

## SETTLEMENT AGREEMENT

This Settlement Agreement and Release (Agreement) is entered into between the State of California Air Resources Board (CARB), with its principal location at 1001 I Street, Sacramento, California 95814; and Fenix Marine Services (FMS) with its principal location at 614 Terminal Way, Pier 302-305, Terminal Island, California 90731.

### I. RECITALS

- (1) Health and Safety Code sections 39650-39675 mandate 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, the CARB identified particulate matter (PM) from diesel-fueled engines as a TAC. Mobile cargo handling equipment (CHE) is powered by diesel-fueled engines that emit toxic PM.
- (2) CHE diesel PM emissions are regulated under chapter 9, division 3, California Code of Regulations, title 13, section 2479 (Cal. Code Regs., tit.13, § 2479; hereinafter referred to as the CHE Regulation).
- (3) The purpose of the CHE Regulation is to reduce diesel PM and criteria pollutant emissions from compression ignition (CI) mobile CHE that operates at ports and intermodal rail yards in the State of California.
- (4) The CHE Regulation applies to any person who conducts business in California, who sells, offers for sale, leases, rents, purchases, owns, or operates any CI mobile CHE that operates at any California port or intermodal rail yard.
- (5) Cal. Code Regs., tit 13, §§ 2479 et seq. authorize a smoke inspection program which requires the owners and operators of California based CHE that operate within Port terminals and Intermodal railyards within the state of California to conduct annual smoke opacity inspections of their CHE equipped with diesel compression ignition (CI) engines that are four years or older.
- (6) Cal. Code Regs., tit 13, § 2479 (e) requires inter alia that the owner of the equipment "test the equipment for excessive smoke emissions periodically according to the inspection intervals specified in section 2479 (e) (2) 5a-c," "measure the smoke emissions for each test...", "record the smoke test opacity levels and other required test information as specified in section 2479 (i)..." repair and keep the records specified in section 2479 (i).

- (7) Failure to comply with the requirements of the CHE Regulation is a violation of state law resulting in penalties. Health and Safety Code sections 39674, 39675, 42400 et seq., 42400 et seq., and 42410 authorize civil penalties up to ten thousand dollars (\$10,000.00), respectively per engine or piece of CHE for each day in which the violations occurs.
- (8) CARB considers testing, measuring, recording, and recordkeeping to be critical components in reducing excessive smoke emissions from these CHE engines.
- (9) Any CI mobile CHE that operates at any California port or intermodal rail yard must meet the performance requirements outlined in the CHE regulation.
- (10) CARB contends that FMS failed to test, measure, record, and maintain records of smoke emissions for its fleet of CHE.
- (11) CARB Enforcement Division staff, with the cooperation of FMS, has alleged certain violations of the CHE Regulation with respect to FMS's CHE in California, including 90 Yard Trucks and 12 Non-Yard Trucks in 2017, and 120 Yard Trucks in 2018, failed to conform to the requirements of the CHE Regulation. In particular, these alleged violations involve the failure to test, measure, record, and maintain records of smoke emissions for its fleet of CI mobile CHE that operates at FMS's California Fenix Marine Services Terminal facility at the Port of Los Angeles.
- (12) CARB alleges that if the allegations described in recital paragraphs 1 through 11 were proven, civil penalties could be imposed against FMS as provided in Health and Safety Code sections 39674, 39675, 42400 et seq., 42402 et seq., and 42410 for each and every piece of equipment involved in the violations and each day.
- (13) FMS admits the allegations described in recital paragraphs 1 through 11, but denies any liability resulting from said allegations.
- (14) 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 alleged violations and voluntarily agree to resolve this matter by means of this Agreement. In order to resolve the violations described herein, FMS has taken, or agrees to take, the actions enumerated below within the Terms and Conditions. Further, CARB accepts this Agreement in termination and settlement of this matter.

## II. TERMS AND CONDITIONS

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

- (1) The Parties shall exchange signed copies of this Agreement by September 10, 2019. 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. FMS shall send the original signed Agreement and any future mailings or documents required per the terms of this Agreement to:

H. Cuauhtémoc Pelayo  
Air Pollution Specialist/Investigator  
Enforcement Division  
California Air Resources Board  
9480 Telstar Avenue, Suite 4  
El Monte, California 91731

- (2) Upon execution of this Agreement, the sum of eighty seven thousand seven hundred fifty dollars (\$87,750.00) shall be paid on behalf of FMS no later than September 10, 2019, as follows:

- \$87,750.00 to the California Air Pollution Control Fund

FMS will send the payment by September 10, 2019, 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

- (3) FMS shall not violate any provision of the CHE Regulation.
- (4) FMS has provided CARB with documentation showing it corrected, prior to the execution of this Agreement, all equipment known to have been in violation and cited in the Notice of Violation # CHE010818\_FMS, issued March 1, 2019, by performing opacity tests in 2019 and being in compliance with all requirements of the CHE Regulation.

- (5) FMS shall submit an annual report in excel spreadsheet format of new and retired CHE. The report will include copies of all smoke opacity tests for CHE requiring smoke tests, and maintenance and repair records for CHE that failed the required smoke test. The report shall be delivered electronically to Hector Pelayo annually no later than October 1, 2019, 2020, and 2021 to the following email address:

[Hector.Pelayo@arb.ca.gov](mailto:Hector.Pelayo@arb.ca.gov)

- (6) FMS shall attend the California Council on Diesel Education and Technology (CCDET III) class, (SAE J1667 Snap Acceleration Smoke Test Procedure for Cargo Handling Equipment) as described on the CCDET webpage, <http://ccdet.org>. This class is conducted by various California Community Colleges and instructs attendees on compliance with the CHE smoke inspection program.
- a) FMS shall have the maintenance manager (or equivalent) and all staff performing opacity tests for compliance with the CHE smoke opacity testing attend the CCDET III class. Proof of CCDET III completion shall be provided to CARB within six months of the date of this Agreement and be maintained in each applicable employee's file for the term of his or her employment.
- b) If FMS uses a contractor to perform the annual smoke opacity testing required under the CHE, in addition to having the fleet maintenance manager (or equivalent) attend the CCDET III course, FMS shall obtain proof that the contractor's conducting the smoke opacity tests completed the CCDET III course within the past four years. This proof of CCDET III completion shall be provided to CARB with smoke opacity test records as required by this Agreement and shall be maintained with the annual smoke opacity test and maintenance records.
- (7) Now therefore, in consideration of the payment on behalf of FMS to CARB, for deposit into the California Air Pollution Control Fund, CARB hereby releases FMS and their principals, officers, agents, predecessors, and successors from claims for violations of the CHE Regulation alleged in recital paragraphs 1 through 11.

### III. GENERAL PROVISIONS

- (1) This Agreement constitutes the entire agreement and understanding between CARB and FMS 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 FMS concerning the subject matter hereof.

- (2) This Agreement shall apply to and be binding upon FMS and their officers, directors, receivers, trustees, employees, successors and assignees, subsidiaries, and parent corporations, and upon CARB and any successor agency that may have responsibility for and jurisdiction over the subject matter of this Agreement.
- (3) The terms and conditions set forth in this Agreement shall remain valid and enforceable notwithstanding any future violations that may occur.
- (4) The effective date of this Agreement shall be the date upon which FMS executes this Agreement.
- (5) 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.
- (6) This Agreement shall further serve to toll any statute of limitation until all terms and conditions of this Agreement have been fulfilled.
- (7) FMS agrees not to assert laches as a defense.
- (8) 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.
- (9) 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.
- (10) 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.
- (11) 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).
- (12) 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.

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

#### IV. PENALTY DETERMINATION

- (1) Pursuant to Health and Safety Code section 39619.7, CARB must provide information on the basis for the penalties it seeks. This 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-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 Health and Safety Code sections 42403 and 43024.

Opacity Testing Violations

The per-unit or per-vehicle penalty in this case is a maximum of \$10,000.00 per-unit per day. The penalty of \$87,750.00 over an unspecified number of days of violation is for 222 noncompliant CHE units. The per-unit penalty in this case is \$395.27 for each noncompliant piece of equipment.

This penalty was calculated by considering all factors specified in Health and Safety Code sections 42403 and 43024, including the fact that FMS came into compliance quickly, is a first time violator, and has cooperated 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 Health and Safety Code section 39674 because FMS failed to comply with section 2479 of the CHE Regulation, which was adopted under the authority of Health and Safety Code section 39658, et seq.

**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 provisions cited above do prohibit emissions above a specified level. However, since the hours of operation of the noncompliant units involved and their individual emission rates are not known, it is not practicable to quantify the excess emissions.

- (2) FMS acknowledges that CARB has complied with Health and Safety Code section 39619.7 in prosecuting or settling this case. Specifically, CARB has considered all relevant facts, including those listed at Health and Safety Code 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.
- (3) 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 FMS, 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 FMS may have secured from its actions. Penalties in future cases might be smaller or larger on a per-unit basis.
- (4) The penalty in this case was based in part on confidential business information provided by FMS 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 FMS that CARB does not retain in the ordinary course of business.

**[Signature page immediately follows.]**

**ACKNOWLEDGED AND ACCEPTED BY:**

**California Air Resources Board**

**Fenix Marine Services**

By:                     /S/                      
                    *(Signature)*

By:                     /S/                      
                    *(Signature)*

Printed Name: Ellen M. Peter

Printed Name: Scott Schoenfeld

Title: Chief Counsel

Title: General Manager

Date:   9/10/19                                    

Date:   8/20/19