

SETTLEMENT AGREEMENT AND RELEASE

This SETTLEMENT AGREEMENT AND RELEASE (hereinafter "Agreement") is entered into between the State of California Air Resources Board (hereinafter "ARB") with its principal office at 1001 I Street, Sacramento, California 95814, and Kinder Morgan Energy partners, L.P., (hereinafter "Kinder Morgan"), with its principal place of business at 1100 Town & Country Road, Orange, CA 92868.

I. RECITALS

- (1) California Code of Regulations (hereinafter "CCR"), Title 13, Section 2257 (Required Additives in Gasoline) provides in pertinent part as follows:

- (a) *Regulatory Standard.*

- (1) On or after January 1, 1992, no person shall sell, offer for sale, supply, or offer for supply any California gasoline unless at the time of the transaction:
 - [i] the producer, importer, or distributor of the gasoline has been issued a currently effective certification for California gasoline pursuant to subsection (c), originally dated no earlier than July 1, 1996. Existing certifications dated between July 1, 1996 and July 16, 1999 that meet the standards described in subsection (c)(1)(A)(i) and (c)(1)(A)(ii) [including those which used test method ASTM D 5500-94] are exempted from subsection (c)(1)(A)(iii), and

- [ii] the gasoline contains at least the minimum concentration of the additive or additives identified in the final application for certification.

- (2) Subsection (a)(1) shall not apply to transactions where the person selling, supplying, or offering the gasoline demonstrates that:
 - [i] the gasoline has not yet been sold, offered, or supplied from the final distribution facility, and either
 - [ii] the person has taken reasonably prudent precautions to assure that he or she will bring the gasoline into satisfaction with the requirements of subsection (a)(1) before it is sold, supplied or offered from the final distribution facility, or [iii] at or before the time of the transaction the person has obtained a written statement from the purchaser, recipient, or offeree of the gasoline stating that he or she is a distributor who has been issued a currently effective certification pursuant to subsection (c), and will cause the gasoline to satisfy the requirements of subsection (a)(1) before it is sold, supplied or offered from the final distribution facility.

- (3) Subsection (a)(1)[ii] shall not apply to the sale, supply, or offer of gasoline from a final distribution facility where the person selling, supplying, or offering the gasoline demonstrates that the gasoline will be corrected to comply with section (a)(1)[ii] prior to the sale of gasoline from the retail outlet to be dispensed into motor vehicles. If such corrective action is taken, the producer, importer, or distributor of the gasoline must notify the Compliance Division of the Air Resources Board by telephone or in writing within 2

business days of the correction and must maintain records to document each occurrence in accordance with subsection (d).

- (4) For the purposes of subsection (a)(1), each sale of gasoline at retail for use in a motor vehicle, and each supply of gasoline into a motor vehicle fuel tank, shall also be deemed a sale or supply by any person who previously sold or supplied such gasoline in violation of subsection (a)(1).

(d) *Recordkeeping.*

(1) Each producer, importer, and distributor who has been issued a certification pursuant to subsection (c) must maintain records identifying each facility at which he or she adds an additive to California gasoline in order to comply with subsection (a)(1). For each such facility, the producer, importer or distributor must compile records showing on a monthly basis for each grade of gasoline:

[i] the volume of California gasoline supplied from the facility by the producer, importer or distributor,

[ii] the volume of California gasoline to which the producer, importer or distributor added the additive to comply with subsection (a)(1), and

[iii] the name and volume of each additive (or additive package) added to the California gasoline fuel. Records covering a month must be compiled no later than 30 days after the end of the month, and must be retained for at least two years after the end of the month.

- (2) Any person required by subsection (d)(1) to compile and retain records must provide to the executive officer any such records within 20 days of a written request received from the executive officer or his/her designee before expiration of the period during which the records are required to be retained. Whenever such a person fails to provide records regarding a volume of California gasoline in accordance with this subsection (d)(2), the volume of California gasoline will be presumed to have been sold by the person in violation of subsection (a)(1).
- (2) California Health and Safety Code (hereinafter "H&SC") section 43027(a) states, "[a]ny person who willfully and intentionally violates any provision of this part, or any rule, regulation, permit, variance, or order of the state board, pertaining to fuel requirements and standards, is liable for a civil penalty of not more than two hundred fifty thousand dollars (\$250,000), and the prosecuting agency shall include a claim for an additional penalty in the amount of any economic gain that otherwise would not have been realized from the sale of the fuel determined to be in noncompliance."
- (3) H&SC section 43027(b) states, "[a]ny person who negligently violates any provision of this part, or any rule, regulation, permit, variance, or order of the state board, pertaining to fuel requirements and standards, exclusive of the

documentation requirements specified in subdivision (d), is liable for a civil penalty of not more than fifty thousand dollars (\$50,000).”

- (4) H&SC section 43027(c) states, “[a]ny person who violates any provision of this part, or any rule, regulation, permit, variance, or order of the state board, pertaining to fuel requirements and standards, exclusive of the documentation requirements specified in subdivision (d), is strictly liable for a civil penalty of not more than thirty-five thousand dollars (\$35,000).”
- (5) H&SC section 43027(d) states, “[a]ny person who enters false information in, or fails to keep, any document required to be kept pursuant to any provision of this part, or any rule, regulation, permit, variance, or order of the state board, pertaining to fuel requirements and standards, is strictly liable for a civil penalty of not more than twenty-five thousand dollars (\$25,000)....”
- (6) H&SC section 43029 requires the prosecuting agency to include a claim for an additional penalty designed to eliminate the economic benefits from noncompliance against any person who violates any provision of this part, or any rule, regulation, permit, variance, or order of the state board pertaining to fuel requirements or standards as follows: “(a) For violations of gasoline requirements, the amount of the penalty shall equal the product of the number of tons of incremental increased vehicular emissions resulting from the manufacture, distribution, and sale of the specified volume of noncompliant fuel and nine thousand one hundred dollars (\$9,100) per ton, which is the maximum calculated cost-effectiveness for California Phase 2 Reformulated Gasoline...”
- (7) H&SC section 43030(a) states, “for the penalties prescribed in Sections 43027..., each day during any portion of which a violation occurs is a separate offense.”
- (8) H&SC section 43031(b) states, “[i]n determining the amount assessed, ...the state board, in reaching any settlement, shall take into consideration all relevant circumstances, including, but not limited to, all of the following: (1) The extent of harm to public health, safety, and welfare caused by the violation. (2) The nature and persistence of the violation, including the magnitude of the excess emissions. (3) The compliance history of the defendant, including the frequency of past violations. (4) The preventive efforts taken by the defendant, including the record of maintenance and any program to ensure compliance. (5) The innovative nature and the magnitude of the effort required to comply, and the accuracy, reproducibility, and repeatability of the available test methods. (6) The efforts to attain, or provide for, compliance. (7) The cooperation of the defendant during the course of the investigation and any action taken by the defendant, including the nature, extent, and time of response of any action taken to mitigate the violation. (8) For a person who owns a single retail service station, the size of the business.”
- (9) ARB alleges in Report of Violation **F10-11-2** the following: Kinder Morgan’s monthly additive records indicate a violation of the minimum additive concentration requirement from March 1st, 2009 through March 31st, 2009 at their terminal in Orange, CA. During this time Kinder Morgan was in process of

installing a new terminal management system. An additive injection rate was inadvertently mis-keyed into the system during installation. The value entered was approximately 95% of the required value.

- (10) ARB alleges that gasoline was dispensed from the Kinder Morgan Orange terminal which did not meet the minimum concentration requirement of additive as certified in Executive Order G-696-508. The reconciliation report that Kinder Morgan produced at the end of the month indicated that insufficient additive was used. Upon discovery, Kinder Morgan promptly reported the problem, initiated an investigation, and took immediate action to increase the additive injection rate to compensate for the underadditization.
- (11) ARB alleges that California gasoline was supplied from the Kinder Morgan Orange terminal that did not meet the requirements of Executive Order G-696-508. However, no volume of fuel was supplied from this facility that had not been additized. Kinder Morgan also initiated a daily reconciliation practice to prevent such incidents from occurring again.
- (12) ARB alleges that the sale, offer for sale, supply, or offer for supply of gasoline was unlawful and in violation of CCR, Title 13, Section 2257.
- (13) ARB alleges that if the facts described in recital paragraphs 1-12 were proven, civil penalties could be imposed against Kinder Morgan as provided in Health and Safety Code Sections 43027, 43029, 43030, and 43031.
- (14) Kinder Morgan admits the facts as alleged in recital paragraphs 1-12, but denies any liability arising out of those facts.
- (15) Kinder Morgan has provided full cooperation during the course of the investigation.
- (16) All violations referred to herein resulted in minimal excess emissions.
- (17) Kinder Morgan is entering into this Agreement solely for the purpose of settlement and resolution of this matter with ARB. Further, 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.

II. TERMS AND RELEASE

In consideration of ARB not filing a legal action against Kinder Morgan for the violation referred to above, ARB and Kinder Morgan agree as follows:

- (1) Within 15-days upon execution of this Agreement, Kinder Morgan shall pay the sum of thirty five thousand dollars (\$35,000). Payment shall be made by check payable to the California Air Pollution Control Fund and addressed to:

Duong Trinh
Air Resources Board
Enforcement Division
9480 Telstar Ave, Suite 4
El Monte, CA 91731

- (2) This Agreement shall apply to and be binding upon Kinder Morgan and its principals, officers, directors, agents, 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.
- (3) This Agreement constitutes the entire agreement and understanding between ARB and Kinder Morgan concerning the claims and settlement in this Agreement, and this Agreement fully supersedes and replaces any and all prior negotiations and agreement of any kind or nature, whether written or oral, between ARB and Kinder Morgan concerning these claims.
- (4) If any court of competent jurisdiction declares or determines any provision of this Agreement to be illegal, invalid, or unenforceable, the legality, validity, and enforceability of the remaining parts, terms, and provisions shall not be affected thereby, and said illegal, unenforceable, or invalid part, term, or provision will be deemed not to be part of this Agreement.
- (5) No agreement to modify, amend, extend, or supersede this Agreement, or any portion thereof, shall be valid or enforceable unless it is in writing and signed by all parties to this Agreement.
- (6) 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.
- (7) If the Attorney General files a civil action to enforce this settlement agreement, the prevailing party shall pay all costs of investigating and prosecuting the action, including expert fees, reasonable attorney's fees, and costs.
- (8) 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.
- (9) 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.

III. 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 also 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 Health and Safety Code section 43031.

The per unit penalty in this case is a maximum of \$35,000 per day per strict liability violation. The penalty obtained in this case is approximately \$ 1,100 per day of violation, representing 31 days of violation. The penalty was reduced because the incident was inadvertent, Kinder Morgan demonstrated efforts to ensure compliance with the installation of a new management system, Kinder Morgan cooperated fully in the case, the gasoline supplied was about 95 percent additized, no unadditized gasoline was released, and Kinder Morgan put into place new measures to prevent reoccurrence of the same violation.

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 43027 because Kinder Morgan put fuel into commerce in California in violation of Title 13 California Code of Regulations section 2257.

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.

The provisions cited above do not prohibit emissions above a specified level. Since the fuels did not meet California air pollution standards, any emissions attributable to them are illegal. However, it is not practicable to quantify these emissions because the information necessary to do so is not available.

- (1) Kinder Morgan 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 (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 not being assessed under a provision of law that prohibits the emission of pollutants at a specified level.
- (2) 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 Kinder Morgan's diligent efforts to comply and to

cooperate with the investigation. Penalties in future cases might be smaller or larger on a per unit basis.

- (3) The penalty is the product of an arms length negotiation between ARB and Kinder Morgan and reflects ARB's assessment of the relative strength of its case against Kinder Morgan, the desire to avoid the uncertainty, burden and expense of litigation, obtain swift compliance with the law and remove any unfair advantage that Kinder Morgan may have secured from its actions.
- (4) Now therefore, in consideration of the payment of Kinder Morgan to the California Air Pollution Control Fund, ARB hereby releases Kinder Morgan and its principals, officers, directors, agents, employees, parents, subsidiaries, predecessors, and successors from any and all claims that ARB may have based on the facts and allegations described in recital paragraphs 1 - 17. The undersigned represent that they have the authority to enter this Agreement.

CALIFORNIA AIR RESOURCES BOARD

By: Ellen M. Peter
Name: Ellen Peter
Title: Chief Counsel
Date: 12-22-2011

KINDER MORGAN ENERGY PARTNERS, L.P.

By: Edward E. Hahn
Name: EDWARD E. HAHN
Title: DIRECTOR - PRODUCTS MOVEMENT
Date: 12-12-11