



STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY
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July 19, 2018

Electronic Copy

Don Nonis
Kinder Morgan, West Region
1995 West First Street
North Vancouver, B.C. V7P 1A8
Canada

Re: Final Determination of Liability for Release of Hazardous Substances at the following Contaminated Site:

- **Site Name:** Vancouver Port of NuStar, Cadet, Swan
- **Site Address:** 2701 NW Harborside Drive, Vancouver, Clark County, WA 98660
- **Cleanup Site ID:** 3450
- **Facility/Site ID:** 1026

Dear Mr. Nonis:

On May 15, 2018, it was confirmed you received the Department of Ecology's (Ecology) written notice of our preliminary determination that Kinder Morgan is a potentially liable person (PLP) for a release of hazardous substances at the Vancouver Port of NuStar, Cadet, Swan facility (Site). On June 14, 2018, the 30-day comment period on our preliminary determination expired. On June 14, 2018, Ecology received your written comments.

Your letter disputes Ecology's preliminary determination that Kinder Morgan is a PLP for the Site based on the following arguments:

1. No credible evidence indicates that the copper ore dust is connected to Kinder Morgan's activities; and
2. The wells, in which sampling results indicate the presence of copper, are not owned by Kinder Morgan or on property leased by Kinder Morgan.

Your letter also puts forth an argument that Kinder Morgan cannot be a liable person under the Model Toxics Control Act (MTCA) because the alleged release was caused by a third party and not by Kinder Morgan.

Ecology has reviewed your comment letter and continues to find that copper was released at the Site as a result of Kinder Morgan's operations; therefore, Kinder Morgan is an "owner or operator" of property within the Site at the time of a release. Discussion of this conclusion follows.

Release associated with Kinder Morgan's transportation of copper-based compound.

Kinder Morgan does not dispute that it operates a facility on property which is part of the Site. Kinder Morgan also does not dispute that it has, in the past and currently still handles, a copper-based compound at the property which is part of the Site.

Ecology believes that during Kinder Morgan's transportation of the copper-based compound, copper is released to the environment. Kinder Morgan handles copper concentrate product with the copper level in excess of 20 percent. Copper has been detected in storm water, groundwater and sediment from monitoring well head monuments, sediment from Port of Vancouver, and NuStar building gutters and surface sediment on and in proximity to Kinder Morgan's operation area. Copper was found in condensate of a soil vapor extraction system knockout tank on the NuStar facility. Fugitive dust from ship loading has been observed by Ecology and NuStar personnel. Sample data reflects areal deposition via copper containing dust to areas surrounding Kinder Morgan operations. Ecology therefore concludes that the copper detected at the Site is the same as that being transported by Kinder Morgan as part of its operation. This is sufficient credible evidence to show Kinder Morgan is an "owner or operator" at the Site.

Kinder Morgan has not identified how it qualifies for a third party defense.

In your letter, aside from asserting that Kinder Morgan would be able to avail itself of a third party defense if it was found to be a liable party, there is no discussion as to *how* Kinder Morgan meets the various requirements to qualify for that defense. MTCA requires that the party who asserts that it qualifies for the third party defense show how it meets all the required factors. That person must show that the release (or threatened release) of a hazardous substance was caused solely by an act or omission of a third party and that: (1) the third party is not an employee or agent or "one whose act or omission occurs in connection with a contractual relationship existing, directly or indirectly, with the person asserting the defense;" (2) the person asserting the defense "has exercised the utmost care with respect to the hazardous substance;" and (3) the person asserting the defense exercised the utmost care against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions. *See* Revised Code of Washington (RCW) 70.105D.040(3)(a)(iii). Kinder Morgan has failed to show any of the factors for the defense to have been met.

Finding

Based on available information, Ecology finds that credible evidence exists that Kinder Morgan is liable under RCW 70.105D.040 for a release of a hazardous substance at the Site as the "owner or operator," as defined in RCW 70.105D.020(22), of a "facility" at the time of a release, as defined in RCW 70.105D.020(8). On the basis of these findings, Ecology has determined that Kinder Morgan is a PLP with regard to the Site.

The purpose of MTCA is to identify, investigate, and cleanup facilities where hazardous substances have been released. Liability for environmental contamination under MTCA is strict, joint and several (RCW 70.105D.040(2)). Ecology ensures that contaminated sites are investigated and cleaned up to the standards set forth in the MTCA statute and regulations. Ecology has determined that it is in the public interest for remedial actions to take place at this Site.

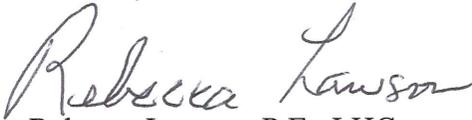
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Ecology will contact you regarding the actions necessary for the Kinder Morgan to bring about the prompt and thorough cleanup of hazardous substances at this Site. Failure to cooperate with Ecology or comply with MTCA in this matter will result in Ecology employing enforcement tools as it deems necessary and appropriate. This includes, but is not limited to, the issuance of an administrative order. Failure to comply with such an order may result in a fine of up to \$25,000 per day and liability for up to three times the costs incurred by the state (RCW 70.105D.050(1)).

Your rights and responsibilities as a PLP are outlined in chapter 70.105D RCW, and Washington Administrative Code (WAC) chapters 173-340 and 173-204. Ecology's cleanup project manager for the Site, Craig Rankine, will contact you with information about how Ecology intends to proceed with the cleanup.

If you have any questions regarding this notice, please contact Craig Rankine at (360) 690-4795 or craig.rankine@ecy.wa.gov.

Sincerely,



Rebecca Lawson, P.E., LHG
Section Manager
Toxics Cleanup Program
Southwest Regional Office

By email and registered mail no.: RE 884 767 309 US

cc: Scott Heidegger, Kinder Morgan, Vancouver (via email)
RJ Sherman, Kinder Morgan, Carteret, New Jersey (via email)
Ivy Anderson, Office of the Attorney General (via email)
Ecology Site File