fund, (d) a copy of the SEP Payment Transmittal Form (Attachment A- 2), (e) a copy of the SEP Agreement (Attachment B), and (f) a copy of the payment check or wire transfer made to Coalition for Clean Air to fund the Kids Making Sense SEP in an envelope marked confidential to:

Mr. Alex Barber
Air Pollution Specialist
California Air Resources Board
Enforcement Division
9480 Telstar Avenue, No. 4
El Monte, California 91731

- (21) If the Attorney General files a civil action to enforce this Settlement Agreement, Electra Cruises shall pay all costs of investigating and prosecuting the action, including expert fees, reasonable attorney's fees, and costs.
- (22) Electra Cruises shall not violate any provision of CCR, Title 17, section 93118.5 and H&SC sections 39650-39675. Prior to execution of this Agreement, Electra Cruises represents that all CHC equipment alleged by CARB to have been in violation and cited in the Notice of Violation #2017-CHC-001 issued June 8, 2017, has been brought into compliance or otherwise is in compliance with the requirements of the CHC Regulation.
- (23) Electra Cruises shall report electronically or by mail, within 30 days of the end of each quarter to Enforcement Division to the individual identified in paragraph 20, their low use hours from engine logs for all vessels claiming low use for a period of one year from the date this Settlement Agreement is fully executed.
- (24) Now therefore, in consideration of the payment on behalf of Electra Cruises to the California Air Pollution Control Fund, CARB hereby releases Electra Cruises and its principals, officers, agents, predecessors and successors from any and all claims for past violations of H&SC sections 39650-39675, and the CHC Regulation, the CARB may have based on the circumstances described in the above Recitals.

GENERAL PROVISIONS

- (25) This Agreement settles all violations of those provisions of the H&SC and CCR that are subject to 2017-CHC-001 issued June 8, 2017. Nothing in this Agreement shall constitute or be construed as a satisfaction or release from liability for any violations of law other than those subject to the NOV 2017-CHC-001 dated June 8, 2017.
- (26) This Agreement constitutes the entire agreement and understanding between CARB and Electra Cruises concerning the subject matter hereof, and supersedes and replaces all prior negotiations and agreements of any kind or nature, whether written or oral, between CARB and Electra Cruises concerning the subject matter hereof.
- (27) The payment obligation and the release obligations under this Agreement shall apply to and be binding upon Electra Cruises and its officers, directors, receivers, trustees, employees, successors and assignees, members, parent corporations, and subsidiaries, if any; and upon CARB and any successor agency that may have responsibility for and jurisdiction over the subject matter of this Agreement.

- (28) The terms and conditions set forth in this Agreement shall remain valid and enforceable notwithstanding any future violations that may occur.
- (29) 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.
- (30) 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.
- (31) The headings in this Agreement are not binding and are for reference only and do not limit, expand, or otherwise affect the contents of this Agreement.
- (32) 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.
- (33) This Agreement shall further serve to toll any statute of limitation until all terms and conditions of this Agreement have been fulfilled.
- (34) Electra Cruises agrees not to assert laches as a defense.
- (35) 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.
- (36) It is further agreed that the stipulated penalties described in this Agreement are non-dischargeable under United States Code, title 11, section 523(a)(7), which provides an exception from discharge for any debt to the extent that such debt is for a fine, penalty, or forfeiture payable to and for benefit of a governmental unit, and is not compensation for actual pecuniary loss, other than certain types of tax penalties.
- (37) The failure of any Party to enforce any provision of this Agreement shall not be construed as a waiver of any such provision, nor prevent such Party thereafter from enforcing such provision, or any other provision of this Agreement. The rights and remedies granted all Parties herein are cumulative and the election of one right or remedy by a Party shall not constitute a waiver of such Party's right to assert all other legal remedies available under this Agreement or otherwise provided by law.
- (38) This Agreement may be executed in counterparts or duplicate originals, all of which shall be regarded as one and the same instrument, and which shall be the official and governing version in the interpretation of this Agreement. This

Agreement may be executed by PDF or facsimile signatures and such signatures shall be deemed to bind each Party as if they were original signatures.

- (39) The effective date of this Agreement shall be the date upon which Electra Cruises executes this Agreement.
- (40) Each of the undersigned represent that he or she has authority to enter into this Agreement.

PENALTY BASIS

- (41) Pursuant to H&SC section 39619.7, CARB must provide information on the basis for the penalties it seeks. The pertinent information is provided throughout this settlement agreement and summarized below.

The manner in which the penalty amount was determined, including a per unit or per vessel penalty.

The penalties in this matter were determined in consideration of all relevant circumstances, including the eight factors specified in H&SC sections 42403 and 43024.

Beginning in 2012, four of Electra Cruises' vessels failed to comply with the in-use requirements and failed to initially report and submit a compliance plan or keep records for the following vessels: Electra, Newport Princess, Athena, Destiny, and the Eternity.

The maximum per unit penalty is up to \$10,000.00 USD per day for strict liability violations pursuant to H&SC section 39674. The penalty obtained in this case is a total of \$137,500.00 USD with a per unit penalty of \$5,000.00 per propulsion engine per year of violation and \$2,500.00 per generator per year of violation. This includes 6 propulsion engines (2 with 2 years of non-compliance and 4 with 5 years of non-compliance) and 2 generators (1 with 3 years of non-compliance and 1 with 4 years of non-compliance).

Penalties must be set at levels sufficient to discourage violations. This penalty was calculated by considering all factors specified in H&SC sections 42403 and 43024. In particular, the penalty reflects penalties obtained in other CHC violation cases. The penalty was discounted based on the fact that this was a first time violation, the violator made diligent efforts to comply and to cooperate with the investigation, and many of the vessels were low-use. Also, Electra Cruises replaced one engine and installed improved shorepower capacity at the berth, even though it was not required to.

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

The penalty provision being applied in this case is H&SC section 39674 because Electra Cruises failed to comply with Section 93118.5 of the CHC Regulation, which was adopted under H&SC section 39600 et seq.

Whether the penalty being assessed is 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.

Since CARB has alleged that Electra Cruises vessels did not meet the CHC regulatory requirements, all of the emissions from it were excess and illegal. This penalty is being assessed under a provision of law that prohibits emission of pollutants at a specific level. However, since the hours of operation of the noncompliant units involved and their individual emission rates are not known, it is not practical for CARB to quantify the excess emissions.

- (42) Electra Cruises acknowledges that CARB has complied with H&SC section 39619.7 in settling this case. Specifically, CARB has considered all relevant facts, including those listed at H&SC sections 42403 and 43024; has explained the manner in which the penalty amount was calculated (including a per unit or per vessel penalty, if appropriate); and has identified the provision of law under which the penalty is being assessed.
- (43) 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 case negotiations, and the potential costs and risk associated with litigating these particular violations. The penalty reflects violations extending over a number of days considered together with the complete circumstances of this case. The penalty also reflects CARB's assessment of the relative strength of its case against Electra Cruises, the desire to avoid the uncertainty, burden, and expense of litigation, to obtain swift compliance with the law, and to remove any unfair advantage that Electra Cruises may have secured from its actions. Penalties in future cases might be smaller or larger on a per unit basis.

STIPULATED CONSENT JUDGMENT

- (44) The Parties stipulate to the entry of a Consent Judgment if Electra Cruises defaults on any of the terms and conditions of this Agreement and hereby waives the right to challenge a Consent Judgment based on the terms of this Agreement. Before declaring a default of the terms and conditions of this

Agreement, CARB shall first provide Electra Cruises ten (10) calendar days written notice of the claimed default and request to cure.

- (45) The Consent Judgment does not constitute evidence of an admission by Electra Cruises regarding any issue of law or fact alleged in the Agreement but sets forth the obligations of Electra Cruises and constitutes the complete, final, and exclusive agreement between CARB and Electra Cruises.
- (46) CARB expressly reserves the right to bring an enforcement action based on violations of law not covered in this Agreement and to seek whatever fines, penalties, or remedies provided by law, including injunctive relief.
- (47) In the event CARB seeks Consent Judgment based on Electra Cruises default under this Agreement, the Parties agree to the following:
 - a. Superior Court of California, County of Sacramento (Court) has jurisdiction over the Parties and of the subject matter of this action;
 - b. Venue is proper in this Court;
 - c. The Court has personal jurisdiction over Electra Cruises for purposes of enforcing the terms of the Consent Judgment; and
 - d. Obligations under this Agreement shall be deemed the terms and conditions of the Consent Judgment.

** Signatures are on the Following Page.*

Electra Cruises
Notice of Violation: 2017-CHC-001

THE UNDERSIGNED HAVE READ THE TERMS OF THE FOREGOING SETTLEMENT AGREEMENT AND FULLY UNDERSTAND AND AGREE TO ALL OF THE TERMS.

ACKNOWLEDGED AND ACCEPTED BY:

California Air Resources Board

Electra Cruises, Inc.

By: 

By: 

Name: Richard W. Corey
Title: Executive Officer
Date: 5/30/19

Name: Randy Goodman
Title: Owner
Date: May 7, 2019