

Appendix C

Response to Comments – Kinder Morgan Energy Partners, L.P., Fairfield, Solano County
- Authorizing Attorney General Referral to Seek Judicial Civil Penalties and Other Relief
for Diesel Fuel Spill in April 2004

Board staff circulated the subject tentative resolution among interested persons in February 2005, requesting any written comments by February 28, 2005. We received one letter from Mr. Tom Jensen, Kinder Morgan Energy Partners, L.P. (KM) vice president of Operations and Engineering-West. Below is a summary of the key points raised in these comments and our responses:

1. Comment: "[Kinder Morgan] objects to the proposed resolution on the basis that said alleged discharge did not impact "waters of the state" within the meaning of Section 13050 of the Water Code and that the Board should defer to the jurisdiction of the California Department of Fish and Game, Office of Spill Prevention and Response."

Response: The specific basis for KM's assertion that the discharge did not impact waters of the state is unclear. The fact is that there was a release of diesel fuel from a pipeline into wetlands and a marsh area that are managed and contained through a system of tide gates and levees. Such wetlands and marsh area are clearly waters of the state. "Waters of the state" is very broadly defined to include "any surface water or groundwater, including saline waters, within the boundaries of the state." Water Code Section 13050(e). For example, based on legislative history, statutory construction and case law, the California Attorney General has construed "waters of the state" as used in the Dickey Water Quality Control Act (the predecessor of the Porter-Cologne Water Quality Control Act) to even include waters in an irrigation system (specifically, the opinion held all waters within the boundaries of the state, whether private or public, in natural or artificial channels, are waters of the state). 48 Ops. Cal. Atty. Gen. 30 (1966).

Moreover, under Water Code Section 13350(a), a person is civilly liable for causing or permitting oil or any residuary product of petroleum to be deposited in or on any waters of the state, without regard to the impact of the discharge (we note, however, that in this case, the impact is significant).

With respect to deference to the Department of Fish and Game Office of Spill Prevention and Response (DFG/OSPR), the Water Board has a duty to administer and implement the Porter-Cologne Water Quality Control Act to protect waters of the state. The Water Board has and will continue to coordinate its efforts with DFG/OSPR. Indeed, referring this matter to the Attorney General's Office for judicial enforcement ensures coordinated state action should other state agencies such as DFG/OSPR seek to impose civil penalties.

2. Comment: "Based on federal and state agency assessments and on-going natural resource damage assessments, it is estimated that less than 8 acres were affected by the release."

Response: It is inaccurate and premature for KM to claim that less than 8 acres of wetlands were affected by the spill. DFG/OSPR and the U.S. Fish and Wildlife Service, as state and federal natural resources trustees, are engaged in Natural Resources Damage Assessment (NRDA) negotiations with KM to recover monies for injury to, destruction of, and/or loss of natural resources. To the best of staff's knowledge, the NRDA negotiations have not been concluded yet. As provided by the Cleanup and Abatement Order No. R2-2004-0054 issued by the Executive Officer, KM is allowed to submit to the Board all available damage assessment studies that were performed under the NRDA process as part of the required wetland mitigation plan for Executive Officer approval. Compensation for natural resources damage can be considered, in part or in full, to satisfy wetland mitigation requirements.

Nonetheless, the tentative resolution does not make any determination about the extent of KM's release or the damages resulting from the release. It merely allows referral of the matter to the Attorney General's Office for judicially imposed civil penalties.

3. Comment: "The concentrations of diesel detected in confirmation soil samples were found to be below applicable human health and ecological risk screening concentrations."

Response: Although the interim remedial action was very effective at reducing the concentrations of petroleum hydrocarbons, the Board has not approved the final soil cleanup levels proposed because KM has not demonstrated that those levels are protective of ecological receptors. The soil screening level is only for protection of human health.

4. Comment: "While [Kinder Morgan] recognizes that various provisions of California law provide for strict liability for damages and certain civil penalties for persons that release petroleum products to the environment, [Kinder Morgan] respectfully requests that the Board take notice of the facts and circumstances related to the subject release, the aggressive response actions taken, and the level of cooperation by [Kinder Morgan] when considering appropriate actions. Penalties should be imposed on those persons guilty of culpable activities - not just because an unforeseen event occurred."

Response: Under Water Code Section 13350(a), any person who "causes or permits any oil or any residuary product of petroleum to be deposited in or on any waters of the state, except in accordance with waste discharge requirements or

other actions or provisions of this division, **shall** be liable civilly, and remedies may be proposed, in accordance with subdivision (d) or (e) [of Water Code Section 13350]." Here, Kinder Morgan, by virtue of its ownership and operation of the pipeline from which there was a release, caused or permitted oil to be discharged into waters of the state. As such, pursuant to Water Code Section 13350(d) and (e), civil liability may be imposed either judicially by a superior court or administratively by the Water Board. The mitigating factors the commenter notes are factors that may be considered in determining the *amount* of civil liability, not whether Kinder Morgan is civilly liable.