APPENDIX F

LEGAL AUTHORITY

State of California
Air Resources Board

MEMORANDUM

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Stationary Source Division
Air Resources Board

To: Peter Venturini, Chief
Stationary Source Division

Through: Michael P. Kenny
General Counsel

From: W. Thomas Jennings
Senior Staff Counsel

Date: July 31, 1990

Re: Authority of Air Resources Board to Adopt Requirements for the Distribution and Retail Availability of Clean Motor Vehicle Fuels

The staff of the Air Resources Board (ARB or Board) has prepared a regulatory proposal which would establish stringent, long-term tiered exhaust emission standards for low-emission motor vehicles. It is expected that, in order to meet these stringent standards, vehicle manufacturers will design some of the vehicles to operate on clean alternative fuels. An integral part of the proposal is that, to the extent vehicles are certified to meet the applicable emission standards only when operated on alternative fuels, gasoline suppliers will be required to distribute appropriate quantities of the fuels to be used in the vehicles. In addition, owners or lessors of service stations will be required to equip a specified percentage of stations to dispense clean fuels used to certify vehicles, and station operators will have to have the fuel available at the stations. Certain de minimis trigger levels for the number of clean fuel vehicles operated would have to be reached before the clean fuel requirements become applicable. The regulatory proposal is described in detail in the public hearing notice dated July 31, 1990.

This memorandum addresses the authority of the Board to adopt the clean fuel portions of the proposal.

SUMMARY

The California Clean Air Act of 1988 (CCAA) among other things enacted Health and Safety Code section 43018. It is our opinion that section 43018 authorizes the Board, upon appropriate findings, to adopt clean fuel regulations of the sort proposed by the staff. The CCAA expanded the Board's previous authority to regulate and control the sale of motor vehicle fuels. Section 43018 does not limit the Board's regulatory options to "specifications" of fuels. Rather, it authorizes the Board to adopt

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whatever control measures pertaining to fuels it finds are technologically feasible, cost-effective, and necessary to attain the state ambient air quality standards at the earliest practicable date and to meet the emissions reductions mandated in the statute. Therefore, the Board has the statutory authority to adopt the proposal as long as it makes the requisite statutory findings.

The staff proposal would not constitute on its face an unconstitutional taking of property under the fifth amendment to the U.S. Constitution. There does not appear to be any "property" that would be "taken" by the proposal. In any case, the clean fuel proposal would substantially advance legitimate state interests, and there is an identifiable nexus between the activities regulated and the governmental interests being furthered. In addition, the proposal cannot be shown on its face to deny gasoline suppliers or service station owners or operators the economically viable use of their property, because the extent to which the clean fuel requirements will be triggered by new alternative clean fuel vehicles is not yet known.

The proposal also would not violate "substantive" due process under the fifth amendment. The proposed regulations are rationally related to a legitimate state interest. The proposal does not trigger the more stringent substantive due process requirements which apply when a regulation infringes on a constitutionally protected personal liberty or fundamental right.

ANALYSIS

I. STATUTORY AUTHORITY

A. Background--The ARB's authority to regulate motor vehicle fuels before enactment of the California Clean Air Act of 1988.

Prior to enactment of the CCAA in 1988, the ARB was only expressly authorized to regulate motor vehicle fuels in two areas--limiting the Reid vapor pressure (RVP) of gasoline (Health and Safety Code section 43830[1]) and limiting the degree of unsaturation of gasoline (measured by bromine number) in the South Coast Air Basin (section 43831). However, the California Supreme Court had determined in Western Oil and Gas Ass'n [WOGA] v. Orange County APCD, 14 Cal.3d 411 (1975), that the Board had additional authority to regulate motor vehicle fuel stemming from its authority to establish motor vehicle emission standards. In 1975, former section 39052.6 provided that the Board could adopt and implement motor vehicle emission standards for the control of air contaminants, other than standards specified by the Legislature, where the Board found its standards to be

1. All section references are to the Health and Safety Code unless otherwise indicated.

necessary and technologically feasible to carry out the purposes of the state air pollution laws. The WOGA court held that section 39052.6 authorized the ARB to control emissions of lead from motor vehicles not just by setting vehicle emission standards which require the use of a mechanical device on the vehicle, but also by regulating the fuel composition and limiting the lead content of gasoline. (id., 14 Cal.3d at 419-420.) Noting the ambitious air quality goals imposed by the Legislature on the ARB and the unavailability of mechanical devices for reducing lead emissions, the court stated:

> If we were to hold that the ARB has no power to regulate fuel content, we would be attributing to the Legislature an intention to deprive the agency of the only realistic means at its disposal to achieve the purposes of the act. (id. at 420)

In 1975, section 39052.6 was recodified as sections 43013 and 43101. (Stats 1975 ch 957, sec. 12.) Section 43013 permitted, and section 43101 mandated, the Board to adopt and implement motor vehicle emission standards that it found necessary and technologically feasible to carry out the purposes of the state clean air laws. Pursuant to these sections and the WOGA case, the Board adopted limits on the lead content of gasoline (13 CCR sections 2253, 2253.2), the sulfur content of unleaded gasoline (13 CCR section 2252(a)-(c)), and the sulfur content of diesel fuel (13 CCR section 2252(d) ff).

In addition, in 1988 the Legislature enacted sections 39663 and 39667, which require the Board to consider additional motor vehicle fuels regulations to control the emissions of toxic air contaminants. (Stats. 1988 ch. 940) Section 39663 directs the Board to prepare a report addressing specific aspects of exposure to known and suspected toxic air contaminants emitted by vehicular sources in California, and by June 30, 1990 to consider a plan for reducing exposure to such air contaminants. Section 39677 directs the Board to consider, in light of its determinations pursuant to section 39663, revisions to its regulations specifying the content of motor vehicle fuel, and its vehicular emission standards, in order to achieve the maximum possible reduction in public exposure to toxic air contaminants. Section 39667 continues,

> Those regulations may include, but are not limited to, the modification, removal, or substitution of vehicle fuel, vehicle fuel components, or fuel additives, or the required installation of vehicular control measures on new motor vehicles.

B. The California Clean Air Act of 1988.

The California Clean Air Act of 1988 is ambitious and far-reaching legislation enacted in recognition of the fact that most urban areas of the state had not attained federal ambient air quality standards by the federal deadline of August 31, 1988. (Stats. 1988, ch. 1568, uncodified section 1(b)(4).) The CCAA directed the development and implementation of

California's own program to attain the ambient air quality standards at the earliest practicable date. (id., uncodified section 1(b).)

While much of the CCAA involves establishment of a process for developing and implementing air pollution control district plans for attaining the ambient standards, it also contains important provisions directing the ARB to reduce emissions from motor vehicles. In the motor vehicle area, the CCAA added a new findings and declaration section (sec. 43000.5), amended section 43013, and enacted a central new section 43018.[2]

In new section 43000.5(d), the Legislature finds and declares that, "the state board should take immediate action to implement both short- and long-range programs of across-the-board reductions in vehicular emissions which can be relied upon by the districts in the preparation of their attainment plans or plan revisions...." In section 43000.5,(e), the Legislature declares that,

> [I]n order to attain the state and federal standards as expeditiously as possible, it is necessary for the authority of the state board to be clarified and expanded with respect to the control of motor vehicles and motor vehicle fuels.

The CCAA amended section 43013 by adding additional subsections specifically authorizing standards and regulations for identified types of motor vehicles and equipment, and making the following additions to the first paragraph:

> 43013. (a) The state board may adopt and implement motor vehicle emissions standards, in-use performance standards, and motor vehicle fuel specifications for the control of air contaminants and sources of air pollution which the state board has found to be necessary, cost-effective, and technologically feasible to carry out the purposes of this division.

Finally, the CCAA enacted new section 43018. Subsections (a)-(c) are set forth below. Subsection (d) establishes a specific timetable for the Board to conduct workshops and rulemaking hearings for specific regulations regarding motor vehicles and motor vehicle fuels. The full text of section 43018 is attached.

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2. The only other CCAA amendment to Division 26, Part 5 ("Vehicular Air Pollution Control") was the enactment of section 43019 regarding expanded fees for the certification of motor vehicles and engines.

43018. (a) The state board shall endeavor to achieve the maximum degree of emission reduction possible from vehicular and other mobile sources in order to accomplish the attainment of the state standards at the earliest practicable date.

(b) Not later than January 1, 1992, the state board shall take whatever actions are necessary, cost-effective, and technologically feasible in order to achieve, not later than December 31, 2000, a reduction in the actual emissions of reactive organic gases [ROG] of at least 55 percent, [and] a reduction in emissions of oxides of nitrogen [NOx] of at least 15 percent from motor vehicles. These reductions in emissions shall be calculated with respect to the 1987 baseline year. The state board also shall take action to achieve the maximum feasible reductions in particulates, carbon monoxide, and toxic air contaminants from vehicular sources.

(c) In carrying out this section, the state board shall adopt standards and regulations which will result in the most cost-effective combination of control measures on all classes of motor vehicles and motor vehicle fuel, including, but not limited to, all of the following:

(1) Reductions in motor vehicle exhaust and evaporative emissions.
(2) Reductions in emissions from in-use emissions from motor vehicles through improvements in emission system durability and performance.
(3) Requiring the purchase of low-emission vehicles by state fleet operators.
(4) Specification of vehicular fuel composition.

C. Effect of the California Clean Air Act of 1988

It is our opinion that section 43018 authorizes the Board, upon appropriate findings, to adopt clean fuel regulations of the sort prepared by the staff. The CCAA expanded the Board's previous authority to regulate and control the sale of motor vehicle fuels. Section 43018 does not limit the Board's regulatory options to "specifications" of fuels. Rather, section 43018 authorizes the Board to adopt whatever control measures pertaining to fuels it finds are technologically feasible, cost-effective, and necessary to attain the state ambient air quality standards at the earliest practicable date and to meet the emissions reductions specified in section 43018(b).

Section 43018(a) and (b) spell out the goals and objectives the ARB must pursue in its motor vehicle regulatory program. Section 43018(a) directs the Board to endeavor to achieve the maximum degree of reductions possible from vehicles, in order to attain the state ambient standards by the earliest practicable date. Section 43018(b) directs the Board to

achieve the specified percentage reductions in emissions of reactive organic gases and oxides of nitrogen from motor vehicles by December 31, 2000, as well as maximum feasible reductions in particulates, carbon monoxide, and toxic air contaminants from vehicular sources. To do so, the Board is directed to take "whatever actions are necessary, cost effective, and technologically feasible." (emphasis added)

Section 43018(c) spells out the means by which the Board is to achieve the required goals and objectives. While sections (c) and (d) mandate consideration of numerous potential controls, the Board is given wide authority to enact whatever vehicle and fuels controls are necessary to attain the ambient standards and mandated emissions reductions. Section 43018(c) directs the Board to adopt "standards and regulations which will result in the most cost-effective combination of control measures on all classes of motor vehicles and motor vehicle fuel . . . ." (emphasis added) The Legislature then lists in section 43018(c)(1)-(4) four broad types of control measures the Board must consider, but the sorts of control measures the Board is authorized to adopt are expressly not limited to those specifically identified.

It is evident that section 43018 provides the ARB with broad regulatory motor vehicle and fuel authority not otherwise granted in the Health and Safety Code, including authority beyond the grants in section 43013. First, one of the nonexclusive control measures specifically identified in section 43018(c) is "requiring the purchase of low-emission vehicles by state fleet operators." (Section 43018(c)(3).) Such a requirement does not fall within the authority granted by section 43013 to adopt "motor vehicle emission standards, in-use performance standards, and motor vehicle fuel specifications." Neither is the authority to require state fleet operators to purchase low-emission vehicles granted to the ARB in the low-emission fleet provisions in sections 43800-43805[3], 40447.5, 40920(a)(3), and 41011. Since the Legislature has listed among the specific control measures to be considered by the ARB a measure nowhere else authorized, it is clear that section 43018 grants the Board expanded authority to adopt regulatory control measures regarding motor vehicle fuels.

Second, the categories of control measures identified in section 43018(c)(1), (2) and (4) essentially correlate to the three categories authorized by section 43013. "Reductions in motor vehicle exhaust and evaporative emissions" in section 43018(c)(1) correlates to "motor vehicle

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3. Section 43802 requires the ARB annually to submit a listing of certified low-emission vehicles to the Department of General Services. Section 43804 provides that if a low-emission vehicle meets the performance, cost, service, and maintenance requirements of the Department of General Services, and if funds are appropriated, the Department shall purchase as many low-emission vehicles as it determines are reasonable and available to meet state needs.

emission standards," "reductions in emissions from in-use emissions from motor vehicles through improvements in emission system durability and performance" in section 43018(c)(2) correlates to "in-use performance standards," and "specification of vehicular fuel composition" in section 43018(c)(4) correlates to "motor vehicle fuel specifications." However, although these three categories are effectively coterminous with the categories authorized in section 43013, section 43018(c) expressly provides that the control measures the Board may adopt are not limited to these categories. Therefore, the Board's authority under section 43018 is necessarily broader than its authority under section 43013.

Third, a broader reading of the authority to control motor vehicle fuels granted by section 43018 is consistent with section 43000.5(d). As discussed above, the 1975 WOGA case had already recognized the Board's authority to regulate the specifications of motor vehicle fuel, stemming from the predecessor statute to sections 43013 and 43101. This preexisting authority was codified by the CCAA amendments to section 43013 which expressly authorized the Board to adopt "motor vehicle fuel specifications." However, in section 43000.5(d) the Legislature declared the necessity that the Board's authority with respect to motor vehicle fuels be "clarified and expanded." That expanded authority to control motor vehicle fuels must be found in section 43018.

Fourth, an analysis of the various versions of section 43018(c) as the CCAA moved through the Assembly and Senate strongly suggests that the Legislature intended a broad grant of authority. The California Clean Air Act was was considered by the legislature as Assembly Bill 2595 (Sher). When the bill was initially introduced March 3, 1987, there were no specific motor vehicle provisions. Language for a new section 43018 was first introduced in a set of May 14, 1987 amendments in the Assembly Natural Resources Committee. At that time the section consisted of a subsection (a), which directed the Board to take whatever actions are necessary to achieve specified ROG and NOx reductions by year 2000, and a subsection (b), which read as follows:

> (b) In carrying out this section, the state board shall adopt standards and requirements which result in the most cost-effective combination of control measures, including but not limited to, reductions in new motor vehicle emissions, requiring use of clean burning fuels, and improvements of in-use vehicle emissions from all classes of motor vehicles sold within the state. (emphasis added)

On April 14, 1988, section 43018 was amended in the Senate Government Organization committee. A new subsection (a) was relatively similar to the version finally enacted, as was subsection (b). The amended version of section 43018(c) read as follows:

> (c) In carrying out this section, the state board shall adopt standards and regulations which will result in the most cost-effective combination of control measures on all classes of motor vehicles and motor vehicle

fuel, including but not limited to, all of the following:

(1) Reductions in motor vehicle exhaust and evaporative emissions.

(2) Reductions in emissions from in-use emissions from motor vehicles through improvements in vehicle certification procedures and emission system durability and performance.

(3) Requiring the manufacture of vehicles capable of utilizing cleaner-burning fuels.

(4) Requiring the purchase of clean fuel vehicles by state fleet operators.

(5) Specification of vehicular fuel composition.

The April 14, 1988 amendments also added for the first time a schedule of workshops and rulemaking hearings the Board was to follow in considering specifically identified control measures. Subsequent amendments to section 43018(c) on May 18, 1988 and June 28, 1988 resulted in the finally enacted text.

The intermediate versions quoted above of what ultimately became section 43018(c) followed the same structure as the enacted text. The Board was mandated to meet certain air quality goals, and then was broadly directed to carry out the mandates by adopting a cost-effective combination of control measures. The Legislature further itemized specific categories of control measures which the broader range of measures were to include but not be limited by. The Legislature did not meaningfully change in the various versions the description of the broader range of control measures the Board was authorized to adopt. It therefore follows that each of the specifically itemized categories listed in the intermediate versions of the bill fell within the broader range of control measures the Legislature intended to authorize for Board action. These more specific categories included "requiring the use of clean burning fuels" (May 14, 1987 version) and "requiring the manufacturer of vehicles capable of utilizing cleaner-burning fuels." (April 14, 1988 version.) The ARB would not have the authority to adopt such approaches, particularly a mandate for the use of clean fuels, unless section 43018 is interpreted as granting broad regulatory authority.[4]

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4. The Legislature's ultimate decision to delete the specific references to clean fuels did not demonstrate an intent to limit the Board's authority to act in this area. The listing of specific control measures in section 43018(c), particularly in the versions that referred to control measures "including, but not limited to, all of the following," imposed an affirmative requirement that the Board consider or adopt the specific measures. The legislature also established in section 43018(d) a specific

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Fifth, legislative analyses of the CCAA prepared during the enactment process indicate a legislative recognition that the widespread introduction of clean fuels could well be necessary to meet the air quality goals the CCAA imposes on the ARB. In a June 15, 1987 report on the bill as amended May 14, 1987, the Legislative Analyst took note of the original language for section 43018 and stated:

> Reduced Motor Vehicle Emissions. The bill requires the Air Resources Board (ARB) to take necessary actions by January 1, 1992 to reduce motor vehicle emissions by the year 2000 to certain levels. According to the ARB, methanol fuel powered vehicles would be required to meet the emission reductions mandated by the bill.

Similarly, In a June 5, 1987 analysis of the May 14, 1987 version of the bill, transmitted to bill author Assemblyman Sher from the Department of Finance, the Department stated:

> The bill would also require that the ARB develop a plan by January 1, 1992 to reduce pollutants from mobile sources by a specified amount by the year 2000. The ARB indicates that this is an indirect mandate to shift to alternative fuels such as methanol because it is the only way this mandate could be met. The issue is more adequately addressed in AB 234 (Leonard), and the ARB indicates it may be appropriate to delete it from this bill.

While the specific reference to control measures "requiring use of clean burning fuels" in the May 14, 1987 version of the bill was deleted, the basic mandate for the ARB to meet specified emissions reductions by year

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schedule for workshops and rulemaking hearings on identified measures including, in the April 14, 1988 version, the required manufacture of vehicles capable of utilizing cleaner burning fuels. Elimination of the references to these clean fuel control measures simply eliminated the mandate that those specific approaches be considered or adopted; in no way did it remove the discretionary authority of the Board to adopt clean fuel control measures if deemed necessary to attain and maintain the ambient standards.

2000 was not.[5] In fact, the mandates on the ARB were strengthened by the new requirement in section 43018(a) that the ARB endeavor to achieve the maximum emissions reductions possible from vehicular sources in order to attain the state ambient standards at the earliest practicable date. The bill analyses quoted above indicate that the legislature was aware that the goals mandated on the ARB by section 43018 might only be achievable through the introduction of clean fuels such as methanol. The decision to retain the mandates in light of such information strongly indicates that the Legislature intended to authorize the Board to adopt control measures related to clean fuels if necessary to meet the mandated goals.

Finally, in this regard the Supreme Court's analysis in the WOGA case demonstrates that a broader reading of the Board's motor vehicle fuel authority under section 43018 is appropriate. As discussed above, the court expressed an unwillingness to attribute to the Legislature an intention to deprive the Board of the only realistic means at its disposal to achieve the clean air goals identified in state law. (WOGA, supra, 14 Cal.3d at 420.) This was a primary reason the court unanimously interpreted the Board's authority to adopt motor vehicle emission standards to include the authority to regulate the composition of motor vehicle fuel. Similarly, in the CCAA the Legislature has mandated in section 43018(a) and (b) ambitious goals for maximum possible reductions of emissions from motor vehicles, as well as specific percentage reductions. To the extent these goals may only be achieved through the introduction of clean fuels and clean fuel vehicles, section 43108 should not be read narrowly to deprive the Board of the means to achieve the mandated goals.

D. Appropriate findings to support adoption of the clean fuels regulations.

As indicated above, it is our opinion that the Board has the statutory authority to adopt the clean fuels regulations described above upon the making of appropriate findings. First, a finding is required that the regulations are necessary to achieve the goals set forth in section 43018(a) or (b). It would be appropriate for the Board to explore other alternative vehicular control measures, and to determine whether the state and federal ambient air quality standards could be expected to be achieved throughout the state without the clean fuels components of the proposed regulations. In this respect, reference to the Air Quality Management Plan for the South Coast Air Quality Management District would be appropriate. A determination that the state ambient standard could not reasonably be attained in the south coast air basin without the clean fuel requirements would help support a conclusion that they are within the range of control measures authorized by section 43018.

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5. The only revisions to the specifically mandated reductions were the change in ROG emission reductions from 50% to 55%, and the change in NOx emissions reductions from 25% to 15%.

In addition, the Board must determine that the requirements are technologically feasible, and are among the most cost-effective control measures that could be expected to result in statewide attainment of the ambient ozone standards.

II. CONSTITUTIONAL AUTHORITY

A. The "Takings" Clause of the Fifth Amendment.

The Western States Petroleum Association (WSPA) and various oil companies have claimed that the provisions in the staff proposal requiring gasoline suppliers to distribute specified quantities of clean fuels violate the "takings clause" of the fifth amendment to the U.S. Constitution, which provides that "private property [shall not] be taken for public use without just compensation." We have considered these assertions and have concluded that on its face the proposal would not constitute an unconstitutional taking.

The threshold question is whether there is any property involved that could legitimately be claimed to be taken by the state or ARB. WSPA has asserted that the staff proposal in effect requires that a portion of each service station, bulk plant and perhaps each refinery be dedicated to the manufacture and distribution of alternative clean fuels, and that a regulation which requires dedication of private property for a public use constitutes a "taking." WSPA analogizes to Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982), which held that an ordinance requiring landlords to allow the installation of cable TV hook-up equipment constituted a "per se" taking of property because it sanctioned a "permanent physical occupation" of the landlord's property by the third party cable TV company. Loretto is clearly distinguishable because the proposed regulations in no way mandate the "occupation" of a refiner's or service station owner's property by the state or a third party. The business premises will continue to belong entirely to the refiner or station owner or lessor.

The staff proposal is much more closely analogous to other air pollution control regulations, promulgated under the state's basic police powers, which may necessitate the construction or installation of substantial equipment incident to meeting mandated emission reductions. A regulation prohibiting the sale of gasoline which exceeds specified sulfur or lead content limits may necessitate the installation of expensive new desulfurization or reforming equipment if the refiner is to continue to produce and distribute gasoline. Similarly, a gasoline vapor recovery regulation will necessitate the installation of vapor recovery systems if a service station is to continue operating. In neither of these cases is the necessary equipment--or the business as a whole--considered to be "occupied," "invaded," or "owned" by the state or a third party even though the sole reason for the equipment is the public purpose of reducing air pollution. While regulations of business activities such as these may raise issues of substantive due process (discussed below) in extreme situations, it is generally recognized that they do not constitute "takings of property" by the state.

Even if the proposed regulations were deemed to involve property interests that could be claimed subject to the "takings clause", we do not believe the regulations on their face impose a "taking." One of the key factors in a takings analysis is the "character of the governmental action." (Penn Central Transportation Co. v. New York, 438 U.S. 104 (1978).) This factor typically involves the question whether the government has "physically invaded" the claimant's property; as noted above, the proposed regulations do not present such an invasion. At times the U.S. Supreme Court has viewed the character of the governmental action in terms of the government's justification of the action--whether the regulation "substantially advance[s] legitimate state interests." (See Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 485 (1987), quoting Agins v. Tiburon, 447 U.S. 255, 260 (1980).)

We believe that there are important ways in which the clean fuel provisions substantially advance legitimate governmental and public interests. Most broadly, the clean fuel program is designed to serve the public interest by contributing to the reduction of emissions of air pollutants from motor vehicles. The people of California face a very serious air pollution problem, and the clean fuel program is proposed as an integral part of the ARB's efforts to address the problem.

Moreover, the clean fuel requirements are expressly imposed as conditions upon the permissible distribution of gasoline, and the clean fuel program will help mitigate the air pollution burdens created by the sale of gasoline. Therefore there is a definite nexus between the activities regulated and the governmental interests being furthered.

First, the gasoline distributed and sold by those subject to the proposed regulations contributes to the very serious air pollution problems that exist in California. The alternative clean fuels that will be distributed under the program are expected to result in less pollution than gasoline. In particular, a majority of the alternative fuel vehicles will likely be designed to also run on gasoline so that they can be used in areas where only gasoline is available. Under the proposed regulations, such a vehicle would not be counted as a clean fuel vehicle unless it is certified to a more stringent standard while operating on the alternative fuel than while operating on gasoline. Therefore, such vehicles will clearly pollute less when fueled with the alternative fuel than they will if operated when only gasoline is available. In this connection, the regulatory program is similar to the regulations adopted by EPA in the mid-1970's requiring any person operating a gasoline outlet with sales of more than 200,000 gallons per year to offer at least one grade of 87 octane unleaded gasoline. (40 CFR sec. 80.22(b).)

Second, oil companies have cumulatively contributed to the development of a motor vehicle fuel distribution network in which gasoline and diesel fuel are the only liquid fuels widely and conveniently available to the motoring public. This situation presents a strong deterrent to the effective introduction of alternative fuel vehicles. Requiring the distribution of appropriate volumes of clean alternative fuels for use in motor vehicles directly mitigates the present problem of a motor fuel distribution system focused almost exclusively on gasoline and diesel fuel.

Finally, the gasoline production and distribution operations of refiners and service station operators emit substantial amounts of ozone-precursors and other air pollutants. The emissions reductions attributable to the clean fuel program will help mitigate these emissions.

Another key factor in a takings analysis is the economic impact of the government action. The U.S. Supreme court has stated that the nature of this inquiry depends on whether a regulation constitutes a taking "on its face" or "as applied" to a specific fact situation. Where a government action is challenged "on its face", it does not constitute a taking unless it denies an owner economically viable use of his or her property. (Keystone, supra, 480 U.S. at 494-495.) At this point the clean fuel regulations can only be analyzed on their face, as we do not know the extent to which clean fuel vehicles will be sold and the distribution of the clean fuels will be required, and what the economic impacts on refiners and station owners will be.

In evaluating the necessary effects of the proposed regulations on the economically viable use of the property of gasoline producers and service station owners, it is appropriate to look in the context of a reasonable unit of their business operations, rather than only the specific and limited operations of distributing the clean fuels. (see Keystone, supra, 480 U.S. at 499.) We believe that the refiners and others will be able to absorb the costs of the clean fuel program in their broader operations for distributing gasoline and diesel fuels. We are satisfied that gasoline producers and service station owners will continue to be able to operate on an adequately profitable basis.

B. "Substantive" Due Process

Police power regulations affecting economic interests generally satisfy the constitutional requirements of "substantive" due process as long as they are rationally related to a legitimate governmental interest. (American Bank & Trust Co. v. Community Hospital, 36 Cal.3d 359 (1984).) If such a regulation infringes upon a constitutionally protected personal liberty or fundamental right, it must be narrowly drawn and must further a sufficiently substantial government interest. (Griffin Development Co. v. City of Oxnard, 39 Cal.3d 256, 265 (1985).)

The "rational relationship" test is a less stringent variant of the "takings" test of whether a regulation substantially advances a legitimate state interest. We discuss above the ways in which the clean fuel regulations will substantially advance a legitimate state interest. These same factors demonstrate the rational relationship necessary to satisfy substantive due process.

Finally, the regulations do not trigger the more stringent substantive due process requirements which must be met where a constitutionally protected personal liberty or fundamental right is infringed. Selling gasoline is not a constitutionally protected activity. The California courts have held that constitutionally protected personal liberties and fundamental rights are not involved where a city prohibits the demolition or conversion of an apartment building to other uses unless no

low or moderate income persons occupy or could afford units in the building, removal will not adversely affect housing supply, and the owner cannot make a reasonable return on his property (Nash v. City of Santa Monica, 37 Cal.3d 97 (1984)); where a city imposes stringent standards on conversions of apartment buildings to condominiums (Griffin Development, supra); and where a city prohibits the conversion of a residential hotel to another use unless one-to-one replacement of the hotel units is provided. (Terminal Plaza Corp. v. San Francisco, 177 Cal.App. 3d 892 (1986).) In light of these cases, we are not aware of any personal liberties or fundamental rights that would be infringed by the proposed regulations.