

SETTLEMENT AGREEMENT AND RELEASE

This SETTLEMENT AGREEMENT AND RELEASE (hereinafter "Agreement") is entered into between the STATE OF CALIFORNIA AIR RESOURCES BOARD (hereinafter "ARB") 1001 I Street, Sacramento, California 95814, and FEDEX FREIGHT, INC. (hereinafter "FEDEX FREIGHT, INC."), 2200 Forward Drive, Harrison, Arkansas 72601.

I. RECITALS

- (1) HSC §§ 39650-39675 mandate the reduction of the emissions of substances that have been determined to be toxic air contaminants. In 1998, following an exhaustive ten-year scientific assessment process, ARB identified particulate matter (PM) from diesel-fueled engines as a toxic air contaminant. In-use on-road diesel vehicles are powered by diesel fueled engines that emit toxic PM. On-road vehicles are controlled under the Truck and Bus regulation, as codified in 13 CCR § 2025. Drayage trucks are controlled under the Drayage Truck Regulation as codified in 13 CCR § 2027.
- (2) 13 CCR § 2027(e)(1) requires that drayage truck owners doing business at a port or intermodal rail yard register with the Drayage Truck Registry (DTR).
- (3) 13 CCR § 2027(d)(5)(A)(2) requires drayage truck motor carriers only dispatch drayage trucks that meet emission standards and compliance deadlines set forth in Phases 1 and 2 in § 2027 (d). 13 CCR § 2027(d)(5)(A)(3) requires motor carriers only dispatch drayage trucks that are registered and in good standing with the Drayage Truck Registry (DTR).
- (4) Failure to comply with the requirements of 13 CCR § 2027 is a violation of state law resulting in penalties. HSC §§ 39674(a) and (b) authorize civil penalties for the violation of the programs for the regulation of toxic air contaminants not to exceed one thousand dollars (\$1,000) or ten thousand dollars (\$10,000), respectively, for each day in which the violation occurs.
- (5) ARB Enforcement Division has documented that FEDEX FREIGHT, INC., as a drayage truck owner, failed to register some drayage trucks in its fleet with the Drayage Truck Registry (DTR).
- (6) ARB Enforcement Division has documented that FEDEX FREIGHT, INC., as a motor carrier, dispatched drayage trucks that are either not compliant with the emissions standards set forth in the Drayage Truck Regulation or not registered with DTR.
- (7) 13 CCR § 2025(r) sets forth the requirements for reporting all vehicles with engines subject to the regulation if the owner of a fleet has elected to utilize the compliance options of 13 CCR §§ 2025(f)(4), 2025(g)(3), 2025(g)(4), 2025(h), 2025(i), the credits of 13 CCR § 2025(j), and the agricultural provisions of 13 CCR § 2025(m), single-engine and two-engine street sweeper provisions of 13

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CCR § 2025(n), extension or exemptions for vehicles used exclusively in NOx exempt areas of 13 CCR § 2025(p)(1), the extension for work trucks of 13 CCR § 2025(p)(2), and the low-use vehicle provision of 13 CCR § 2025(p)(4).

- (8) Failure to comply with the requirements of 13 CCR § 2025 is a violation of state law resulting in penalties. HSC §§ 39674(a) and (b) authorize civil penalties for the violation of the programs for the regulation of toxic air contaminants not to exceed one thousand dollars (\$1,000) or ten thousand dollars (\$10,000), respectively, for each day in which the violation occurs.
- (9) 13 CCR § 2025(e)(8) states: "All information specified in 13 CCR § 2025(r) must be reported to the Executive Officer."
- (10) FEDEX FREIGHT, INC. has elected to utilize the compliance options/credits/provisions of section 13 CCR § 2025(i).
- (11) ARB has documented that FEDEX FREIGHT, INC. failed to report some vehicles with engines subject to the regulation for which the fleet owner has elected to utilize the compliance options of 13 CCR § 2025(i).
- (12) In order to resolve these alleged violations, FEDEX FREIGHT, INC. has taken, or agreed to take, the actions enumerated below under "RELEASE". Further, ARB accepts this Agreement in termination and settlement of this matter.
- (13) 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 Agreement. Specifically, ARB and FEDEX FREIGHT, INC. agree as follows:

II. TERMS AND RELEASE

In consideration of ARB not filing a legal action against FEDEX FREIGHT, INC. for the alleged violations referred to above, and FEDEX FREIGHT, INC.'s payment of the penalties set forth in Section 1 below, ARB and FEDEX FREIGHT, INC. agree as follows:

- (1) Upon execution of this Agreement, the sum of ninety two thousand dollars (\$92,000.00) shall be paid on behalf of FEDEX FREIGHT, INC. no later than October 13, 2016, as follows:
 - \$69,000.00 payable to the **Air Pollution Control Fund**
 - \$23,000.00 payable to the **Peralta Colleges Foundation**

Please send the signed Settlement Agreement and any future mailings or documents required per the terms of this Settlement Agreement to:

**Ms. Andrea Juarez
Air Pollution Specialist
California Air Resources Board
Enforcement Division
9480 Telstar Avenue, Suite 4
El Monte, California 91731**

Please send the payment along with the attached "Settlement Agreement Payment Transmittal Form" (Attachment A) to:

**California Air Resources Board
Accounting Office
P.O. Box 1436
Sacramento, California 95812-1436**

- (2) If the Attorney General files a civil action to enforce this settlement agreement, FEDEX FREIGHT, INC. shall pay all costs of investigating and prosecuting the action, including expert fees, reasonable attorney's costs, and costs.
- (3) It is further agreed that the penalties described in "Terms and Release", paragraph 1 are punitive in nature, rather than compensatory. Furthermore, the penalty is intended to deter and punish FEDEX FREIGHT, INC. for violations of state environmental statutes, and these penalties are payable to and for the benefit of ARB, a governmental unit. Therefore, it is agreed that these penalties imposed on FEDEX FREIGHT, INC. by ARB arising from the facts described in recital paragraphs (1) through (11) are non-dischargeable under 11 United States Code § 523 (a)(7), which provides an exception from discharge for any debt to the extent such debt is for a fine, penalty or forfeiture payable to and for benefit of governmental unit, and is not compensation for actual pecuniary loss, other than certain types of tax penalties.
- (4) FEDEX FREIGHT, INC. shall instruct all employees who operate diesel-fueled vehicles to comply with the idling regulations set forth in 13 CCR § 2485, within 45 days of this Agreement.
- (5) FEDEX FREIGHT, INC. shall not dispatch drayage trucks that are not compliant with the emission standards set forth in the Drayage Truck Regulation or trucks that are not registered with DTR. ARB reserves the right to audit the dispatch records of FEDEX FREIGHT, INC. for compliance with 13 CCR § 2027 (d)(5) any time in the future.

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- (6) FEDEX FREIGHT, INC. shall not violate the Drayage Truck Regulation, as codified in 13 CCR § 2027.
- (7) FEDEX FREIGHT, INC. shall not violate the Truck and Bus regulation as codified in 13 CCR § 2025.
- (8) This Agreement shall apply to and be binding upon FEDEX FREIGHT, INC., and its officers, directors, receivers, trustees, employees, successors and assignees, subsidiary and parent corporations and upon ARB and any successor agency that may have responsibility for and jurisdiction over the subject matter of this Agreement.
- (9) This Agreement constitutes the entire agreement and understanding between ARB and FEDEX FREIGHT, INC. concerning the subject matter hereof, and supersedes and replaces all prior negotiations and agreements between ARB and FEDEX FREIGHT, INC. concerning the subject matter hereof.
- (10) 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.
- (11) Severability. 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.
- (12) 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.
- (13) 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.
- (14) Senate Bill 1402 (Dutton, Chapter 413, statutes of 2010) requires ARB to provide information on the basis for the penalties it seeks (HSC § 39619.7). This information, which is provided throughout this settlement agreement, is summarized here:

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 HSC §§ 42403 and 43024.

The penalties were discounted based on the fact that this was a first time violation and the violator made diligent efforts to comply and to cooperate with the investigation.

Drayage Truck Violations

The per vehicle penalty for the drayage violations involved in this case is a maximum of \$1,000 per vehicle per day for strict liability violations or \$10,000 per vehicle per day for negligent or intentional violations pursuant to HSC § 39674.

The penalty obtained for the drayage truck owner violations involved in this case for failure to register their vehicles in the DTR is \$20,750.00 or \$125.00 per vehicle for 166 vehicles after considering the factors specified in HSC § 43024.

The penalty obtained for the drayage truck motor carrier violations involved in this case for dispatching drayage trucks that do not meet emission standards and compliance deadlines set forth in Phases 1 and 2 in § 2027 (d) is \$3,075.00 for 41 dispatches or \$75.00 per dispatch after considering the factors specified in HSC § 43024.

Truck and Bus Violations

The per unit penalty for the Truck and Bus violations involved in this case is a maximum of \$1,000 per vehicle per day for strict liability violations or \$10,000 per vehicle per day for negligent or intentional violations.

The penalty obtained for the Truck and Bus violations involved in this case for failure to report all required information for some vehicles in the fleet is \$68,175.00 or \$75.00 per vehicle per violation for 909 vehicles.

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

Drayage Truck Violations

The penalty provision being applied for the Drayage Truck Regulation (13 CCR § 2027) violations in this case is HSC § 39674 because the Drayage Truck Regulation is an Airborne Toxic Control Measure adopted pursuant to authority contained in HSC §§ 39002 et seq., 39650-39675 and because FEDEX FREIGHT, INC., as a drayage truck owner, failed to register their vehicles in DTR; and as a motor carrier, dispatched drayage trucks that were either not compliant with the emission standards set forth in the Drayage Truck Regulation or not registered with DTR.

Truck and Bus Violations

The penalty provision being applied for the Truck and Bus regulation (13 CCR § 2025) violations in this case is HSC § 39674 because the Truck and Bus regulation is an Airborne Toxic Control Measure adopted pursuant to authority contained in HSC §§ 39002 et seq., 39650-39675 and because FEDEX FREIGHT, INC. failed to report all required information for some vehicles in the fleet for which they have elected to utilize compliance options/credits/provisions as required in 13 CCR § 2025(r).

Is the penalty being assessed 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.

Drayage Truck Violations

The provisions cited above do prohibit emissions above a specified level of g/hp-hr. However, since the hours of operation of the noncompliant trucks involved and their individual emission rates are not known, it is not practicable to quantify the excess emissions.

Truck and Bus Violations

The provisions cited above do not prohibit emissions above a specified level.

- (15) FEDEX FREIGHT, INC. acknowledges that ARB has complied with Senate Bill 1402 in prosecuting or settling this case. Specifically, ARB has considered all relevant facts, including those listed at HSC § 43024, has explained the manner in which the penalty amount was calculated, 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.
- (16) 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 cases, and the potential costs and risk associated with litigating these particular violations. Penalties in future cases might be smaller or larger on a per unit basis.
- (17) The penalty was based on confidential settlement communications between ARB and FEDEX FREIGHT, INC. that ARB does not retain in the ordinary course of business. The penalty is the product of an arms length negotiation between ARB and FEDEX FREIGHT, INC. and reflects ARB's assessment of the relative

strength of its case against FEDEX FREIGHT, INC., the desire to avoid the uncertainty, burden and expense of litigation, obtain swift compliance with the law and remove any unfair advantage that FEDEX FREIGHT, INC. may have secured from its actions.

- (18) Now therefore, in consideration of the payment on behalf of FEDEX FREIGHT, INC. to the Air Pollution Control Fund and the Peralta Colleges Foundation, ARB hereby releases FEDEX FREIGHT, INC. and their principals, officers, agents, predecessors and successors from any and all claims, ARB may have or have in the future based on the circumstances described in paragraphs (1) through (11) of the Recitals. The undersigned represent that they have the authority to enter into this Agreement.

California Air Resources Board

Signature: *Ellen M. Peter*
Print Name: Ellen M. Peter
Title: Chief Counsel
Date: 10/27/2016

FedEx Freight, Inc.

Signature: *Michael W. Hoffman*
Print Name: Michael W. Hoffman
Title: VP Equipment & Maintenance
Date: 9/30/2016

Approved
Legal Department
SSL 9/30/16