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U.S.EPA - Region 09

Attorneys for Complainant

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 HAWTHORNE STREET
SAN FRANCISCO, CALIFORNIA 94105

_____)	Docket No. CAA-09-2019- <u>0062</u>
In the Matter of:)	
)	
Mercer Transportation Company, Inc.)	CONSENT AGREEMENT AND
)	FINAL ORDER PURSUANT TO
Respondent)	40 C.F.R. §§ 22.13 and 22.18
_____)	

I. CONSENT AGREEMENT

A. PRELIMINARY STATEMENT

1. This is a civil administrative penalty assessment proceeding brought under section 113(d) of the Clean Air Act (the "Act"), 42 U.S.C. § 7413(d), and sections 22.13 and 22.18 of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Consolidated Rules"), as codified at 40 C.F.R. Part 22. In accordance with 40 C.F.R.

§§ 22.13 and 22.18, entry of this Consent Agreement and Final Order (“CAFO”) simultaneously initiates and concludes this matter.

2. Complainant is the Assistant Director of the Air, Waste & Analysis Branch of the Enforcement and Compliance Assurance Division, United States Environmental Protection Agency, Region IX (the “EPA”), who has been duly delegated the authority to initiate and settle civil administrative penalty proceedings under section 113(d) of the Act.
3. Respondent is Mercer Transportation Company, Inc. (“Mercer” or “Respondent”), a corporation whose principal place of business is located at 1128 West Main Street, Louisville, Kentucky.
4. Complainant and Respondent, having agreed that settlement of this action is in the public interest, consent to the entry of this CAFO without adjudication of any issues of law or fact herein, and Respondent agrees to comply with the terms of this CAFO.

B. JURISDICTION

5. Pursuant to section 113(d)(1) of the Act, 42 U.S.C. § 7413(d)(1), EPA and the United States Department of Justice jointly determined that this matter, which involves alleged violations that occurred more than one year before the initiation of this proceeding, is appropriate for an administrative penalty assessment.
6. In satisfaction of the notice requirements of section 113(a) of the Act, 42 U.S.C. § 7413(a), on April 10, 2019, EPA issued to Respondent a notice of violation (“NOV”) and provided a copy of the NOV to the California Air Resources Board (“ARB”), providing notice to both that EPA found that Respondent committed the alleged

violations described in Section I.D of this CAFO and providing Respondent an opportunity to confer with the EPA.

C. GOVERNING LAW

Clean Air Act

7. Pursuant to section 107(d) of the Act, 42 U.S.C. § 7407(d), the Administrator promulgated lists of attainment status designations for each air quality control region (“AQCR”) in every state. These lists identify the attainment status of each AQCR for each of the criteria pollutants. The attainment status designations for California AQCRs are listed at 40 C.F.R. § 81.305.
8. There are seven AQCRs designated as nonattainment for fine particulate matter (i.e., PM_{2.5}) in California, including all of the Los Angeles-South Coast Air Basin. *See* 40 C.F.R. § 81.305.
9. Section 110(a) of the Act requires that all states adopt SIPs that provide for the implementation, maintenance and enforcement of primary and secondary air quality standards. 42 U.S.C. § 7410(a).
10. A person’s failure to comply with any approved regulatory provision of a SIP renders the person in violation of an applicable implementation plan and subject to enforcement under section 113(a)(1) of the Act. 42 U.S.C. § 7413(a)(1).

Title 13, Section 2027 of California Code of Regulations: On-Road Diesel-Fueled Heavy-Duty Drayage Trucks

11. On September 19, 2011, the California Air Resources Board (“ARB”) adopted “Regulation to Control Emissions from In-Use On-Road Diesel-Fueled Heavy-Duty

Drayage Trucks,” codified at title 13, section 2027 of the California Code of Regulations (the “Drayage Truck Regulation”).

12. The Drayage Truck Regulation was incorporated into the federal SIP, effective May 4, 2012. *See* 77 Fed. Reg. 20308 (April 4, 2012). The purpose of the Drayage Truck Regulation is to “reduce emissions and public exposure to diesel particulate matter (diesel PM), oxides of nitrogen (NOx), and other air contaminants by setting emission standards for in-use, heavy-duty diesel-fueled vehicles that transport cargo to and from California’s ports and intermodal facilities.” *See* section 2027(a) of the Drayage Truck Regulation.
13. Under section 2027(c)(14) of the Drayage Truck Regulation, “Diesel Particulate Matter (PM)” means “the particles found in the exhaust of diesel fueled compression ignition engines. . . .”
14. Under section 2027(c)(15) of the Drayage Truck Regulation, “Drayage Truck” means “any in-use on-road vehicle with a gross vehicle weight rating (GVWR) greater than 26,000 pounds that is used for transporting cargo, such as containerized, bulk, or break-bulk goods, that operates: (A) on or transgresses through port or intermodal rail yard property for the purpose of loading, unloading or transporting cargo, including transporting empty containers and chassis; or (B) off port or intermodal rail yard property transporting cargo or empty containers or chassis that originated from or is destined to a port or intermodal rail yard property.”
15. Under section 2027(c)(16) of the Drayage Truck Regulation, “Drayage Truck Owner” means “(A) the person registered as the owner of a drayage truck as shown by the Department of Motor Vehicles, or its equivalent in another state, province, or country;

or the International Registration Plan. or (B) the lessee of the truck, as indicated on the drayage truck's registration pursuant to Vehicle Code section 4453.5.”

16. Under section 2027(c)(17) of the Drayage Truck Regulation, “Drayage Truck Operator” means “the driver of the vehicle or any person, party or entity that controls the operation of a drayage truck.”
17. Under section 2027(c)(18) of the Drayage Truck Regulation, “Drayage Truck Registry (DTR)” means “an ARB database that contains information on all trucks that conduct business at California ports and intermodal rail yards.”
18. Under section 2027(c)(33) of the Drayage Truck Regulation, “Motor Carrier” means “a business intermediary that contracts with beneficial cargo owners, ship companies, port terminals or Class I railroads, and with owners and operators of drayage trucks that it dispatches for pick-up and delivery of goods that are destined for or originated from ports and/or intermodal rail yards.”
19. Under section 2027(c)(34) of the Drayage Truck Regulation, “On-road” means “a vehicle that is designed to be driven on public highways and roadways and that is registered or is capable of being registered by the California Department of Motor Vehicles (DMV) under Vehicle Code sections 4000 et seq.- or DMV’s equivalent in another state, province, or country; or the International Registration Plan. . . .”
20. Under section 2027(c)(36) of the Drayage Truck Regulation, “Port” means “the port property where marine and port terminals are typically located for the loading and unloading of water-borne commerce onto and from ocean-going vessels.”
21. Under section 2027(c)(43) of the Drayage Truck Regulation, “Vehicle” is as defined in California Vehicle Code Section 670. In turn, that section defines “Vehicle” as “a

device by which any person or property may be propelled, moved or drawn upon a highway, excepting a device moved exclusively by human power or used exclusively upon stationary rails or tracks.”

22. The Drayage Truck Regulation applies to “owners and operators of on-road diesel-fueled, alternative diesel-fueled and dual-fueled heavy-duty drayage trucks that operate in California[,] ‘motor carriers,’ that dispatch drayage trucks that operate in California, ‘marine or port terminals,’ ‘intermodal rail yards,’ and ‘rail yard and port authorities.’”
See Drayage Truck Regulation at § 2027(b)(1).
23. Under the Drayage Truck Regulation, each motor carrier must provide a copy of the Drayage Truck Regulation or an ARB-approved summarized version to each drayage truck owner that it contracts with for deliveries to ports and intermodal rail yards in California. *See Drayage Truck Regulation at § 2027(d)(5)(A)(1).*
24. Under the Drayage Truck Regulation, each motor carrier must only dispatch drayage trucks that meet emission standards and compliance deadlines set forth in the Drayage Truck Regulation. *See Drayage Truck Regulation at § 2027(d)(5)(A)(2).*
25. Under the Drayage Truck Regulation, each motor carrier must only dispatch drayage trucks to ports and intermodal rail yards in California that are registered and in good standing with the DTR and are DTR compliant. *See Drayage Truck Regulation at § 2027(d)(5)(A)(3).*
26. Under the Drayage Truck Regulation, each motor carrier must keep a record of all dispatched drayage trucks to a port or intermodal rail yard containing the following information for a minimum of five years from the date of dispatch: (a) truck dispatch date and time; (b) bill of lading or tracking number; (c) truck license plate number and

issuing state; and (d) DTR number. *See* Drayage Truck Regulation at § 2027(d)(5)(A)(5).

D. ALLEGED VIOLATIONS OF LAW

27. At all times relevant to this CAFO, Respondent was a “Motor Carrier” as that term is defined under section 2027(c)(33) of the Drayage Truck Regulation and subject to the requirements of the Drayage Truck Regulation.
28. On or about October 20, 2017, EPA, Region IX, issued an information request pursuant to section 114 of the Act, 42 U.S.C. § 7414, to Respondent (the “Information Request”), seeking information concerning Respondent’s compliance with the Drayage Truck Regulation during 2014-2017.
29. On or about January 17, 2018, Respondent submitted its response (the “Response”) to the Information Request.
30. The Response indicated that Mercer contracted with up to 652 drayage truck owners for deliveries to ports and intermodal rail yards in California from January 2, 2015 to October 16, 2017.
31. The Response indicated that Mercer dispatched approximately 252 drayage trucks to ports and intermodal rail yards that were not registered and in good standing with DTR from January 2, 2015 to October 16, 2017.
32. By dispatching approximately 252 drayage trucks to ports and intermodal rail yards in California that were not registered and in good standing with DTR from January 2, 2015 to October 16, 2017, Mercer violated section 2027(d)(5)(A)(3) of the Drayage Truck Regulation.

33. The Response indicated that Mercer failed to keep records regarding DTR numbers for approximately 252 drayage trucks dispatched to a port or intermodal rail yard in California from January 2, 2015 to October 16, 2017.

34. By failing to keep records regarding DTR numbers for approximately 252 drayage trucks dispatched to a port or intermodal rail yard in California from January 2, 2015 to October 16, 2017, Mercer violated section 2027(d)(5)(A)(5) of the Drayage Truck Regulation.

E. TERMS OF CONSENT AGREEMENT

35. For the purpose of this proceeding, as required by 40 C.F.R. § 22.18(b)(2), Respondent:

- a. admits that EPA has jurisdiction over the subject matter alleged in this CAFO and over Respondent;
- b. neither admits nor denies the specific factual allegations contained in Section I.D of this CAFO;
- c. neither admits nor denies the alleged violations of law stated in Section I.D of this CAFO;
- d. consents to the assessment of a civil penalty under this Section, as stated below;
- e. consents to the conditions specified in this CAFO;
- f. waives any right to contest the allegations set forth in Section I.D of this CAFO;
- and
- g. waives its rights to appeal the proposed Order contained in this CAFO.

Civil Penalty

36. Respondent agrees to:

- a. pay the civil penalty of FORTY-SIX THOUSAND SEVEN HUNDRED EIGHTY SEVEN DOLLARS (\$46,787) (“EPA Penalty”) within 30 calendar days of the Effective Date of this CAFO;
- and
- b. pay the EPA Penalty using any method, or combination of methods, provided on the website <http://www2.epa.gov/financial/additional-instructions-making-payments-epa>, and identifying each and every payment with “Docket No. CAA-09-2019-5062”. Within 24 hours of payment of the EPA Penalty, send proof of payment to Mark Sims at:

Mail Code (ENF-2-1)
Enforcement and Compliance Assurance Division
U.S. Environmental Protection Agency, Region IX
75 Hawthorne Street
San Francisco, CA 94105

and at sims.mark@epa.gov (“proof of payment” means, as applicable, a copy of the check, confirmation of credit card or debit card payment, confirmation of wire or automated clearinghouse transfer, and any other information required to demonstrate that payment has been made according to the EPA requirements, in the amount due, and identified with “Docket No. CAA-09-2019-5062”).

37. If Respondent fails to pay the civil administrative penalty specified in Paragraph 36(a) of this CAFO within 30 days after the effective date of this CAFO, then Respondent shall pay to EPA a stipulated penalty in the amount of FIVE HUNDRED DOLLARS (\$500.00) for each day the default continues plus the penalty sum specified in Paragraph 36(a), upon written demand by EPA.

38. If Respondent fails to timely pay any portion of the penalty assessed under this CAFO, EPA may:

- a. request the Attorney General to bring a civil action in an appropriate district court to recover: the amount assessed; interest at rates established pursuant to 26 U.S.C. § 6621(a)(2); the United States' enforcement expenses; and a 10 percent quarterly nonpayment penalty, 42 U.S.C. § 7413(d)(5);
- b. refer the debt to a credit reporting agency or a collection agency, 42 U.S.C. § 7413(d)(5), 40 C.F.R. §§ 13.13, 13.14, and 13.33;
- c. collect the debt by administrative offset (i.e., the withholding of money payable by the United States to, or held by the United States for, a person to satisfy the debt the person owes the Government), which includes, but is not limited to, referral to the Internal Revenue Service for offset against income tax refunds, 40 C.F.R. Part 13, Subparts C and H; and
- d. suspend or revoke Respondent's licenses or other privileges, or (ii) suspend or disqualify Respondent from doing business with EPA or engaging in programs EPA sponsors or funds, 40 C.F.R. § 13.17.

39. The provisions of this CAFO shall apply to and be binding upon Respondent and its officers, directors, employees, agents, trustees, servants, authorized representatives, successors, and assigns. Nothing in the previous sentence adversely affects any right of EPA under applicable law to assert successor or assignee liability against Respondent's successors or assignees.

40. By signing this CAFO, Respondent acknowledges that this CAFO will be available to the public and agrees that this CAFO does not contain any confidential business information or personally identifiable information.
41. By signing this CAFO, the undersigned representative of Complainant and the undersigned representative of Respondent each certify that he or she is fully authorized to execute and enter into the terms and conditions of this CAFO and has the legal capacity to bind the party he or she represents to this CAFO.
42. By signing this CAFO, Respondent certifies, to the best of Respondent's knowledge and belief, that the information it has supplied concerning this matter was at the time of submission true, accurate, and complete for each such submission, response, and statement. Respondent acknowledges that there are significant penalties for submitting false or misleading information, including the possibility of fines and imprisonment for knowing submission of such information, under 18 U.S.C. § 1001.
43. Each party shall bear its own attorney's fees, costs, and disbursements incurred in this proceeding.

F. EFFECT OF CONSENT AGREEMENT AND ATTACHED FINAL ORDER

44. In accordance with 40 C.F.R. § 22.18(c), completion of the terms of this CAFO resolves only Respondent's liability for federal civil penalties for the violations and facts specifically alleged above.
45. Penalties paid pursuant to this CAFO shall not be deductible for purposes of federal taxes.

46. This CAFO constitutes the entire agreement and understanding of the parties and supersedes any prior agreements or understandings, whether written or oral, among the parties with respect to the subject matter hereof.
47. Any violation of this Order may result in a civil judicial action for an injunction or civil penalties of up to \$99,681 per day per violation, or both, as provided in section 113(b)(2) of the Act, 42 U.S.C. § 7413(b)(2), as well as criminal sanctions as provided in section 113(c) of the Act, 42 U.S.C. § 7413(c). EPA may use, subject to claims of confidential business information validly asserted pursuant to Subpart B of 40 C.F.R. Part 2, any information submitted under this Order in an administrative, civil judicial, or criminal action.
48. Nothing in this CAFO shall relieve Respondent of the duty to comply with all applicable provisions of the Act and other federal, state, or local laws or statutes, nor shall it restrict EPA's authority to seek compliance with any applicable laws or regulations, nor shall it be construed to be a ruling on, or determination of, any issue related to any federal, state, or local permit.
49. Nothing herein shall be construed to limit the power of EPA to undertake any action against Respondent or any person in response to conditions that may present an imminent and substantial endangerment to the public health, welfare, or the environment.
50. EPA reserves the right to revoke this CAFO and settlement penalty if and to the extent that EPA finds, after signing this CAFO, that any information provided by Respondent was materially false or materially inaccurate at the time such information was provided to EPA, and EPA reserves the right to assess and collect any and all civil penalties for any

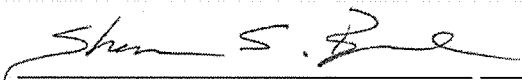
violation described herein. EPA shall give Respondent notice of its intent to revoke, which shall not be effective until received by Respondent in writing.

G. EFFECTIVE DATE

51. Respondent and Complainant agree to issuance of the attached Final Order. Upon filing, EPA will transmit a copy of the filed CAFO to the Respondent. This CAFO shall become effective after execution of the Final Order by the Regional Judicial Officer on the date of filing with the Regional Hearing Clerk.

The foregoing Consent Agreement in the Matter of Mercer Transportation Company, Inc.,
Docket No. CAA-09-2019-⁰⁰⁶² is Hereby Stipulated, Agreed, and Approved for Entry.

FOR RESPONDENT MERCER TRANSPORTATION COMPANY, INC.:


Signature

7/22/2019
Date

Printed Name: Shannon S. Broome

Title: Partner, Hunton Andrews Kurth (Counsel for Mercer)

Address: 50 California Street, Suite 1700, San Francisco, CA

Respondent's Federal Tax Identification Number: 75-1555599

The foregoing Consent Agreement In the Matter of Mercer Transportation Company, Inc.,
Docket No. CAA-09-2019-~~0062~~, is Hereby Stipulated, Agreed, and Approved for Entry.

FOR COMPLAINANT:

8/2/2019

DATE

Claire Trombadore

Claire Trombadore
Acting Assistant Director
Air, Waste & Analysis Branch
Enforcement and Compliance Assurance Division
United States Environmental
Protection Agency, Region IX
75 Hawthorne Street
San Francisco, CA 94105

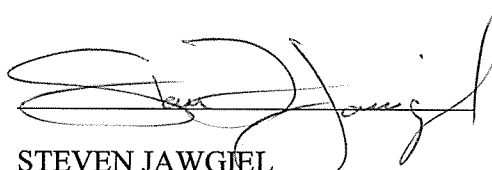
II. FINAL ORDER

EPA Region IX and Mercer Transportation Company, Inc., having entered into the foregoing Consent Agreement,

IT IS HEREBY ORDERED that this CAFO (Docket No. CAA-09-2019-⁰⁰⁶²) be entered, and Respondent shall pay a civil administrative penalty in the amount of FORTY-SIX THOUSAND SEVEN HUNDRED EIGHTY SEVEN DOLLARS (\$46,787) and otherwise comply with the terms set forth in the CAFO.

08/08/19

DATE



STEVEN JAWGIEL
Regional Judicial Officer
United States Environmental
Protection Agency, Region IX

CERTIFICATE OF SERVICE

I hereby certify that the original and fully executed Consent Agreement and Final Order in the matter of Mercer Transportation Company, Inc. (Docket #: CAA-09-2019-0062), was filed with the Regional Hearing Clerk, U.S. EPA Region IX, 75 Hawthorne Street, San Francisco, CA 94105, and that a true and correct copy of the same went to the following parties:

FIRST CLASS MAIL – CERTIFIED (7015 3010 0000 3883 5390)

Respondent -- Mr. James L. Stone
President
Mercer Transportation Company, Inc.
1128 West Main Street
Louisville, KY 40203-1432

BY U.S. POSTAL SERVICE

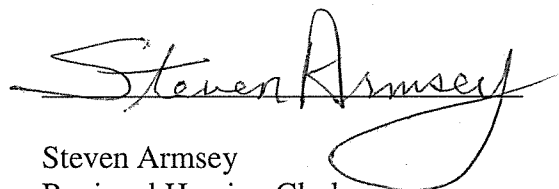
Ms. Shannon S. Broome, Esq.
Partner/Office Managing Partner San Francisco
Hunton Andrews Kurth LLP
50 California Street, Suite 1700
San Francisco, CA 94111

HAND DELIVERED

Complainant -- David Kim, Esq.
(By Counsel) Assistant Regional Counsel
Office of Regional Counsel
U.S. Environmental Protection Agency, Region IX
75 Hawthorne Street
San Francisco, CA 94105

Aug. 8, 2019

DATE


Steven Armsey
Regional Hearing Clerk