

## 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 2266.5 (Requirements pertaining to California Reformulated Gasoline Blendstock for Oxygen Blending (CARBOB) and Downstream Blending) provides in pertinent part as follows:
  - (d) Documentation required when CARBOB is transferred.
    - (1) Required Documentation. On each occasion when any person transfers custody or title of CARBOB, the transferor shall provide the transferee a document that prominently:
      - (A) States that the CARBOB does not comply with the standards for California gasoline without the addition of oxygenate,
      - (B) Identifies the applicable flat limit, PM alternative specification, or TC alternative specification for oxygen, and
      - (C) Identifies, consistent with the notification made pursuant to section (b), the oxygenate type or types and amount or range of amounts that must be added to the CARBOB to make it comply with the standards for California gasoline. Where the producer or importer of the CARBOB has elected to specify the properties of the oxygenate pursuant to section (b)(1)(D), the document must also prominently identify the maximum permitted sulfur, benzene, olefin and aromatic hydrocarbon contents – not to exceed the maximum levels in the section (b)(1)(D) notification – of the oxygenate to be added to the CARBOB.
  - (e) Restrictions on transferring CARBOB.
    - (1) Required agreement by transferee. No person may transfer ownership or

custody of CARBOB to any other person unless the transferee has agreed in writing with the transferor that either:

(A) The transferee is a registered oxygenate blender and will add oxygenate of the type(s) and amount (or within the range of amounts) designated in accordance with section (b) before the CARBOB is transferred from a final distribution facility, or

(B) The transferee will take all reasonably prudent steps necessary to assure that the CARBOB is transferred to a registered oxygen blender who adds the type and amount (or within the range of amounts) of oxygenate designated in accordance with section (b) to the CARBOB before the CARBOB is transferred from a final distribution facility.

(2) Prohibited sales of CARBOB from a final distribution facility. No person may sell or supply CARBOB from a final distribution facility where the type and amount or range of amounts of oxygenate designated in accordance with section (b) has not been added to the CARBOB.

(f) Restrictions on blending CARBOB with other products.

(1) Basic prohibition. No person may combine any CARBOB that has been supplied from the facility at which it was produced or imported with any other CARBOB, gasoline, blendstock or oxygenate, except:

(A) The specified oxygenate.

1. The CARBOB may be blended with oxygenate of the type and amount (or within the range of amounts) specified by the producer or importer at the time the CARBOB was supplied from the production or import facility.

2. Where ethanol is the specified oxygenate and specifications for the ethanol are identified in the product transfer document for the CARBOB pursuant to section 2266.5(d)(1)(C), only ethanol meeting those specifications may be combined with the CARBOB.

3. Where ethanol is the specified oxygenate and specifications for the ethanol are not identified, only ethanol meeting the standards in section 2262.9(a) may be combined with the CARBOB.

(h) Downstream blending of California gasoline with nonoxygenate blendstocks.

(1) Basic prohibition. No person may combine California gasoline which has been supplied from a production or import facility with any nonoxygenate blendstock, other than vapor recovery condensate, unless the person can affirmatively demonstrate that (1) the blendstock that is added to the California gasoline meets all of the California gasoline standards without regard to the properties of the gasoline to which the blendstock is added, and (2) the person meets with regard to the blendstock all requirements in this subarticle applicable to producers of California gasoline.

(2) Exceptions.

(A) Protocols. Notwithstanding section (i)(1), the executive officer may enter into a written protocol with any person to identify conditions under which the person may lawfully blend transmix into California gasoline which has been supplied from its production or import facility. The executive officer may only enter into such a protocol if he or she reasonably determines that alternatives to the blending are not practical and the blending will not significantly affect the properties of the California gasoline into which the transmix is added. Any such protocol shall include the person's agreement to be bound by the terms of the protocol.

(B) Blending to meet a cap limit. Notwithstanding section (i)(1), a person may add nonoxygenate blendstock to California gasoline that does not comply with one or more of the applicable cap limits contained in section 2262, where the person obtains the prior approval of the executive officer based on a demonstration that adding the blendstock is a reasonable means of bringing the gasoline into compliance with the cap limits.

(i) Restrictions during the RVP season on blending gasoline containing ethanol with California gasoline not containing ethanol.

(1) Basic prohibition. Within each air basin during the Reid vapor pressure cap

limit periods specified in section 2262.4(a)(2), no person may combine California gasoline produced using ethanol with California gasoline produced without using ethanol, unless the person can affirmatively demonstrate that: (A) the resulting blend complies with the cap limit for Reid vapor pressure set forth in section 2262, or (B) the person has taken reasonably prudent precautions to assure that the gasoline is not subject to the Reid vapor pressure cap limit either because of sections 2261(d) or (f) or 2262.4(c)(1) or (c)(3), or because the gasoline is no longer California gasoline.

(2) Exception. Section 2266.5(i)(1) does not apply to combining California gasolines that are in a motor vehicle's fuel tank.

NOTE: Authority cited: sections 39600, 39601, 43013, 43013.1, 43018, and 43101, Health and Safety Code; and *Western Oil and Gas Ass'n. v. Orange County Air Pollution Control District*, 14 Cal.3d 411, 121 Cal.Rptr. 249 (1975). Reference: sections 39000, 39001, 39002, 39003, 39010, 39500, 39515, 39516, 41511, 43000, 43013, 43013.1, 43016, 43018, 43021, and 43101, Health and Safety Code; and *Western Oil and Gas Ass'n. v. Orange County Air Pollution Control District*, 14 Cal.3d 411, 121 Cal.Rptr. 249 (1975).

- (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 F10-1-2 the following: On July 28, 2008, at 13:36 hours a Vanilla Oil driver loaded 6415 gallons of regular unleaded carbob gasoline from the Kinder Morgan Chico terminal and delivered the gasoline to a Double E service station in Hamilton City, CA. The gasoline was later found to have an ethanol content of approximately 35% by volume, higher than the maximum cap limit allowed by state law.
- (10) 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 2266.5.
- (11) ARB alleges that if the facts described in recital paragraphs 1 were proven, civil penalties could be imposed against Kinder Morgan as provided in Health and Safety Code Sections 43027, 43029, 43030, and 43031.

- (12) Kinder Morgan admits the facts as alleged in recital paragraphs 1-11, but denies any liability arising out of those facts.
- (13) Kinder Morgan has provided full cooperation during the course of the investigation.
- (14) All violations referred to herein resulted in minimal excess emissions.
- (15) 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 total amount of \$15,000. Payment shall be made by check payable to the California Air Pollution Control Fund and addressed to:  
  
Steve Brisby  
Air Resources Board  
Enforcement Division  
1001 I Street  
Sacramento, CA 95814
- (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 \$ 15,000 per day of violation, representing 1 day of 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 2265.

**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 - 12. The undersigned represent that they have the authority to enter this Agreement.

**CALIFORNIA AIR RESOURCES BOARD**

By:   
Name: James R. Ryden  
Title: Chief, Enforcement Division  
Date: 6/1/11

**KINDER MORGAN ENERGY PARTNERS, L.P.**

By:   
Name: EDWARD E. HAHN  
Title: DIRECTOR, PRODUCTS MOVEMENT  
Date: 5-26-2011