

SETTLEMENT AGREEMENT

This Settlement Agreement and Release (Agreement) is entered into between the State of California Air Resources Board (CARB), with principal location at 1001 I Street, Sacramento, California 95814; and ITS Technology & Logistics, LLC (ITS) with principal location at ITS/BNSF 6540 S Austin Rd. Stockton Ca. 95215.

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 California Air Resources Board (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. 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 CHE Regulation).
- (2) 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.
- (3) 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.
- (4) 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 old or older.
- (5) 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).
- (6) 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., 42402 et seq., and 42410 authorize civil penalties for the violation of the programs for the regulation of TACs not to exceed one

thousand dollars (\$1,000.00) or not to exceed ten thousand dollars (\$10,000.00), respectively, per engine or piece of CHE for each day in which the violation occurs. In addition, Health and Safety Code section 43016 authorizes a civil penalty up to thirty-seven thousand, five hundred dollars (\$37,500.00) for violations of "any provision of this part, or any order, rule, or regulation of the state board adopted pursuant to this part" for each action.

- (7) CARB considers testing, measuring, recording, and recordkeeping to be critical components in reducing excessive smoke emissions from these CHE engines.
- (8) Any CI mobile CHE that operates at any California port or intermodal rail yard must meet the performance requirements outlined in the CHE regulation.
- (9) CARB contends that ITS failed to test, measure, record, and maintain records of smoke emissions for its fleet of CHE.
- (10) CARB Enforcement Division staff, with the cooperation of ITS, has alleged certain violations of the CHE Regulation with respect to ITS's CHE in California, with 17 yard trucks that did not 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 ITS's California intermodal facility.
- (11) CARB alleges that if the allegations described in recitals 1 through 9 were proven, civil penalties could be imposed against ITS as provided in Health and Safety Code sections 39674, 39675, 42400 et seq., 42402 et seq., 42410, and 42016 for each and every piece of equipment involved in the violations and each day.
- (12) ITS admits the allegations described in recital paragraphs 1 through 8, but denies any liability resulting from said allegations.
- (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 alleged violations and voluntarily agree to resolve this matter by means of this Agreement. In order to resolve the violations described herein, ITS 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 ITS for the alleged violations referred to above, CARB and ITS agree as follows:

- (1) The Parties shall exchange signed copies of this Agreement by November 26, 2018. 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. ITS 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
Air Resources Board
9480 Telstar Avenue, Suite 4
El Monte, California 91731

- (2) Upon execution of this Agreement, ITS shall pay the sum of six thousand three hundred seventy five dollars (\$6,375.00) no later than November 26, 2018, as follows:

- \$6,375.00 to the California Air Pollution Control Fund

ITS will send the payment by November 26, 2018, 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) ITS shall not violate any provision of the CHE Regulation.
- (4) ITS has corrected, prior to the execution of this Agreement, all equipment known to have been in violation and cited in the Notice of Violation # CHE053118 ITS, issued September 6, 2018, by performing opacity tests in 2018 and being in compliance with all requirements of the CHE Regulation.
- (5) ITS has provided documentation that proves that the violations have been corrected and CARB has inspected and confirmed correction of the violations.
- (6) Now therefore, in consideration of the payment on behalf of ITS to CARB, for

deposit into the California Air Pollution Control Fund, CARB hereby releases ITS and their principals, officers, agents, predecessors, and successors from claims for violations of the CHE Regulation alleged in recital paragraph 6.

III. GENERAL PROVISIONS

- (1) This Agreement constitutes the entire agreement and understanding between CARB and ITS 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 ITS concerning the subject matter hereof.
- (2) This Agreement shall apply to and be binding upon ITS 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 ITS 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) ITS 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 section 43024.

The per CHE penalty for the opacity violations involved in this case is a maximum of \$37,500.00 per CHE per violation per year. The penalty obtained for the opacity violations in this case is \$6,375.00 for 17 violations involving 17 pieces of CHE, or \$375.00 per CHE per violation.

This penalty was calculated by considering all factors specified in Health and Safety Code sections 42403 and 43024, including the fact that ITS 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 ITS failed to comply with section 2479 of the CHE Regulation, which was adopted under the authority of Health and Safety Code section 39674, 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) ITS 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 section 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. However, since the hours of operation of the noncompliant units involved and their individual emission rates are not known, it is not practical for CARB to quantify the excess emissions.
- (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. 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 ITS 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 ITS that CARB does not retain in the ordinary course of business. The penalty also reflects CARB's assessment of the relative strength of its case against ITS, 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 ITS may have secured from its actions.

ACKNOWLEDGED AND ACCEPTED BY:

California Air Resources Board

Dated: 12/17/18 By: 
(Signature)
Printed Name: Todd Sax
Title: Division Chief

ITS Technology & Logistics, LLC

Dated: 11/15/18 By: 
(Signature)
Printed Name: Paul Kleppatsch
Title: VP & General Counsel