

FINAL STATEMENT OF REASONS

Proposed Amendments to the California Reformulated Gasoline Regulations:
Labeling Requirements for Retail Pumps Dispensing Gasoline Containing MTBE

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State of California
AIR RESOURCES BOARD

Final Statement of Reasons for Rulemaking
Including Summary of Comments and Agency Responses

**HEARING TO CONSIDER AMENDMENTS TO THE CALIFORNIA
REFORMULATED GASOLINE REGULATIONS REGARDING LABELING OF
PUMPS DISPENSING GASOLINE CONTAINING MTBE**

Public Hearing Date: June 24, 1999
Agenda Item No.: 99-5-1

I. GENERAL

This rulemaking was initiated by the publication on May 7, 1999 of a notice for a June 24, 1999 public hearing to consider amendments to the California reformulated gasoline regulations. A Staff Report: Initial Statement of Reasons for Proposed Rulemaking was also made available for public review and comment on May 7, 1999. The Staff Report, which is incorporated by reference herein, contained the text of the regulatory amendments as initially proposed by the staff, along with an extensive description of the rationale for the proposal.

The staff proposal consisted of two elements. The first element was an amendment to section 2262.5(a), title 13, California Code of Regulations (CCR), eliminating the wintertime oxygen requirement in the Lake Tahoe Air Basin prior to October 1, 1999. This would mean that the Tahoe area's gasoline will no longer be subject to the oxygen requirement from October 1, 1999 through January 31, 2000 - the last wintertime period during which the oxygen requirement was to apply there. The second element was the adoption of a new regulation as section 2273 title 13, CCR. This regulation would, on a statewide basis, require the labeling of retail gasoline pumps dispensing gasoline containing methyl tertiary-butyl ether (MTBE), and require that persons delivering gasoline containing MTBE to retailers provide documentation indicating the presence of MTBE in the gasoline.

At the June 24, 1999 hearing, the Board adopted Resolution 99-22, in which it adopted the amendment to section 2262.5(a), title 13, CCR, eliminating the wintertime oxygen requirement in the Lake Tahoe Air Basin prior to October 1, 1999. The resolution also approved the new section 2273 establishing MTBE labeling requirements, with various modifications to the originally proposed text. In accordance with section 11346.8 of the Government Code, the Board, in Resolution 99-22, directed the Executive Officer to make the text of the modified section 2273 available to the public for a supplemental written comment period of 15 days; he was then directed either to adopt the regulation with such additional modifications as may be appropriate in light of the comments received, or to present the regulation to the Board for further consideration if warranted in light of the comments.

Since it was necessary for the amendments to section 2262.5(a) to become effective before the start of the next Lake Tahoe wintertime oxygenates period beginning October 1, 1999, the ARB submitted those amendments to the Office of Administrative Law (OAL) for final action on July 27, 1999 while the rulemaking process was being completed for the provisions on MTBE labeling. Those amendments were approved by OAL on September 8, 1999, and became effective on that date.

The text of the modified section 2273, in the form approved by the Board, was made available for a supplemental 15-day comment period by issuance of a “Notice of Public Availability of Modified Text and Supporting Documents and Information” on July 20, 1999. This Notice also announced a 15-day comment period pursuant to section 45, title 1, CCR for an additional document being added to the record — a June 30, 1999 letter from James Holland of Kinder Morgan Energy Partners L.P. (Kinder Morgan) to the ARB. Written comments were received on the modified text of section 2273 during the 15-day comment period and were considered by the Executive Officer. The Executive Officer then issued Executive Order 99-067, adopting the amendments.

Fiscal Impacts. The Board has determined that the adoption of section 2273, title 13, CCR, will not result in a mandate to any local agency or school district, the costs of which are reimbursable by the state pursuant to Part 7 (commencing with section 17500), Division 4, Title 2 of the Government Code.

Consideration of Alternatives. The Board has determined that no alternative considered by the agency would be more effective in carrying out the purpose for which section 2273 was proposed or would be as effective and less burdensome to affected private persons than the action taken by the Board.

II. SUMMARY OF MODIFICATIONS

This section summarizes the modifications made to the originally proposed regulatory text, and explains the rationale for the modifications. The modifications are listed in the order they appear in the Final Regulation Order. Most of the modifications resulted from informal comments to the staff from interested parties.

1. Label language: To reflect the findings made by the Governor in Executive Order D-5-99, the text of the label has been modified to add the statement that “The State of California has determined that the use of this chemical presents a significant risk to the environment.” This statement replaces the full chemical name of MTBE, as the public is much more aware of the acronym “MTBE” and elimination of the full chemical name will allow focus on the rest of the label text as well as preserves the size of the original label.

2. Label format and placement: In order to accommodate the modified label language, and to more prominently display the word “MTBE,” the minimum size of the letters has been modified to be more appropriately tailored to the required text. In addition, to provide greater flexibility on placement of the label, the requirement for placement on the upper two-thirds of the dispenser has been eliminated. The remaining requirement that the label be conspicuous and legible to the driver will be adequate to assure appropriate placement.

3. De-minimis level of MTBE: At the May 6, 1999 workshop, interested parties commented that it was unrealistic to categorize “non-MTBE” gasoline as containing less than 0.3 volume percent (vol.%) MTBE. This is because contamination from prior deliveries of gasoline containing MTBE could occur in storage tanks, delivery trucks and the pipeline. To better accommodate these possible sources of MTBE contamination, interested parties urged an allowable level of 0.6 vol.% MTBE to categorize non-MTBE gasoline. The modifications increase the originally proposed level to 0.6 vol.%, which is sufficiently low to prevent gasoline intentionally blended with MTBE to be labeled as non-MTBE, but is high enough to allow for shipments of gasoline blended without MTBE to be shipped within the current gasoline distribution system.

4. Restructuring of section 2273(b): Section 2273(b) has been restructured to make it clearer and more straightforward. These modifications do not result in a substantive change. As originally proposed, the lead-in paragraph of section 2273(b) made the labeling requirements inapplicable where the MTBE content of the gasoline is less than 0.3 vol.%, and then provided that the MTBE content could be determined by any of the three methods in (b)(1), (b)(2), and (b)(3) respectively. Subsection (b)(3) identified an established American Society of Testing and Materials (ASTM) test method for determining the MTBE content of gasoline, and authorized the approval of equivalent methods. Subsections (b)(1) and (b)(2) identified presumptions that the gasoline was below 0.3 vol.% if the gasoline storage tank had been drained and refilled in accordance with either of two alternative procedures, and the MTBE did not exceed 3.0 vol.%. Treatment of the two presumptions as methods for determining MTBE content could be confusing because they did not, in fact, determine the actual MTBE content of the gasoline — rather they were intended to protect the retail outlet operator from liability notwithstanding the fact that the actual MTBE content exceeded 0.3 vol.%.

Since the ASTM test method is the only one of the alternatives that truly determines the MTBE content, section 2273(b)(1) of the modified text identifies the ASTM test method as the sole method for determining the actual MTBE content of the gasoline at the retail outlet (along with methods deemed equivalent). Modified section 2273(b)(2) then provides that the MTBE labeling requirements do not apply under the circumstances that had previously triggered the presumptions; these circumstances are set forth in section 2273(b)(2)(A) and (B). As later discussed, the modifications make limited corrections to the characterization of the section 2273(b)(2)(A) and (B) conditions, and would add two additional circumstances in section 2273(b)(2)(C) and (D) that would relieve the operator of liability.

5. Revising the table on filling and draining in the original text: The last two numbers in the right-hand column in the originally proposed table in section 2073(b) — now section 2073(b)(2)(A) — have been modified to reflect the 0.6 vol.% de-minimis MTBE level approved by the board. Clarifying changes in the headings of the table are designed to better reflect the procedures for using the table.

6. Revising the equation in the original text: A modification to the number in the original equation (section 2073(b)(2)(B) in the modified text) reflects the modified 0.6 vol.% de-minimis MTBE level. In addition, the lead-in language has been modified to better clarify that the refillings with non-MTBE gasoline must be consecutive and that the storage tank must be refilled to at least 95% of capacity.

7. Addition of an alternative equation: To provide the operator of a retail outlet with additional flexibility in assuring compliance with the regulation, an alternative equation has been added that allows an operator to calculate the concentration of MTBE in the gasoline storage tank when the tank is not filled to 95% of capacity. This alternative equation also has the advantage of being useable where there is an intervening delivery of gasoline containing MTBE among the deliveries of non-MTBE gasoline. The Executive Officer is directed to make available a computer program that may be used in applying the equation; this will make it easier for operators of retail outlets to use the alternative equation.

8. Alternative protocol: New section 2273(b)(2)(D) provides operators of retail outlets additional flexibility in assuring compliance with the regulation by allowing alternative compliance protocols found equivalent by the Executive Officer to those in modified sections 2273(b)(2)(A), (B), (C).

9. Deliveries of gasoline to retail outlets: Because it is difficult for carriers transporting commingled batches of gasoline to know or routinely determine the actual MTBE concentration of the gasoline they are delivering, the requirement in section 2273(d) that the invoice or other documentation for gasoline containing at least 0.6 vol.% MTBE identify the approximate concentration of MTBE has been eliminated. Language has been substituted requiring that the documentation identify whether or not the gasoline contains 0.6 percent by volume or more MTBE; the documentation *may* identify the MTBE concentration if it is known. Since retail outlet operators will be relying on the MTBE information on the documentation in complying with sections 2273(b)(2)(A), (B), (C), it is particularly important that all deliveries of gasoline to outlets be accurately labeled. Therefore, to ensure that the distributor makes an affirmative determination, the modified language requires that the documentation for deliveries of *all* gasoline identify whether or not the gasoline contains 0.6 vo.% or more MTBE.

There is a need to assure that as long as a gasoline dispenser is not affixed with an MTBE label, the gasoline being delivered to the storage tank supplying the dispenser has not been produced with MTBE. The modifications add new section 2273(d)(2), which is designed to address this need. Since there can be circumstances where it is difficult for the tank truck driver

to ascertain that the appropriate labels are posted, section 2273(d)(2)(B) allows the distributor to rely on a written notification previously provided by the operator of the retail outlet.

10. Headings: Explanatory headings have been added to the various subsections to make the regulation more readable.

III. SUMMARY OF PUBLIC COMMENTS AND AGENCY RESPONSES

During the 45-day public comment period on the original proposal (both the MTBE labeling and Lake Tahoe elements), the Board received written comments from the California Independent Oil Marketers Association (CIOMA), Robinson Oil Co., Inc. (Robinson Oil), Kinder Morgan Energy Partners Inc. (Kinder-Morgan), the Western States Petroleum Association (WSPA), the Oxygenated Fuels Association (OFA), White Environmental Associates, and the South Tahoe Public Utilities District (STPUD). At the hearing, oral testimony was received from CIOMA, Robinson Oil, WSPA, OFA, White Environmental Associates, STPUD, and the California Energy Commission (CEC). During the 15-day public comment period on the modified proposal, the Board received written comments from the Mobil Business Resources Corporation (Mobil) and White Environmental Associates. Set forth below is a summary of each objection or recommendation regarding the proposed MTBE labeling requirement or the procedures followed by the ARB, together with an explanation of how the proposed action was changed to accommodate each objection or recommendation, or the reasons for making no change. WSPA and STPUD generally supported the MTBE labeling requirements; their comments of support are not summarized.

A. Comments Pertaining to the MTBE Labeling Requirements Made Before or at the Hearing

1. Label Text and Placement on Pump

1. Comment: If cross contamination by MTBE is a fact of life, then the gasoline should be labeled to reflect that. A more accurate label would say that the gasoline “Contains more than X% MTBE.” (STPUD)

Agency Response: Because of the extensive use of MTBE in California’s gasoline supply, cross contamination of gasoline not produced with MTBE is likely to occur. It is expected that trace amounts of MTBE will be detectable in gasoline sold in California over the next several years. However, the purpose of the labeling requirements is to identify gasoline being sold at a retail gasoline outlet that has been intentionally produced with MTBE. This will provide a means for the public to make an informed choice as to the type of gasoline they purchase. Adding language to the label to further inform the consumer that the gasoline

contains more than a certain amount of MTBE (in this case, 0.6 volume percent MTBE) would not provide the consumer any additional useful information.

2. Comment: We are concerned that the addition of the language reflective of the Governor's Executive Order might require a larger label. If such language is adopted, we urge the Board to make the lettering small enough to keep the overall label size as proposed. (WSPA)

Agency Response: We agree. The modified label language replaces the original label wording "(METHYL TERTIARY BUTYL ETHER)," and has been sized so that the dimensions of the label as originally proposed are retained.

3. Comment: WSPA is concerned that the placement requirements are over-specified. Having the label placed in the upper two-thirds of the dispenser, be conspicuous, exhibit contrasting colors, be legible to the customer, and have a specific letter size is redundant. We urge the Board to simplify the label placement requirements. (WSPA)

Agency Response: We agree with the commenter. Language requiring the label to be placed on the upper two-thirds of the pump has been removed. The other placement requirements have been retained to ensure that the labels are easily legible to the customer.

4. Comment: The word "Contains" should be no smaller than 16 point helvetica and "MTBE" should be no smaller than 72 point helvetica. The label should be white and the lettering black, and required to be placed somewhere on the upper half of the dispenser near the nozzle or selector button for the gasoline containing MTBE. (White Environmental Associates)

Agency Response: The lettering sizes proposed by the commenter are similar to the sizes specified in the regulation as adopted. However, since the regulation specifies the physical size of the lettering (one-quarter inch lettering for "Contains" and five-eighths inch lettering for "MTBE"), and that the label be legible, it is not necessary to specify the font type as well. In addition, the regulation calls for the label to be of contrasting colors to the background color of the pump, and therefore it is not necessary to specify the color of the label. Also, since the label must be legible to a customer when viewed from the driver's position of a vehicle, it is not necessary to specify that it be placed on the upper-half of the dispenser.

2. Definition of Non-MTBE Gasoline

5. Comment: OFA supports a threshold for requiring the label no less than 1 volume percent MTBE (which is equivalent to 0.2 weight percent oxygen). (OFA)

Agency Response: We believe the commenter's proposed threshold for defining non-MTBE gasoline is too high. Kinder-Morgan (California's primary common carrier pipeline)

has, for the past several years, utilized a pipeline acceptance specification for non-oxygenated gasoline of 0.05 weight percent oxygen (equivalent to 0.3 volume percent MTBE). Refiners presently meet this level when shipping non-oxygenated gasoline in common carrier pipelines. Kinder-Morgan's June 30, 1999 letter indicates that a retail level of 0.6 volume percent MTBE would allow them to maintain a pipeline acceptance specification of 0.3 volume percent MTBE for non-MTBE gasoline.

6. Comment: California should not overly restrict alternative sources of gasoline (i.e., imports) during California refinery outages. (OFA)

Agency Response: The regulation as adopted only requires that gasoline containing MTBE in excess of 0.6 volume percent be labeled at the retail level. Nothing in the regulation restricts alternative sources of gasoline being delivered to California, including gasoline containing MTBE.

7. Comment: The U.S. Environmental Protection Agency (U.S. EPA) allows up to 2 volume percent MTBE in clear gasoline and in commingling with ethanol blended gasoline. (OFA)

Agency Response: We disagree with the commenter. According to U.S. EPA's Reformulated Gasoline (RFG) Questions and Answers dated May 9, 1995, U.S. EPA allows gasoline arriving at a terminal and intended by the producer to be blended with a specific oxygenate to contain de-minimis amounts of other oxygenates. For RFG not intentionally blended with MTBE, U.S. EPA allows up to 0.6 volume percent MTBE to be present in the non-MTBE blended fuel.

8. Comment: WSPA member companies have been dealing successfully with the current commercial pipeline specification that defines a non-oxygenated gasoline as containing less than 0.05 weight percent oxygen, or as ARB staff have translated it, 0.3 volume percent MTBE. Since there are many opportunities for contact with residual MTBE-containing gasoline in the distribution system downstream of the pipeline inlet, a higher level must be allowed at the proposed retail enforcement point. WSPA has been informed by Kinder-Morgan that they would impose a pipeline acceptance level at half the downstream enforcement level. Therefore, for the current acceptance specification to remain, the retail level for which gasoline is defined to contain MTBE should be doubled to not less than 0.6 volume percent. (WSPA)

Agency Response: We agree with the commenter and have changed the level for which gasoline is defined as containing MTBE to 0.6 volume percent.

9. Comment: Even if refiners can make operational adjustments to accommodate a 1 volume percent limit at the refinery, additional costs will be incurred downstream of the refinery. (OFA)

Agency Response: We disagree with the commenter. Kinder-Morgan has indicated that their current operations (including commingling and cross contamination effects) allow for tanks to be designated as non-MTBE. As stated in response to comment 5, Kinder-Morgan has indicated that with a pipeline acceptance criteria of 0.3 volume percent MTBE for non-MTBE gasoline, a 0.6 volume percent MTBE level for non-MTBE gasoline can be maintained downstream of the pipeline. In addition, Kinder-Morgan currently conducts a gasoline testing oversight program that includes oxygenate testing. Kinder-Morgan has also indicated that gasoline will be designated as either containing less than 0.6 volume percent MTBE, or 0.6 volume percent or more MTBE, on their bills of lading when shipped.

At the retail level, no service station operator is required to sell non-MTBE gasoline, nor are sales of gasoline containing MTBE prohibited. However, if gasoline is sold at the retail level with an MTBE content of less than 0.6 volume percent, then the gasoline will be deemed to contain no MTBE for the purposes of determining the MTBE content of their storage tanks. In contrast, gasoline designated as containing 0.6 volume percent MTBE or greater will be deemed to contain 15 volume percent MTBE (the maximum level allowed in both the federal and California RFG regulations). As such, retail operators will be able to determine the MTBE content of their gasoline using their delivery records and either the table provided in the adopted regulation or the computer program developed and provided by the ARB. It is not expected that any retailers will need to vacuum their tanks to remove any gasoline containing MTBE, nor that they will have to have analytical tests performed to determine the MTBE content of their gasoline.

10. Comment: The minimum detection limit for the test method D4815-94a is 0.1 weight percent oxygen, with a reproducibility of 0.04 weight percent oxygen. Adding these together, we get 0.14 weight percent oxygen, or close to 0.8 volume percent MTBE. (OFA)

Agency Response: We disagree with the commenter. Test method D4815-94a is capable of identifying individual ethers (including MTBE) at concentrations greater than 0.1 mass (weight) percent. The reproducibility of the test method at this level is 0.03 weight percent. The test method also provides a method for converting results obtained in weight percent to volume percent. Considering the specific gravities of MTBE and gasoline, the test method is accurate for the detection of MTBE in gasoline at levels greater than 0.14 volume percent, significantly lower than the adopted de-minimis MTBE level of 0.6 volume percent.

- 11 Comment: Self enforcement (or compliance checking) at the retail level is likely to be done with portable oxygenate analyzers. These instruments should not be relied upon for accuracy below 0.5 - 0.6 volume percent as they are intended for oversight purposes. (OFA)

Agency Response: The commenter is correct to note that portable oxygenate analyzers are typically not reliable below total oxygenate levels of 0.5 volume percent. However, these limitations are not anticipated to be an issue as the ARB staff does not expect that retail operators are likely to use this equipment to determine the MTBE level of the gasoline in

their storage tanks. As stated in response to comment 9, the adopted regulation provides several methods for a retail operator to determine the MTBE content in their storage tank that do not require any testing.

12. Comment: Whatever the Board decides regarding allowable limits of cross contamination today, those limits should be lowered as the use of MTBE in the State is cut back. (STPUD)

Agency Response: When MTBE is totally phased-out from use in California gasoline in 2003, it may be appropriate to establish a lower de-minimis level of MTBE. Staff will evaluate and recommend a new de-minimis level for MTBE gasoline in a subsequent rulemaking.

13. Comment: WSPA companies are concerned that residual MTBE may cause some gasoline batches to require dispenser labeling even though no MTBE has been intentionally added. Our industry does not have experience transporting non-MTBE gasoline via pipeline or in non-dedicated trucks. Our companies may find 0.6 volume percent MTBE too restrictive once we attempt to use it in the real world. Therefore, we may need to revisit the situation with ARB once experience is gained and should problems be realized. (WSPA)

Agency Response: The regulation is intended to require the labeling of gasoline to which MTBE has been intentionally added. In defining gasoline as not containing MTBE, we have made every effort to set a maximum level of MTBE that should accommodate the expected sources of possible MTBE contamination. However, recognizing this issue, the Board in Resolution 99-22 directed the ARB Executive Officer to monitor the implementation of the labeling requirements, to report back no later than December 1999, and to recommend modifications if necessary.

3. Determination of MTBE Content

14. Comment: If keeping track of retail station label compliance becomes too burdensome (as may be the case for a station that may receive gasoline oxygenated with MTBE one week and non-oxygenated gasoline the next), station operators may opt to leave the labels on full-time, thus defeating the intent of the regulation. (OFA)

Agency Response: As stated in previous responses, the regulation is intended to require the labeling of pumps that dispense gasoline to which MTBE has been intentionally added. If a service station operator makes due diligence to only obtain non-MTBE gasoline, compliance with the regulation should not be burdensome. However, if a service station operator receives shipments of gasoline containing MTBE, the pumps should be labeled until such time as adequate volumes of non-MTBE fuel have been delivered to dilute the storage tank to an MTBE level that is below 0.6 volume percent. This may mean that retailers have to leave labels on their pumps if they take periodic shipments of gasoline containing MTBE.

15. Comment: Jobbers and dealers who acquire gasoline from common carrier pipelines or community storage tanks will not be able to determine the exact amount of MTBE present in the gasoline they purchase. (CIOMA)

Agency Response: The regulation has been modified so that a person delivering gasoline to a retail outlet is not required to specify the approximate amount of MTBE present in the gasoline. The adopted regulation only requires that the bill of lading or other transfer documentation identify if the gasoline does or does not contain 0.6 volume percent or greater MTBE. Kinder-Morgan has stated that they will issue bills of lading that state whether the product contains less than 0.6 volume percent MTBE or contains greater than or equal to 0.6 volume percent MTBE.

In the calculations that may be used to determine the MTBE concentration in a gasoline storage tank, the regulation specifies the MTBE content of gasoline containing less than 0.6 volume percent MTBE will be treated as zero; the MTBE content of gasoline containing greater than or equal to 0.6 volume MTBE will be treated as 15 volume percent, unless a different MTBE content is stated on the bill of lading.

16. Comment: Jobbers and dealers will not be able to accurately attest to the amount of MTBE present in the fuel they are selling, even using the CARB-developed chart or computer program being created, because the initial amount of MTBE will be unknown to these segments of the gasoline distribution system. (CIOMA)

Agency Response: The regulation allows calculations to be used in determining the MTBE content of a gasoline storage even if the initial MTBE content in the storage tank is unknown. Both the compliance table (section 2273(b)(2)(A)) and tank turnover equation (section 2273(b)(2)(B)) presume an initial storage tank MTBE concentration of 15 volume percent. In addition, the computer program the ARB is required to make available allows a retailer to use the actual initial MTBE concentration if it is known. Otherwise, as with the compliance table and tank turnover equation, the MTBE content is presumed to be 15 volume percent.

17. Comment: Jobbers and dealers may not have access to MTBE-free, segregated gasoline that has not been shipped via common carrier pipeline and stored in community storage tanks at terminals owned by Kinder-Morgan and other common carriers. (CIOMA)

Agency Response: Staff estimates that greater than 60 percent of the gasoline transported in California is shipped through the common carrier pipeline. As stated in response to comment 9, Kinder-Morgan has indicated that their current operations would allow for the segregation of non-MTBE gasoline containing less than 0.6 volume percent MTBE. If Kinder-Morgan decides to segregate and distribute non-MTBE gasoline, independent jobbers and dealers will have the same opportunity to acquire this fuel as other gasoline suppliers.

18. Comment: Kinder-Morgan has stated that it will not be able to differentiate between MTBE and other oxygenates in testing. Therefore, rack buyers will be given information only identifying the total oxygenate content of the gasoline they purchase, not information quantifying the amount of MTBE in a load of gasoline purchased from their facilities. (CIOMA)

Agency Response: See the response to comment 15.

19. Comment: If the presence and percentage of MTBE in the common supply at any given point cannot be reliably determined, then jobbers, dealers, and other downstream sellers will not be able to calculate the amount of MTBE in the gasoline they sell. The computer program and chart being developed will be useless to these sellers since they will not have the initial figure needed to put into the formula to determine the total MTBE quantity in a storage tank. (CIOMA)

Agency Response: See the responses to comments 15 and 16.

20. Comment: Refiners will not be able to quantify the amount of MTBE in gasoline shipped through common carrier pipelines or stored in community storage tanks since the gasoline in those systems will be commingled with gasoline containing MTBE. (CIOMA)

Agency Response: The regulation does not require refiners to provide documentation stating the amount of MTBE contained in the product and shipped in a common carrier pipeline. However, Kinder-Morgan has indicated that if a producer is shipping non-MTBE gasoline in their pipelines, the producer will be required to provide written certification that their product contains no more than 0.3 volume percent MTBE. Based on this pipeline acceptance criterion and their gasoline oversight testing program, Kinder-Morgan will then issue bills of lading stating that the gasoline contains less than 0.6 volume percent MTBE gasoline.

21. Comment: Both proposed enforcement methods have shortcomings. Sampling and testing each batch at retail outlets is impractical. The calculation method is necessarily imprecise since it needs to be a “one size fits all” method. WSPA requests that a third provision be added that would allow a company to enter into a protocol with the Executive Officer to design its own method. (WSPA)

Agency Response: We agree with the commenter and have added provisions allowing a person/company to determine the amount of MTBE contained in their gasoline storage tanks in accordance with an alternative protocol approved by the ARB Executive Officer.

4. General Comments

22. Comment: This requirement falls very heavily and very unfairly on un-branded independent marketers. (Robinson Oil)

Agency Response: The regulation applies equally to all retail gasoline outlets, both branded and un-branded oil marketers. As stated in response to comment 17, we expect independent marketers will have equal access to non-MTBE gasoline carried through common carrier pipelines. In addition, the Board, in adopting Resolution 99-22, directed the ARB Executive Officer to monitor the implementation of the regulation, particularly with respect to how small businesses and independent gasoline marketers are affected, and to report back on these matters to the Board no later than December 1999, with recommendations of modifications if necessary.

23. Comment: Most of the gasoline we purchase comes from common carrier terminal companies' community tankage. What this means is, if we elect not to purchase from MTBE gasoline suppliers, but these suppliers put gasoline with MTBE in the same tankage as our MTBE-free suppliers, we will have tainted gasoline. This means the regulation will require us to label our pumps even if we purchase only from MTBE-free suppliers. (Robinson Oil)

Agency Response: See response to comment 17.

24. Comment: Many of our suppliers refine and sell both branded and unbranded gasoline. I suspect that they may first eliminate MTBE from their branded gasoline so they can take the labels off of their pumps, while still selling gasoline with MTBE to unbranded independents. This may allow a more cost-effective transition for them while at the same time giving their branded stations a competitive advantage. (Robinson Oil)

Agency Response: There are many reasons consumers purchase one fuel over another, including price, convenience, brand loyalty, and perceived performance benefits. The competitive advantage of selling non-MTBE gasoline is speculative at this point, and non-MTBE gasoline may be sold at a premium in comparison to gasoline containing MTBE.

25. Comment: I think it would be a good idea to rethink these labeling requirements and not institute them. The lack of a labeling mandate will still enable market mechanisms to work. If a company has MTBE-free gasoline, they can certainly advertise this fact to their advantage. Although this advantage may not be available to unbranded independents, at least they would not be punished with "red flag" labels. (Robinson Oil)

Agency Response: The Governor's Executive Order D-5-99 directs the ARB to develop regulations that require the prominent identification at the pump of gasoline containing MTBE, so that consumers can make an informed choice on the type of gasoline they purchase. While it is true that without the regulation some gasoline marketers may choose to market their gasoline as "MTBE-free," there would be no assurances to the public as to what

this means. The regulation provides a clear benchmark for identifying gasoline to which MTBE has not been intentionally added.

26. Comment: Since 90 percent of the gasoline sold today is shipped through common carrier pipelines or stored in community storage, this regulation will require extensive and costly changes to the gasoline distribution system. (CIOMA)

Agency Response: See response to comment 9.

27. Comment: The only fuel sellers who will be able to remove the “Contains MTBE” label from their pumps will be those supplied directly by truck from the refinery where oxygenates other than MTBE or no oxygenates are used to make California reformulated gasoline. Any fuel seller without that privilege will suffer a substantial competitive disadvantage. (CIOMA)

Agency Response: See response to comments 17 and 24.

28. Comment: A clear definition of the responsible party, the retail gasoline outlet “operator,” is needed. (WSPA)

Agency Response: The term “operator” in the regulation is self-explanatory — the operator is the person or entity that operates the outlet. The commenter has not identified any situation in which a definition in the regulation would be necessary to avoid ambiguity.

29. Comment: WSPA believes that for the purpose of the labeling requirement, no more information is needed on the product transfer documentation than is required at the dispenser. Therefore, we suggest that the Board require the words “contains MTBE” (as defined in this rulemaking) or “does not contain MTBE” be used on product transfer documentation. (WSPA)

Agency Response: The regulation has been modified to require that the product transfer documentation or bill of lading state whether the gasoline does or does not contain 0.6 volume percent MTBE or more; identification of the actual MTBE content is optional.

B. Comments Made Before or During the Hearing Related to Staff's Suggested Modifications to the Original Proposal

1. Label Language

30. Comment: Regarding the proposed gasoline pump labeling requirements, OFA strongly disagrees with the finding stated in the proposed label that "The State of California has determined that the use of this chemical presents a significant risk to the environment." We believe that this language is factually inaccurate, misleads the public, and misrepresents the directions of the Governor's Executive Order. (OFA)

Agency Response: The modified language accurately reflects the finding in the Governor's Executive Order D-5-99 on the risk of using MTBE in gasoline. In the Executive Order, the Governor found that "there is, on balance, a significant risk to the environment associated with the continued use of MTBE in gasoline." In making this finding, the Governor relied on the November 1998 report prepared by the University of California (UC Report) titled "Health & Environmental Assessment of MTBE" and peer review comments of the UC report by the United States Geological Survey and the Agency for Toxic Substance and Disease Registry, as well as testimony presented at public hearings.

The UC Report concluded that

There are significant risks and costs associated with water contamination due to the use of MTBE. This is because MTBE is highly soluble in water and will transfer readily to groundwater from gasoline leaking from underground storage tanks, pipelines and other components of the gasoline distribution system. In addition, the use of gasoline containing MTBE in motor boats, in particular those using older 2-stroke engines, results in the contamination of surface water reservoirs. . . . [I]t is clear that we are placing our limited water resources at risk by using MTBE. . . . If MTBE continues to be used at current levels and more sources [of water] become contaminated, the potential for regional degradation of water resources, especially groundwater basins, will increase.

Pg. 11-12, Vol. 1.

31. Comment: The use of MTBE as intended, i.e., as part of the complex hydrocarbon mixture we refer to as gasoline, does not pose a threat to the environment. (OFA)

Agency Response: See response to comment 30.

32. Comment: Leaking underground storage tanks and inadequate monitoring and enforcement practices are the primary reasons for gasoline contamination of soil and water. It is

inaccurate to describe the threat to groundwater resources posed by leaking underground storage tanks as one attributable to the “use of MTBE.” (OFA)

Agency Response: See response to comment 30.

33. Comment: It is inaccurate to postulate the MTBE “presents a significant risk to the environment.” (OFA)

Agency Response: See response to comment 30.

34. Comment: We strongly disagree with the State’s finding “that MTBE presents a significant risk to the environment” and would describe the application of such warning language on pump labels as arbitrary and capricious. (OFA)

Agency Response: The additional language contained on the MTBE label is neither arbitrary nor capricious, and is based on the findings reached by the Governor on the use of MTBE in gasoline, as discussed in the response to comment 30.

35. Comment: We urge the Board to consider amending the proposed pump language to more specifically and accurately address the facts about MTBE. We propose the following alternative, “Contains MTBE. Spills must be cleaned promptly to protect California’s water.” (OFA)

Agency Response: We do not believe this suggested alternative pump language would more accurately or specifically address the facts about MTBE. In the UC Report, it was concluded that, although there are numerous sources of MTBE contamination to groundwater supplies (including surface spills), “because leaking underground fuel tanks are so numerous and handle such a large volume of product, they clearly pose the most serious threat to groundwater.” (Pg. 31, Vol. 1).

36. Comment: To the extent that leaking underground storage tanks present a threat to California’s water resources, the proposed pump label is misdirected. Any regulatory initiative should address the actual problem and, thus, be directed at those associated with inadequate construction, maintenance, use and monitoring of underground storage tanks. The proposed labeling statement is an unreasonable requirement that cannot accomplish any goal related to the purported threat to the environment, because consumers reading the statement have no control over the storage tanks. (OFA)

Agency Response: The regulation is not misdirected. While it is true consumers have no control over storage tanks, as stated in response to comment 35, leaking underground storage tanks represent the most serious threat to groundwater contamination. Since the regulation is intended to allow the public to make a choice as to whether they purchase

gasoline containing MTBE, consumers indirectly control the contents of the underground storage tanks through their gasoline purchasing patterns.

37. Comment: OFA believes that the warning language proposed for the label substantially exceeds the intent and direction of the Governor's Executive Order D-5-99. (OFA)

Agency Response: Item 7 of the Governor's Executive Order states that, "In order that consumers can make an informed choice on the type of gasoline they purchase, I am directing the California Air Resources Board to develop regulations that would require prominent identification at the pump of gasoline containing MTBE." The regulation carries out this directive by informing the consumer of not only whether the gasoline they are purchasing contains MTBE, but also of the findings of the Governor's Executive Order. Nothing in the Executive Order limits the ARB in making specific the intent of the labeling requirements as contained in the Executive Order.

38. Comment: The Executive Order does not direct CARB to adopt any specific pump warning language; the label must simply state "Contains MTBE." (OFA)

Agency Response: See response to comment 37.

39. Comment: We encourage you to keep the label simple and consistent with the Uniform Regulation adopted by the National Conference of Weights and Measures (Handbook 130). (OFA)

Agency Response: To the extent possible, the label conforms to the Uniform Regulation adopted by the National Conference of Weights and Measures (Uniform Regulation). The word "MTBE" in the label is at least five-eighth inch high and the label must be conspicuous and visible from the driver's position.

40. Comment: To add any superfluous language that is not necessary for the consumer to make a purchase decision or to be informed regarding health and safety warnings is to detract from these primary messages and serves no worthy purpose. The Label should simply read "Contains MTBE." (White Environmental Associates)

Agency Response: We disagree with the commenter. In carrying out the directive in the Governor's Executive Order to allow consumers to make an informed choice on the type of gasoline they purchase, staff believes it is appropriate and useful to not only indicate whether the gasoline they are purchasing contains MTBE, but also to convey the Governor's findings that the use of MTBE presents a significant risk to the environment.

2. De-minimis Level of MTBE in Non-MTBE Gasoline

41. Comment: If the industry is forced to get down to 0.6 volume percent, the normal tank turnover approach to retail conversion may have to be reexamined. It is likely that many tanks will need to be vacuumed out when they switch service. (OFA)

Agency Response: See response to comment 9.

42. Comment: We believe that allowing gasoline containing up to 0.6 volume percent MTBE to be exempt from labeling is misleading to the gasoline-consuming public. The absence of the label might be construed as indicating the gasoline is “MTBE-free” when, in fact, it isn’t. We believe that “MTBE-free” gasoline should be just that: totally free of MTBE. (STPUD)

Agency Response: As stated in response to comment 1, because of the extensive use of MTBE in California’s gasoline supply, cross contamination of gasoline not produced with MTBE is likely to occur. It is expected that trace amounts of MTBE will be detectible in gasoline sold in California over the next several years. Therefore, it is not possible to have truly “MTBE-free” gasoline, that is gasoline containing no detectible amounts of MTBE. To define non-MTBE gasoline as having no detectible amount of MTBE would likely require the labeling of all the pumps in the State as containing MTBE, defeating the purpose of the proposed regulation which is to identify gasoline being sold at a retail gasoline outlet that has been intentionally produced with MTBE.

3. Delivery Prohibition

43. Comment: If the Board feels an important addition is an enforcement provision that would place some responsibility on delivery truck drivers to make sure no gasoline “containing MTBE” was delivered to a tank serving a dispenser that was not labeled, we urge you to also adopt a provision allowing an alternate compliance method to avoid the situation where truck drivers are obliged to search a service station for dispenser labels by themselves in the dead of night. (WSPA)

Agency Response: We agree with the commenter. The regulation has been modified to allow the party delivering gasoline to a service station to maintain a written notification from the service station operator that all of the station’s dispensing equipment, or all of the station’s dispensing equipment dispensing the grade of gasoline being delivered, is labeled as containing MTBE.

4. Legal Issues Presented by the OFA

i. Determination That MTBE Presents a Significant Risk to the Environment

44. Comment: A regulation requiring the statement that "The State of California has determined that the use of this chemical presents a significant risk to the environment" would be arbitrary and capricious, because there is no factual basis to justify such a determination. (OFA)

Agency Response: The statement accurately reflects the determination expressed in Executive Order, D-5-99 and the UC Report provides a factual basis for the determination. See the response to comment 30.

45. Comment: It would be irrational for ARB to require a labeling statement that the State has determined that MTBE in gasoline is a significant risk to the environment, when MTBE has in fact been a significant boon to the environment. (OFA)

Agency Response: The statement accurately reflects the determination expressed in Executive Order D-5-99, and the UC Report provides a rationale basis for the determination. See the response to comment 30.

46. Comment: The proposed labeling statement is contradicted by empirical evidence that actually shows that MTBE does not present a significant risk to the environment. (OFA)

Agency Response: The UC Report provides empirical evidence supporting the labeling statement.

47. Comment: It is true that MTBE has been detected in varying concentrations and frequency throughout California. However, these detections do not represent a significant threat to the environment. (OFA)

Agency Response: See response to comment 30.

ii. The Proposed Labeling Requirement is Unreasonable

48. Comment: The proposed regulation describes a threat to groundwater resources posed by leaking underground storage tanks as one attributable to the use of MTBE. It then directs a labeling measure to consumers whose use of gasoline with MTBE does not pose a threat to the environment, and in fact, has benefitted the environment by contributing substantially to the large air quality improvement recorded in the State as a result of the introduction of reformulated and oxygenated gasolines. (OFA)

Agency Response: The commenter is correct to note that reformulated and oxygenated gasolines have provided air quality benefits to California. However, in evaluating the environmental impacts of MTBE, the Governor concluded, upon review of the UC Report, public testimony, and other sources, that “while MTBE has provided California with clean air benefits, because of leaking underground fuel storage tanks, MTBE poses an environmental threat to groundwater and drinking water.” As such, as stated in response to comment 30, the Governor found that “there is, on balance, a significant risk to the environment associated with the continued use of MTBE in gasoline.”

iii. The Clean Air Act Preempts the Proposed Labeling Requirement

49. Comment: Any measure to inhibit the use of MTBE in automotive fuels contradicts the fuels provisions of the federal Clean Air Act (CAA) and is therefore preempted under the principles of field preemption and frustration of congressional objectives preemption. Congress specifically made clear its intention to leave the choice of oxygenate under CAA Section 211(k) RFG program unregulated and up to the marketplace. (OFA)

The state-wide "Cleaner Burning Gasoline" Program is sanctioned only because it does not interfere with federal requirements and objectives. But a State regulation limiting MTBE would constitute an impermissible encroachment on the federal RFG and winter oxygenate programs so carefully crafted by Congress as the exclusive regulatory scheme for such gasoline, and would have nationwide repercussions for the RFG program, the production of gasoline, and American industry's response to future governmentally-mandated environmental programs. (OFA)

Agency Response: The new regulation only imposes labeling requirements for gasoline pumps dispensing gasoline containing MTBE, and thus does not limit or inhibit the use of MTBE in California gasoline.

Even if the regulation were construed as limiting or inhibiting the use of MTBE, it is not preempted by the CAA. The CAA Amendments of 1970 enacted §211(c), which granted U.S. EPA general authority to control emissions of air pollutants by regulating motor vehicle fuels and fuel additives. Congress expressly addressed federal preemption of state motor vehicle fuel requirements by adding §211(c)(4). While establishing a broad rule of preemption for other states, Congress carved out an exception for California, which is the

only state authorized to receive a waiver under §209(b) from the §209(a) preemption of state emission standards for new motor vehicles.¹ Section 211(c)(4)(B) provides:

(B) Any State for which application of section 209(a) has at any time been waived under section 209(b) may at any time prescribe and enforce, for the purpose of motor vehicle emission control, a control or prohibition respecting any fuel or fuel additive.

Thus, in light of the broad authority given California to craft its own program to regulate motor vehicle fuels in order to reduce air pollution, we believe that the federal RFG requirements in CAA section 211(k) would only preempt a California regulation that made it a practical impossibility for persons to comply with the federal RFG requirements in California. The MTBE labeling regulation certainly does not have this effect.

50. Comment: The functioning and efficiency of the nationwide system of gasoline supply is likely to be disrupted by any regulation that makes MTBE unacceptable to the market. This will occur if the labeling requirement causes consumer confusion, shortages, price fluctuations, and market disruption. (OFA)

Agency Response: Staff does not expect any disruptive effects to the gasoline supply to occur as a result of the regulation, because the regulation does not limit the ability of refiners to use MTBE in the production of gasoline, nor does it limit the ability of gasoline containing MTBE to be imported and sold in California.

iv. The Proposed Labeling Requirements Violate the Commerce Clause of the United States Constitution

51. Comment: To the extent that the labeling statement is intended to, and in fact does reduce the use of MTBE in California, it constitutes a burden on interstate commerce in violation of the Commerce Clause of the United States Constitution. The regulation would further violate the Commerce Clause by discriminating against MTBE in favor of other oxygenates. Since reformulated gasoline and winter oxygenated gasoline containing MTBE greatly benefits air quality in both California and the rest of the nation, ARB cannot justify the regulation in terms of overriding benefits. On balance, the burden on interstate commerce is clearly excessive in relation to the putative local benefits of the label. Moreover, there are

¹ The section 209(b) waiver provisions apply to any state which has adopted standards (other than crankcase emission standards) for the control of emissions from new motor vehicles or motor vehicle engines prior to March 30, 1966. (§209(b)(1).) California is the only state that meets this condition. (S. Rep. No. 403, 90th Cong. 1st Sess., 532 (1967), *Motor and Equipment Manufacturers Association [MEMA] v. EPA*, 627 F.2d 1095, 1101 fn. 1 (D.C. Cir. 1979).) Congress allowed California alone among the states to establish its own emissions standards for new motor vehicles because of California's unique air pollution problems and its pioneering efforts in controlling motor vehicle emissions. (*MEMA*, 627 F.2d at 1110.)

less discriminatory alternatives to reducing any risk to the environment such as enforcement of storage tank standards. (OFA)

Agency Response: Again, all this regulation does is require labeling of gasoline containing MTBE. Like the ARB's other fuels regulations, it represents the exercise of the state's police powers. The UC Report clearly provides adequate support for the content of the label. The labeling requirement no more constitutes an unconstitutional burden on interstate commerce than the rest of the California reformulated gasoline regulations. See *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 444 (1960).

C. Comments Pertaining to the MTBE Labeling Requirements Made During the 15-Day Comment Period

52. Comment: MTBE has received adequate coverage in the press to explain the issues behind the label, therefore there is no reason for the additional label language and it should be dropped. (White Environmental Associates)

Agency Response: See response to comment 40.

53. Comment: The additional label language does not accurately explain why the label is on the dispenser. The problem with MTBE getting into California's groundwater is with the California underground storage tank program. The proposed statement on the MTBE label is inaccurate and misleading. (White Environmental Associates)

Agency Response: See response to comment 30.

54. Comment: As an additive to gasoline, MTBE benefits the environment and, used as intended, is not a "significant risk" to the environment. (White Environmental Associates)

Agency Response: See response to comment 30.

55. Comment: There is already a condition of "information overload" with messages competing for consumer attention. In the process of designing a new label, the existing labels should receive careful consideration regarding the importance of their messages relative to each other and to the new label. (White Environmental Associates)

Agency Response: In developing the regulation, staff evaluated and considered both the layout and content of numerous gasoline labels currently required. While the commenter is correct to note that there are a significant number of labels that are required to be placed on or around gasoline dispensing equipment, as stated in response to comment 40, staff believes that the proposed label is appropriate to not only indicate whether the gasoline they are

purchasing contains MTBE, but also to convey the Governor's findings that the use of MTBE presents a significant risk to the environment.

56. Comment: The subject label should simply meet the intent of the Executive Order. With the superfluous, inaccurate, misleading additional language, it clearly goes beyond the intent and purpose of the Executive Order. (White Environmental Associates)

Agency Response: See response to comments 30 and 40.

57. Comment: Mobil questions the legal basis on which the ARB supports the newly modified language of the proposed Regulation to warn consumers that the use of MTBE "presents a significant risk to the environment." The actual provision of the Executive Order that requires labeling does not require such a warning. (Mobil)

Agency Response: We agree that the Governor's Executive Order does not require the ARB to mandate that the label include the statement, "The State of California has determined that the use of this chemical presents a significant risk to the environment." However, we believe the ARB has the authority to require such a statement under Health and Safety Code sections 43013 and 43018, which provide the basic authorization for the ARB's motor vehicle fuels regulations. The Staff Report discussed why MTBE is currently used in most California gasoline; one of the factors has been the oxygen requirements in the CaRFG regulations. In the uncodified MTBE Public Health and Environmental Protection Act of 1997 (stats. 1997, ch. 816 (SB 521)), the Legislature directed the University of California to assess the health and environmental risks and benefits associated with the use of MTBE. It then directed the Governor, based on the UC Report and subsequent comments and hearings, to find whether or not, on balance, there is a significant risk to human health or the environment of using MTBE in gasoline. The Governor made the affirmative finding in Executive Order. Given this context, the ARB's broad motor vehicle fuels authority in section 43018 includes the authority to require labeling of gasoline pumps dispensing gasoline containing MTBE. And for the reasons provided in the response to Comments 30 and 40, we think the requirement is consistent with, and reflects the overall intent of, the Executive Order.

58. Comment: At the hearing, ARB staff explained that the proposed regulation's labeling requirements were also intended "to conform to the wording of the proposed pump label in Senate Bill [SB] 192, by Senator Perata, which is currently pending in the Legislature." However, after the June 24 Board hearing, SB 192 was amended and the current version no longer contains a labeling requirement, or any language concerning significant risk to the environment. Thus, contrary to the ARB's suggestion, SB 192 does not require that consumers be warned that the use of MTBE "presents a significant risk to the environment." (Mobil)

Mobil notes that it is well-established that regulations may only implement actual laws. It is improper that ARB staff drafted the proposed regulation's labeling requirements, including the "significant risk to the environment" language, to satisfy the requirements of proposed legislation. (Mobil)

Agency Response: As stated in the Staff Report and at the Board hearing, the originally proposed label language was modified to better reflect the findings in the Governor's Executive Order. As noted by the commenter, ARB staff did consider SB 192 during their development of the regulation. At that time, SB 192 would have also required the labeling of pumps dispensing gasoline containing MTBE. In order to ensure that the ARB and the Legislature did not approve contradictory labels, the ARB incorporated the labeling language proposed at the time in SB 192, which also reflected the Governor's findings on the use of MTBE in gasoline. SB 192 ultimately was not enacted this term, and thus we agree that the bill does not require the content of the label specified in the final regulation. However, as noted in the previous response, we believe the ARB has the authority to require such a statement under Health and Safety Code sections 43013 and 43018, and that the adopted content of the label is appropriate for the reasons provided in the response to Comments 30 and 40.

59. Comment: Mobil is also concerned that the proposed regulation's "significant risk to the environment" is misleading to consumers. The University of California, which was charged by law to prepare a report (UC Report) on the effects of MTBE, never reached that sweeping conclusion. Instead, the UC Report found that "there are significant risks and costs associated with contamination due to the use of MTBE...from gasoline leaking from underground storage tanks, pipelines and other components of the gasoline distribution system." With regard to the environmental or health risk from MTBE, the UC Report concluded: "For the general population, the risk of exposure to MTBE through ingestion of MTBE-contaminated water is currently low." (Mobil)

Agency Response: See response to comment 30.

60. Comment: The warning is entirely unclear as to the nature of the risk and could unnecessarily alarm consumers. For example, the consumer is likely to assume that a warning at the pump about a "significant risk" refers to a risk that may occur at the time the consumer uses the pump, e.g., exposure to gasoline vapors, not the potential risk to groundwater identified in the UC Report. Until the proposed regulation's labeling requirements are amended to delete the misleading wording, many consumers will be denied the opportunity called for in the Executive Order, which is to allow consumers the opportunity to make an "informed choice" at the gasoline pump. (Mobil)

Agency Response: The label language as adopted states that the use of MTBE presents a significant risk to the environment. As stated in response to comment 30, this language reflects the Governor's findings on the use of MTBE in gasoline. The commenter states that

the modified language could be interpreted to mean that exposure to gasoline vapors presents a risk to the individual. It should be noted that gasoline by itself consists of several compounds, including benzene, that are known human carcinogens, and that gasoline pumps already carry warning labels on the risks of inhalation of gasoline vapors, as well as other labels including flammability and explosion warnings. In light of these existing warning labels and the fact that the label does not indicate any increased risk to individuals, we do not expect that the label will create any new safety concerns to individuals, and will not hinder consumers ability to make an informed choice at the pump.

61. Comment: Mobil is acutely concerned that during the rulemaking process ARB failed to adequately consider the direct and indirect economic and environmental effects of implementing the proposed regulation's labeling requirements, including its new warning to consumers that use of MTBE "presents a significant risk to the environment." ARB has focussed solely on the "out-of-pocket" cost of implementing the actual pump labels — *i.e.*, preparing and/or posting the label, estimated at \$25 per station. Missing from ARB's consideration of the economic impact of the proposed regulation are the significant economic consequences of the modified warning label — *i.e.*, consumers moving away from gasoline containing MTBE and purchasing alternative types of available gasoline. For instance, ARB fails to consider the substantial economic costs — including costs to individual consumers, retail outlets, and the economy as a whole — associated with substituting ethanol for MTBE. Also missing is any consideration of the impact it could have on the allocation of federal highway funds to California, since the partial tax exemption for alcohol fuels means the federal government collects considerably less excise tax on gasoline containing ethanol than gasoline containing MTBE. (Mobil)

Agency Response: All the regulation requires is the labeling of gasoline pumps dispensing gasoline containing MTBE, and notification by gasoline distributors to retail operators about whether gasoline being delivered contains MTBE. Depending on the reactions of consumers to the labels in the context of other factors that affect gasoline purchase decisions, and the potential availability of non-MTBE gasoline, it is possible that the regulation could indirectly reduce the use of MTBE and increase the use of MTBE alternatives. However, we believe that a consumer's decision to purchase one fuel over another is based on various reasons, including price, convenience, brand loyalty, and perceived performance benefits. The possibility that the labeling requirements will lead to a switch from MTBE to ethanol is too speculative and indirect for the ARB to be required in this rulemaking to assess potential economic impacts of such a switch to ethanol. For example, Government Code section 11346.5(a)(9) required the hearing notice in this rulemaking to include a "statement of the potential cost impact of the proposed regulation on private persons or businesses directly affected." In this context, the statute defines "cost impact" to mean the "reasonable range of costs, or a description of the type and extent of costs, that a representative private person or business necessarily incurs in reasonable compliance with the proposed action." Costs that could ultimately be associated with changes in MTBE usage in gasoline are clearly not costs

necessarily incurred by individuals or businesses in reasonable compliance with the labeling requirement.

The costs associated with substitutions for MTBE are being considered as the ARB develops the Phase 3 Reformulated Gasoline regulations.

62. Comment: The ARB has also failed to consider the potential environmental effects of the proposed regulation's labeling requirements. Again, the ARB states that the regulation is intended to speed the removal of MTBE from gasoline. However, the ARB gives little (or no) consideration to how this change will actually affect the environment. In particular, ARB has not addressed potential environmental impacts that could result from a switch from MTBE to ethanol. (Mobil)

Agency Response: As is the case with economic impacts, we believe the possibility that the labeling requirements will result in a switch from MTBE to ethanol is too speculative for the ARB to be required to consider in this rulemaking the potential environmental impacts of an increase in the use of ethanol in California gasoline. We note, however, that the ARB, the State Water Resources Control Board, and the Office of Environmental Health and Hazard Assessment are currently conducting an environmental fate and transport analysis of ethanol. This information will be considered by the ARB as it develops the Phase 3 Reformulated Gasoline regulations.

63. Comment: Mobil believes that the most appropriate response to its concerns is to withdraw the proposed regulation — at least until the economic and environmental effects of its implementation have been fully considered. Alternatively, Mobil requests that the ARB consider returning to the labeling requirements originally proposed. (Mobil)

Agency Response: We do not believe a delay or a return to the originally proposed label is appropriate. As stated previously, the regulation does not ban the use of MTBE in gasoline. It simply informs the public as to its presence. As such, the economic and environmental costs attributed to the regulation by the commenter are not applicable. However, these costs will be addressed by the ARB as it develops the Phase 3 Reformulated Gasoline regulations.

In addition, as stated in response to comment 40, we believe that the modified label language is reflective of the Governor's Executive Order, and will be more informative to the consumer than the labeling requirements in the original proposal.