

## SETTLEMENT AGREEMENT

This Settlement Agreement (Agreement) is entered into between the California Air Resources Board (CARB), with its principal location at 1001 I Street, Sacramento, California 95814; and COSCO Container Lines, Co., Ltd. (COSCO) with its principal location at 378 East Daming Road, Shanghai, China 200080 (collectively, the Parties).

### I. RECITALS

- (1) California Health and Safety Code (H&SC) section 39650-39675 (H&SC §§ 39650-39675) mandates the reduction of the emission of substances that have been determined to be toxic air contaminants (TAC). In 1998, following an exhaustive 10-year scientific assessment process, CARB identified particulate matter (PM) from diesel-powered engines as a TAC.
- (2) CARB has promulgated an Airborne Toxic Control Measure for Auxiliary Diesel Engines Operated On Ocean-Going Vessels At-Berth in a California Port (At-Berth Regulation), which is codified at California Code of Regulations (CCR), title 17, section 93118.3 (17 CCR § 93118.3).
- (3) Pursuant to 17 CCR § 93118.3 (b), the At-Berth Regulation applies to “any person who owns, operates, charters, rents, or leases any United States (U.S.) or foreign flagged container vessel, passenger vessel, or refrigerated cargo vessel that visits a California port.”
- (4) As set forth in 17 CCR § 93118.3 (d), for the 2014 through 2016 compliance years, vessel fleets that visited ports in California were required to be in compliance with the in-use operational requirements by plugging into shore power for at least half of the fleets visits, and to reduce the baseline fleet power generation (BFPG) by 50 percent. For the 2017 compliance year, vessel fleets that visited ports in California were required to plug into shore power for at least 70 percent of the fleets visits, and to reduce the BFPG by 70 percent. The calculation methodologies for determining compliance with the At-Berth Regulation are set forth in 17 CCR § 93118.3 (e).
- (5) Responsible officials for each vessel fleet obligated to comply with the At-Berth Regulation are required to provide annual statements of compliance to CARB by March 1 of each year and maintain records at a central location as set forth in 17 CCR § 93118.3 (g)(1).
- (6) Under 17 CCR § 93118.3 (h)(2), any failure to meet requirements “shall constitute a single, separate violation...for each hour that a person operates the auxiliary diesel engine until such provision, prohibition, limit, standard, criteria, or requirement has been met.”

- (7) CARB, with the full cooperation from COSCO, has determined that COSCO did not achieve the baseline power reduction requirement and failed to achieve the applicable percentage of visits as specified in 17 CCR § 93118.3 (d)(1)(A). COSCO did submit timely annual statements in compliance with 17 CCR § 93118.3.
- (8) CARB asserts that failure to meet the requirements of the regulation is a violation of State Law resulting in penalties. H&SC sections 39674, 39675, 42400 et seq., 42402 et seq., and 42410, authorizes civil or administrative penalties not to exceed \$10,000.00 for each day that a violation occurred.
- (9) 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 violations described above, and voluntarily agree to resolve this matter by means of this Agreement.

## II. TERMS AND RELEASE

In consideration of CARB not filing a legal action against COSCO for the violations described above, CARB and COSCO agree as follows:

- (10) The Parties shall exchange signed copies of this Agreement. This Agreement may be executed in counterparts. Facsimile or photocopied signatures shall be considered as valid signatures as of the date hereof, although the original signature pages shall thereafter be appended to this Agreement.
- (11) Upon execution of this Agreement, COSCO shall pay the sum of **nine-hundred sixty-five thousand and three hundred dollars (\$965,300.00)** USD no later than **October 15, 2019** into the **Air Pollution Control Fund**.

COSCO agrees to pay by check, credit card, or wire transfer using instructions provided separately by CARB in a payment transmittal form. Payments shall be made to the following address:

For payments made by check or credit card:

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

CARB-COSCO Settlement Agreement  
RMES031415-SP

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: RMES031415-SP

(12) COSCO shall promptly send the original signed and dated Settlement Agreement, copy of proof of the penalty payment, and payment transmittal form(s) to:

Rebecca Geyer, Air Pollution Specialist  
California Air Resources Board  
8340 Ferguson Blvd.  
Sacramento, CA 95828

(13) COSCO shall not deduct any penalties paid pursuant to this Agreement in calculating and submitting its federal, state, or local income tax.

(14) COSCO shall comply with all requirements of the At-Berth Regulation (17 CCR § 93118.3).

(15) This Agreement constitutes the entire agreement and understanding between CARB and COSCO concerning the subject matter hereof, and supersedes and replaces any and all prior negotiations and agreements of any kind or nature, whether written or oral, between CARB and COSCO concerning the subject matter hereof.

(16) The terms of this Agreement shall be binding upon COSCO 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.

(17) The terms and conditions set forth in this Agreement shall remain valid and enforceable notwithstanding any future violations that may occur.

(18) The effective date of this Agreement shall be the date upon which COSCO executes this Agreement.

(19) 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.

- (20) This Agreement shall further serve to toll any statute of limitation until all terms and conditions of this Agreement have been fulfilled.
- (21) COSCO agrees not to assert laches as a defense.
- (22) Each provision of this Agreement is severable, and in the event that any provision of this Agreement is held to be illegal, invalid or unenforceable in any jurisdiction, the remainder of this Agreement remains in full force and effect.
- (23) 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.
- (24) 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.
- (25) It is further agreed that the penalties described in this Agreement are non-dischargeable under United States Code, title 11, section 523(a)(7).
- (26) In the event COSCO fails to pay on time, COSCO shall pay all costs associated with collection of the penalties consistent with Government Code § 12513.1.
- (27) COSCO shall not deduct any penalties paid pursuant to this Agreement in calculating and submitting its federal, state, or local income tax.
- (28) 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.
- (29) 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.

### **III. PENALTY DETERMINATION**

- (30) Pursuant to H&SC section 39619.7, CARB must provide information on the basis for the penalties it seeks. This information is provided throughout this Agreement and summarized below.

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

Penalties must be set at levels sufficient to discourage violations. 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.

The maximum per unit penalty is \$10,000 per day for strict liability violations under H&SC section 39674 for each hour that a person operates the auxiliary diesel engines at a California port in violation of the At-Berth Regulation. From 2014 to 2016, COSCO vessels operated at the ports of Long Beach / Los Angeles, and Oakland but did not plug the vessels into shore power for at least half of the visits, and did not reduce the BFPG by 50 percent, resulting in 2,401 alleged violations of the At-Berth Regulation. For the 2017 compliance year, COSCO's fleet visiting the Port of Oakland did not plug into shore power for at least 70 percent of the fleet's visits and did not reduce the BFPG by 70 percent, resulting in 211 alleged violations. The per unit penalty for each of the cases above was agreed to be \$250 per violation in 2014, \$350 per violation in 2015, \$450 per violation in 2016, and \$550 per violation in 2017.

This penalty was calculated by considering all factors specified in H&SC sections 42403 and 43024, including the fact that COSCO made significant investments in an effort to comply with the At-Berth Regulation, there were factors beyond the reasonable control of COSCO that contributed to the violations, COSCO's commitment to exceed the 80 percent requirement before 2020 and its further committed to have 100 percent of its vessels shore power capable, and COSCO cooperation with CARB's investigation.

Penalties were also 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 cost 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 COSCO, 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 COSCO may have secured from its actions. Penalties in future cases might be smaller or larger on a per unit basis.

**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 COSCO failed to comply with the At-Berth Regulation (17 CCR § 93118.3), which was adopted under the authority of H&SC sections 39600, 39601, 39650, 39658, 39659, 39666, and 41511.

**Whether the 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.**

The ATCM does not prohibit emissions above a specified level, but does impose in-use operational requirements for any person who owns, operates, charters, rents, or leases any U.S. or foreign flagged container vessel, passenger vessel, or refrigerated cargo vessel that visits a California port. COSCO operated vessels that visited California ports without complying with the in-use operational requirements and as a result, emitted excess PM and oxides of nitrogen (NOx). All of the emissions stemming from the violation were excess and illegal.

- (31) COSCO acknowledges that CARB complied with H&SC section 39619.7 in prosecuting or 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 vehicle penalty, if appropriate), has identified the provision of law under which the penalty is being assessed, and has considered and determined that this penalty is being assessed under a provision of law that prohibits the emission of pollutants at a specified level.
- (32) The penalty in this case was based in part on confidential business information provided by COSCO that is not retained by CARB in the ordinary course of business. The penalty in this case was also based on confidential settlement communications between CARB and COSCO that CARB does not retain in the ordinary course of business. Accordingly, CARB will not release any submissions by COSCO that are protected under the Evidence Code, California Public Records Act or other similar laws to any third party unless required by law and/or Court Order.
- (33) Now therefore, in consideration of the payment on behalf of COSCO to CARB, for deposit into the California Air Pollution Control Fund, CARB hereby releases COSCO and its principals, officers, agents, insurers, attorneys, predecessors, directors, receivers, trustees, employees, assignees, parent corporations, members, liquidators, and successors from claims for violations of the At-Berth Regulation alleged in the recitals.

(34) Each of the undersigned represents and warrants that he or she has full authority to enter into this Agreement.

ACKNOWLEDGED AND ACCEPTED BY:

**California Air Resources Board**

Dated: 10/15/2019

By: \_\_\_\_\_ /S/  
(Signature)

Printed Name: Richard W. Corey

Title: Executive Officer

**COSCO Container Lines, Co., Ltd.**

Dated: 10/4/2019

By: \_\_\_\_\_ /S/  
(Signature)

Printed Name: Qin He

Title: General Manager