

SETTLEMENT AGREEMENT:
STAGE II VAPOR RECOVERY SYSTEMS MEDIATION

This Settlement Agreement is made as of this 8th day of July, 2003 by and between the Independent Oil Marketers Association of New England, Inc., the New England Convenience Store Association, Inc. and the New England Service Station & Automotive Repair Association, Inc. ("the Plaintiffs"), the Massachusetts Petroleum Council, and the Massachusetts Department of Environmental Protection ("DEP").

WHEREAS, a dispute has arisen between the Plaintiffs and DEP concerning DEP's requirements for Stage II Vapor Recovery Systems, pursuant to DEP's regulations set forth at 310 CMR 7.24 (6); and

WHEREAS, the Plaintiffs filed a lawsuit in Suffolk Superior Court (Independent Oil Marketers Association of New England, Inc., New England Convenience Stores Association, Inc. and New England Service Station & Automotive Repair Association v. Commissioner, Massachusetts Department of Environmental Protection, Civil Action No. 01-0743a) ["the Lawsuit"] challenging DEP's requirements for Stage II Vapor Recovery Systems under DEP's regulations set forth at 310 CMR 7.24 (6); and

WHEREAS, DEP denies each and every claim in the Lawsuit; and

WHEREAS, the parties met on April 30, May 8, May 13, and May 21, and May 29, 2003 to seek a mediated settlement; and

WHEREAS, the parties, in an effort to avoid the expense and uncertainty of continued litigation, have, in good faith, reached a compromise and settlement of the dispute;

NOW, THEREFORE, the parties agree as follows:

1. In preparing Stage II program regulation revisions (310 CMR 7.24(6)), the Department of Environmental Protection (Department or DEP) conducted a public review process including two public hearings on the revisions under the provisions of Massachusetts General Law Chapter

30A on January 18 and 20, 2000. The final comment period ended on January 28, 2000. The public comment period was re-opened on June 6, 2000 and remained open until June 30, 2000. At the conclusion of this process, on September 11, 2000, the Department submitted revised Stage II program regulations to the Secretary of State's Office for promulgation. On that same date, the Department submitted the revised regulations as amendments to the Massachusetts State Implementation Plan ("SIP") for Ozone to the US Environmental Protection Agency (EPA) for review and approval.

2. In a Federal Register notice (Volume 65, Number 243) dated December 18, 2000, EPA approved the SIP revision for the amended Stage II regulations effective on January 17, 2001. In its approval, EPA stated that it believed there was a justifiable basis for DEP proceeding with revisions to its Stage II rules. EPA noted that Massachusetts added the following provisions to its Stage II rules in order to justify its level of emissions reductions claimed under its Ozone SIP: (1) a provision explicitly requiring installation of CARB (California Air Resources Board) approved Stage II systems; (2) a provision requiring annual Stage II system compliance testing and certification; and (3) a provision explicitly requiring weekly visual inspections of the Stage II system components.

3. In the Federal Register notice, EPA further stated, "EPA is approving Massachusetts' revised Stage II rule because revisions will significantly improve the enforceability and emission reductions associated with the rule. With the revised Stage II rule, along with the resources DEP is currently devoting to Stage II enforcement, EPA believes that the assumed level of SIP credit will be achieved".

4. The Department of Environmental Protection intends to make its demonstration that the assumed level of SIP credit for the Stage II program is being achieved by showing that it is implementing the Stage II program as designed under current regulations, 310 CMR 7.24(6). The

demonstration will focus primarily on an evaluation of: the percentage of gasoline dispensed in Massachusetts through Stage II system equipped facilities; the installation of CARB-certified Stage II systems; annual compliance test result data; and annual compliance certification by Stage II system owners/operators. The demonstration will also include a description of DEP's outreach, compliance and enforcement experience with respect to Stage II.

5. DEP offers the following guidance: For compliance by individual Stage II systems, the standard by which the Department determines that a Stage II system is "correctly maintained" is not that the system is operating "day in and day out" at 95% control efficiency. Rather the standard is a combination of the system passing annual compliance tests and the facility owner/operator certifying to having performed weekly visual inspections of the Stage II system and one of the following: either (1) having repaired or replaced, within 14 days, any system component determined to be incorrectly installed, non-functioning, or broken; or (2) taken such component(s) out of service in accordance with c. 242 of the Acts of 2002. (The interim DEP Policy on Dispensing of Gasoline Through a Stage II System with Defective Components provides further guidance on the implementation of c. 242). During the period of time particular components are taken out of service as required, the facility is not considered in violation of the Stage II regulations.

6. The Department will monitor individual facility compliance through a combination of inspections, facility submissions, and records reviews for conformance with Stage II regulations, 310 CMR 7.24 (6). If the Department determines that a violation of Stage II regulations has occurred, it will take appropriate enforcement action. The Department will notify the Stage II system owner/operator, in writing, within 30 days of an inspection when the Department determines that a violation of the Stage II regulations has occurred.

7. Should the Department, as a result of reviewing compliance with the SIP or in the course of its compliance and enforcement efforts or for any other reason, believe that changes to the approach as laid out in 310 CMR 7.24(6) are necessary, it will convene a stakeholder meeting to review and discuss such changes and the reasons for such changes prior to initiating them (i.e., prior to the drafting of regulatory revisions).

8. DEP will provide the Stage II inspection checklist used as a guideline by DEP inspectors to the regulated community. This checklist will describe the generic inspection that is usually conducted by DEP inspectors. It should be recognized that DEP may deviate from this checklist depending upon the circumstances of a particular inspection.

9. DEP and the industry trade associations will jointly hold periodic forums at which Department senior managers and staff, Stage II system owners and operators, Stage II compliance testing and installation contractors, and other interested stakeholders will have an opportunity to discuss Stage II compliance and implementation issues. The first forum will be held within 6 months of this settlement. Future forums will be held at the initiation of the Department or at the request of a stakeholder group.

10. In order to maximize the productivity of the forums, DEP and the industry trade associations will make every effort to meet approximately 30 days prior to each forum and will exchange background information to prepare for discussions as soon as practicable prior to each forum. Building upon the discussions initiated during the mediation sessions, the primary topics of the first forum will be: (1) Testing requirements for substantial modifications to Stage II systems in the context of when a test(s) is required and what test(s) is appropriate, and (2) The standard for conducting pressure tests (10" vs. 2" water column).

11. The parties agreed that DEP would ask EPA to review and respond to the results of these settlement discussions as contained in the draft clarification document. On May 15, 2003 DEP asked EPA Region I air quality staff to review and respond to the results of the settlement discussions as described in the draft clarification document dated May 15, 2003. On May 16, 2003, EPA verbally indicated to DEP that the agency did not see any problems with the clarifications contained in the May 15, 2003 document.

12. The DEP participants will include, as part of the ordinary training process, training to DEP Stage II staff and supervisors regarding the implementation of the commitments in this Agreement.

13. DEP offers the following guidance: The compliance certification statement that must be signed by Stage II responsible officials includes a statement that “systems to maintain compliance are in place at the facility and will be maintained for the coming year even if the processes or operating procedures are changed over the course of the year.” For purposes of this statement, “systems” means procedures. Procedures to maintain compliance means that a Stage II facility owner/operator has procedures in place to ensure weekly visual inspections and required tests are conducted, and that broken or defective components are repaired, replaced or isolated and that the required records are maintained. Language to this effect will be put on the certification form as a footnote and in the instructions. This certification does not mean that a Stage II system responsible official is guaranteeing that the Stage II system is 100% in compliance every day of the coming year. Rather it is a representation that the Stage II owner/operator has taken the steps required to ensure that compliance will be maintained into the coming year.

14. As part of its regular training for Stage II Compliance Testing companies, the Department will include the following guidance: once a Stage II Compliance Testing Company has started the compliance testing required under the Stage II regulations, 310 CMR 7.24 (6), it must

complete each required test and accurately report the test results on all forms submitted to DEP. The Stage II regulations do not address what a Stage II Compliance Testing Company shall or shall not do prior to starting required Stage II compliance testing.

15. DEP will amend Stage II Form E, Change of Stage II System Owner, Operator, Lessee, or Controller Notification, by adding at the end of Sections B.1 and B.2 the following:

“Important: Please provide the effective date the new Responsible Official assumed his or her responsibilities”.

16. The parties believe this agreement resolves all the issues raised in the pending litigation and legislation. During the mediation sessions, the parties engaged in respectful, professional and factually-based discussions and by recognizing the responsibilities, constraints and costs of all parties reached this agreement. The process and agreements set out in this document provide a sound basis for communication, cooperation and the building of trust among the parties to ensure a good working relationship into the future. To further this relationship, the parties agree to the following:

- a. For one year from the date of this Agreement, the parties will not file new legislation or regulations regarding the matters resolved.
- b. The pending legislation, House Docket Number 4175, will be withdrawn.

17. Thereafter, in the interest of maintaining a good working relationship, the parties will consult prior to making a final decision to seek legislative or regulatory changes to the Stage II program.

18. Upon execution of this Agreement, the Plaintiffs shall file a Stipulation of Dismissal without prejudice and without costs (the "Dismissal Stipulations") as to the Lawsuit, in the form attached hereto.

19. The Plaintiffs release (i) DEP; (ii) the Commissioner of the Department of Environmental Protection; and (iii) the Commonwealth; from any claims for attorney's fees and costs incurred in connection with the Lawsuit, or otherwise with respect to the Plaintiffs' previous efforts in challenging the Commonwealth's Stage II Vapor Recovery requirements, through the date of this Agreement.

20. If any portion of this agreement is rendered or declared invalid, inoperable, illegal, or otherwise unenforceable by reason of existing or subsequently enacted legislation or by a decree of a court of competent jurisdiction, such invalidation shall not affect the validity or enforceability of any other portion of this Agreement.

21. This Settlement shall not be construed as an admission of any fact or law by any party, nor shall any party be precluded in the future from the opportunity to litigate facts, claims or defenses arising from a similar dispute.

22. This Settlement Agreement will be executed in five (5) originals.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the first date written above.

INDEPENDENT OIL MARKETERS
ASSOCIATION OF NEW ENGLAND, INC.

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF ENVIRONMENTAL
PROTECTION

BY: _____

BY: _____

NEW ENGLAND CONVENIENCE
STORES ASSOCIATION, INC.

NEW ENGLAND SERVICE STATION &
AUTOMOTIVE REPAIR ASSOCIATION, INC.

BY: _____

BY: _____

MASSACHUSETTS PETROLEUM COUNCIL

BY: _____