

## SETTLEMENT AGREEMENT

This Settlement Agreement is entered into between the State of California Air Resources Board ("CARB") 1001 I Street, Sacramento, CA 95814, and Dutra Construction Co., Inc. ("Dutra") with its principal place of business located at 2350 Kerner Blvd Ste 200 San Rafael, CA 94901 (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) and (g) of the CHC Regulation sets forth the various fuel, emission, and recordkeeping requirements for CHCs subject to this regulation and section 93118.5(e)(6)(C) of the CHC Regulation sets forth the compliance methods for meeting in-use engine and vessel 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 Dutra, has documented that Dutra, based in San Rafael, California, conducts business in California and operates new or in-use diesel fueled CHC in RCW.

- (8) CARB alleges in its Notice of Violation, identified as “#CHC012320\_Dutra,” dated January 23, 2020 (“NOV”), that Dutra failed to have non-resettable hour meters installed in certain engines, as well as meet in-use engine standards and recordkeeping standards for certain vessels in its fleet, in accordance with the CHC Regulation.
- (9) CARB alleges that if the allegations described in the above recitals were proven, civil penalties could be imposed against Dutra as provided in H&SC sections 39674, 39675, 42400 et seq., 42402 et seq., and 42410, per day, for each engine involved in the violation.
- (10) Dutra admits to recital paragraphs 1 through 8, but denies any liability resulting from said allegations.
- (11) In order to avoid the costs, expenses, and uncertainty associated with litigation, the Parties desire to fully settle and resolve, by this Agreement, all alleged violations, claims, and disputes relating to NOV #CHC012320\_Dutra.

**TERMS AND CONDITIONS**

In reliance upon the foregoing Recitals and in consideration of the promises, payments and releases set forth below, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, CARB and Dutra agree as follows:

- (12) Dutra shall pay a civil penalty and agrees to fund a Supplemental Environmental Project (SEP) entitled Placer County Community Based SEP Phase 2 in the total amount of **one hundred forty-eight thousand, five hundred dollars (\$148,500.00 USD)** (“Settlement Payment”) split into the two following payments:

Payment Due Date:	In the Amount of and Payable To:	
<b>September 30, 2020</b>	<b>\$74,250.00</b>	<b>California Air Resources Board</b>
<b>December 31, 2020</b>	<b>\$74,250.00</b>	<b>Placer County Air Pollution Control District</b>

- (13) Dutra’s payment of **seventy-four thousand two hundred fifty dollars (\$74,250.00 USD)** to the California Air Resources Board for deposit into the Air Pollution Control Fund shall be paid by the first due date specified in Paragraph 12. The payment will be made by check, credit card, wire transfer, or portal, using instructions provided separately by CARB in a Payment Transmittal Form. Payments shall be made to the address that correlates to the payment method elected, and shall be accompanied by the Payment Transmittal Form to ensure proper application:

**For payments made by check or credit card, mail to:**

California Air Resources Board Accounting Branch  
P.O. Box 1436  
Sacramento, CA 95812-1436

**For payments made by wire transfer:**

State of California Air Resources Board  
c/o Bank of America, Inter Branch to 0148  
Routing No. 0260-0959-3 Account No. 01482-80005  
Notice of Transfer: Edna Murphy, Fax: (916) 322-9612  
Reference: CHC012320\_Dutra

**For payments made via the First Data payment portal:**

Information to assist you with making online payments via the First Data payment portal is available at this link on CARB's website:

<https://ww2.arb.ca.gov/payments>

- (14) Dutra's payment of **seventy-four thousand two hundred fifty dollars (\$74,250.00 USD)** to the Placer County Air Pollution Control District shall be paid by wire transfer or check payable to the SEP implementer/recipient, Placer County Air Pollution Control District (PCAPCD) by the second due date specified in Paragraph 12, using instructions provided separately by the PCAPCD. For payment to the PCAPCD, Dutra shall send the payment to:

A.J. Nunez  
Senior Administrative Services Officer  
Placer County Air Pollution District  
110 Maple Street  
Auburn, CA 95603

- (15) Dutra agrees that by funding the SEP entitled Placer County Community Based SEP Phase 2, Dutra will not receive any direct or indirect financial benefit, and that whenever Dutra publicizes or refers to the SEP or the results of the SEP, Dutra will state that the SEP is being undertaken as part of the settlement of a CARB enforcement action.
- (16) In the event the PCAPCD does not fully implement or complete the SEP in accordance with the terms of the SEP Agreement, CARB shall be entitled to recover the full amount of the SEP from the PCAPCD, less any amount expended 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, Dutra assigns any and all rights against the PCAPCD to CARB.

Upon funding the SEP, Dutra shall be released from all liabilities as they relate to the implementation or non-implementation of the SEP.

- (17) Dutra shall, upon completion of each, promptly send the executed Settlement Agreement, proof of all payment(s), all Payment Transmittal Form(s), and all annual reports to the following recipient via email; in addition the original executed Settlement Agreement must be sent via mail:

Michael Sekigahama Air Pollution Specialist  
California Air Resources Board Enforcement Division  
8340 Ferguson Ave  
Sacramento, California 95828  
Email: michael.sekigahama@arb.ca.gov

- (18) If the Attorney General files a civil action to enforce this Settlement Agreement, Dutra shall pay all costs of investigating and prosecuting the action, including expert fees, reasonable attorney's fees, and costs.
- (19) Dutra shall not violate any provision of CCR, Title 17, section 93118.5 and H&SC sections 39650-39675. Dutra attests that, prior to execution of this Agreement, all CHC equipment alleged by CARB to have been in violation and cited in the NOV has been brought into compliance with the requirements of the CHC Regulation. All vessel changes made to bring equipment into compliance will be reported to CARB as required by the CHC Regulation.
- (20) Dutra shall submit annual reports to the above CARB recipient, or any other CARB recipient designated by CARB in the future, for three years after execution of this Agreement. All reports shall include every diesel engine operating on vessels in Dutra's California fleet and include the following information: vessel name, vessel type, vessel homeport, current hour meter reading, engine make, engine model, engine family name, engine serial number, engine model year, engine rated brake horsepower, and engine use (propulsion or auxiliary). If the engine has emission control equipment installed the report will also include: type of diesel emission control, manufacturer of emission control equipment, model name, serial number, and date installed. If no installations were made, Dutra shall so state.

Dutra shall submit all reports according to the following schedule:

- 2020 report due by January 30, 2021;
- 2021 report due by January 30, 2022; and
- 2022 report due by January 30, 2023.

Dutra shall email or mail the annual reports to the address identified in Paragraph 17 using the excel template provided by CARB enforcement.

All reports identified in this paragraph are independent of any other requirement of the CHC Regulation and does not absolve Dutra from its responsibility of filing additional reports as required by the regulation.

- (21) In consideration for Dutra's foregoing obligations, including full completion of the Settlement Payment, CARB (1) agrees ex post facto that all official records and correspondence related to the NOV will be in the name of "Dutra Construction Co., Inc" rather than "The Dutra Group," including the NOV itself and the Tolling Agreement (dated on or about April 17, 2020) and (2) hereby releases, waives, and forever discharges Dutra and its subsidiaries, affiliates, parent companies, successors, and assigns, and each of their principals, officers, directors, shareholders, managers, employees, receivers, and trustees from any violations, claims, and disputes CARB alleged in NOV #CHC012320\_Dutra. Nothing in this Agreement shall constitute or be construed as a satisfaction or release from liability for any violations of law other than those alleged in NOV #CHC012320\_Dutra.

### **GENERAL PROVISIONS**

- (22) This Agreement constitutes the entire agreement and understanding between CARB and Dutra 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 Dutra concerning the subject matter hereof.
- (23) The payment obligation and the release obligations under this Agreement shall apply to and be binding upon Dutra and its officers, directors, receivers, trustees, employees, successors and assignees, members, parent corporations, and subsidiaries, if any; and upon CARB and any alternate or successor agency that may have any responsibility for and jurisdiction over the subject matter of this Agreement.
- (24) The terms and conditions set forth in this Agreement shall remain valid and enforceable notwithstanding any future violations that may occur.
- (25) 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.
- (26) 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.
- (27) 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.
- (28) 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.

- (29) This Agreement shall further serve to toll any statute of limitation until all terms and conditions of this Agreement have been fulfilled.
- (30) Dutra agrees not to assert laches as a defense.
- (31) 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.
- (32) 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.
- (33) 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.
- (34) Should Dutra be unable to comply with any provision of the Settlement Agreement due to a majeure event, Dutra shall notify CARB in writing of the event and provide sufficient proof to establish (A) the force majeure event occurred, (B) non-compliance with any provision of this Settlement Agreement is due to the force majeure event, and (C) Dutra used its best efforts to fulfill the obligations so as to minimize any adverse effects of the delay. The term "Force Majeure" means, for purposes of this Settlement Agreement, a sudden and unforeseeable event involving a clear and imminent danger, demanding immediate action to prevent or mitigate the loss of, or damage to, life, health, property, or essential public services, arising from causes beyond the control of the Person claiming the event, which delays or prevents the performance of any obligation under this Settlement Agreement, despite the Person's best efforts to fulfill the obligation. This includes war, fires, floods, hurricanes, tornadoes, earthquakes, volcanic eruptions, and pandemics where the State of California or federal government issues a declaration of emergency. This does not include negligent acts or the Applicant's financial inability to perform which is unrelated to the event as described in this section.
- (35) 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.

- (36) The effective date shall be the date upon which this Settlement Agreement is fully executed.
- (37) Each of the undersigned represent that he or she has authority to enter into this Agreement.
- (38) The Parties represent that they have participated fully in the review and drafting of this Settlement Agreement; understand and accept all terms; enter into this Settlement Agreement freely and voluntarily; have had an opportunity to consult with legal counsel; are fully informed of the terms and effect of this Settlement Agreement; have agreed to this Settlement Agreement after independent investigation and agree it was not arrived at through fraud, duress, or undue influence; and knowingly and voluntarily intend to be legally bound by this Settlement Agreement.

### **PENALTY BASIS**

- (39) 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.

Between October 2018 and May 2019 CARB staff performed routine inspections on Dutra's in-use commercial harbor craft in Regulated California Waters. Eight in-use engines were found to be operating for one to three years past their respective compliance deadlines or without a functioning hour meter totaling 14 alleged in-use standard violations. Four in-use engines were found to have inadequate records between 2017 and 2019 for determining engine hour usage, totaling nine alleged recordkeeping violations. The total number of alleged violations found during the investigation was 23.

The maximum per unit penalty is \$10,000.00 USD per day for strict liability violations pursuant to H&SC section 39674. In considering the eight factors specified in H&SC sections 42403 and 43024 the total penalty issued in this case is \$148,500.00 USD with a per unit penalty of \$6,456.52 per engine per year.

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 the first-time violations were alleged against Dutra and Dutra 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.**

The penalty provision being applied in this case is H&SC Section 39674 because Dutra 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, whether it is practicable to provide a quantification of excess emissions.**

Since CARB has alleged that some of Dutra's vessels did not meet the CHC regulatory requirements by failing to bring certain engines into compliance by their respective deadlines all hours operated by those engines were in excess of what the regulation allows and, therefore, illegal. Due to Dutra's inadequate recordkeeping it is impossible for CARB to calculate exactly how many hours of excess emissions occurred.

This penalty is being assessed under a provision of law that prohibits emission of pollutants at a specific level. However, the individual emissions rate of all the engines are not known and it is not practical nor possible for CARB to accurately quantify these excess emissions.

- (40) Dutra 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.
- (41) 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 alleged violations. The penalty reflects alleged 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 Dutra, 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 Dutra may have secured from its actions. Penalties in future cases might be smaller or larger on a per unit basis.



## STIPULATED CONSENT JUDGMENT

- (42) The Parties stipulate to the entry of a Consent Judgment if Dutra 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. Ten (10) calendar days before declaring a default of the terms and conditions of this Agreement, CARB shall first provide Dutra written notice of the claimed default and request that Dutra cure the default within a specified time.
- (43) The Consent Judgment does not constitute evidence of an admission by Dutra regarding any issue of law or fact alleged in the Agreement but sets forth the obligations of Dutra and constitutes the complete, final, and exclusive agreement between CARB and Dutra.
- (44) CARB expressly reserves the right to bring an enforcement action based on violations of law not settled in this Agreement and to seek whatever fines, penalties, or remedies are provided by law, including injunctive relief.
- (45) In the event CARB seeks Consent Judgment based on Dutra's default under this Agreement, the Parties agree to the following:
- a. The 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 Dutra 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.

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**

**DUTRA CONSTRUCTION CO., INC.**

By: \_\_\_\_\_ /S/ \_\_\_\_\_

By: \_\_\_\_\_ /S/ \_\_\_\_\_

Name: Richard W. Corey  
Title: Executive Officer  
Date: August 24, 2020

Name: Harry K. Stewart  
Title: Chief Operating Officer  
Date: July 22, 2020