

## 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 EOTT Trucking LLC (hereinafter "EOTT") 13484 Madison Pike, Morningview, KY 41063.

### I. RECITALS

- (1) Health and Safety Code, Section 39650-39675 mandates the reduction of the emissions of substances that have been determined to be toxic air contaminants (TACs). In 1998, following an exhaustive 10-year scientific assessment process, the Air Resources Board identified particulate matter (PM) from diesel-fueled engines as a toxic air contaminant. Transport Refrigeration Units (TRUs) are powered by diesel fueled engines that emit toxic particulate matter. TRUs are controlled under Title, 13 California Code of Regulations (CCR), section 2477.
- (2) CCR, Title 13, section 2477 (e) (1) (A) (1) states: No owner/operator shall operate a TRU or TRU generator (gen) set in California unless it meets the in-use emission category performance standard.
- (3) The ARB Enforcement Division has documented that EOTT, operated a TRU in California that did not meet the in-use emission category performance standard.
- (4) Health and Safety Code, Sections 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 (\$1,000.00) or not to exceed ten thousand dollars (\$10,000.00) respectively, for each day in which the violation occurs.
- (5) EOTT is willing to enter into this Agreement solely for the purpose of settlement and resolution of this matter with ARB. ARB accepts this Agreement in termination of this matter. Accordingly, the parties agree to resolve this matter completely by means of this Agreement, without the need for formal litigation, and therefore agree as follows:

### II. TERMS & RELEASE

In consideration of ARB not filing a legal action against EOTT, for the violation alleged above, ARB and EOTT agree as follows:

- (1) Upon execution of this Agreement, EOTT shall pay a civil penalty of \$750.00. Payment shall be made in check form as described below and the payments shall be made in check form as described below and the full amount shall be submitted as per the agreed payment schedule.

- \$750 to the **California Air Pollution Control Fund**.

**ARB to receive by:**

11/01/2011	First Payment
12/01/2011	Second Payment
01/20/2012	Third Payment

- First payment is due on November 01, 2011 and shall be made in form of a check payable to the **California Air Pollution Control Fund** in the amount of \$250.00.
- Second payment is due on December 01, 2011 and shall be made in form of a check payable to the **California Air Pollution Control Fund** in the amount of \$250.00.
- Third payment is due on January 01, 2012 and shall be made in form of a check payable to the **California Air Pollution Control Fund** in the amount of \$250.00.
- All payments and documents shall be sent to the attention of:

Eric Bissinger, Air Pollution Specialist  
Air Resources Board, Enforcement Division  
1001 I Street  
P.O. Box 2815  
Sacramento, CA 95812

- (2) Effect of Untimely Payment. If any payment is more than 15 days late, the entire remaining balance becomes immediately due and payable. In addition, if the Attorney General files a civil action to enforce this settlement agreement, EOTT shall pay all costs of investigating and prosecuting the action, including expert fees, reasonable attorney's fees, and costs.
- (3) It is agreed that if EOTT, including its subsidiary or parent company, at any time becomes insolvent, or makes an assignment for the benefit of creditors or similar action adversely involving EOTT, its subsidiary, or parent company, or a proceeding or petition under any bankruptcy, reorganization, arrangement of debt, insolvency, readjustment of debt, or receivership law or statute is filed by or against EOTT, its subsidiary, or parent company, or a trustee in bankruptcy, custodian, receiver or agent is appointed or authorized to take charge of any of EOTT's, its subsidiary, or parent company's properties, or if any deposit account

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or other property of EOTT, its subsidiary, or parent company be attempted to be obtained or held by writ of execution, garnishment, attachment, condemnation, levy, forfeiture or other legal process, or EOTT, its subsidiary, or parent company takes any action to authorize any of the foregoing, the entire remaining balance becomes immediately due and payable without notice or demand.

- (4) 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 EOTT for violations of state environmental statutes, and these penalties are payable to and for the benefit of ARB, a government unit. Therefore, it is agreed that these penalties imposed on EOTT by the ARB arising from the facts described in recital paragraphs (1) – (5) are nondischargeable under 11 U.S.C. § 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.
- (5) Each 1974 or newer diesel powered heavy-duty vehicle in the EOTT fleet shall comply with California's emission control label (ECL) requirements set forth in the CCR, Title 13, Section 2183 (c).
- (6) EOTT shall instruct all employees who operate diesel-fueled vehicles in California to comply with the idling regulations set forth in CCR, Title 13, Section 2485, within 45 days of this Agreement.
- (7) EOTT shall comply with California's TRU in-use performance standards set forth in Title 13, CCR, Section 2477 (e) (1) (A). Within 90 days of the execution of this Agreement, EOTT shall submit the proof of the compliance with the TRU ATCM to Mr. Eric Bissinger, Air Pollution Specialist, ARB Enforcement Division, Air Resources Board, Enforcement Division, P.O. Box 2815, Sacramento, CA 95812.
- (8) EOTT shall not violate California's TRU ATCM, as codified in CCR, Title 13, Section 2477.
- (9) This Agreement shall apply to and be binding upon EOTT, 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.
- (10) This Agreement constitutes the entire agreement and understanding between ARB and EOTT, concerning the subject matter hereof, and supersedes and

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replaces all prior negotiations and agreements between ARB and EOTT, concerning the subject matter hereof.

- (11) 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.
- (12) 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.
- (13) 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.
- (14) 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.
- (15) **SB 1402 Statement**

Senate Bill 1402 (Dutton, Chapter 413, statutes of 2010) requires the ARB to provide information on the basis for the penalties it seeks (see Health and Safety Code section 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 penalty in this matter was determined in consideration of all relevant circumstances, including the eight factors specified in Health and Safety Code sections 42403 and 43024.

### TRU Violation

The per unit penalty for the TRU violations involved in this case is a maximum of \$1,000 per unit per day for strict liability violations or \$10,000 per unit per day for negligent or international violations pursuant to H&SC section 39674. The penalty obtained for the TRU violation involved in this case is \$750 for the TRU failing to meet in-use performance standard. The penalty was discounted based on the violator's adverse financial condition, the fact that this was a first time violation and the violator made unusually diligent efforts to cooperate with the investigation.

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

TRU Violation

The penalty provisions being applied for the TRU ATCM (Title 13, CCR, section 2477) violations in this case is H&SC section 39674 because the TRU ATCM is a Toxic Air Contaminant Control Measure adopted pursuant to authority contained in H&SC section 39002, et seq., 39650-39675 and because EOTT received a Notice of Violation for operating a non-compliant TRU in California.

**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.**

TRU Violation

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

- (16) EOTT acknowledges that ARB has complied with SB 1402 in prosecuting and settling this case. Specifically, ARB has considered all relevant facts, including those listed at HSC section 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.
- (17) 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. The penalty was discounted based on the fact that this was a first time violation and the violator made unusually diligent efforts to cooperate with the investigation. Penalties in future cases might be smaller or larger on a per unit/vehicle basis.
- (18) The penalty was based on confidential settlement communications between ARB and EOTT that ARB does not retain in the ordinary course of business either. The penalty is the product of an arms length negotiation between ARB and EOTT and reflects ARB's assessment of the relative strength of its case against EOTT, the desire to avoid the uncertainty, burden and expense of litigation, obtain swift

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compliance with the law and remove any unfair advantage that EOTT may have secured from its actions.

- (19) Now, therefore, in consideration of the payment by EOTT, in the amount of seven hundred fifty dollars (\$750.00), ARB hereby releases EOTT and its principals, officers, directors, agents, subsidiaries, predecessors, and successors from any and all claims that ARB may have based on the facts and allegations described in recital paragraphs (1) through (5) above. The undersigned represent that they have the authority to enter into this Agreement.

California Air Resources Board

By:

Name: James Ryden

Title: Chief Enforcement Division

Date:

11/30/11

EOTT Trucking LLC

By:

Name: Johnnie Hubbard

Title: Owner EOTT LLC

Date:

10-20-11