

State of California
California Environmental Protection Agency
AIR RESOURCES BOARD

**Final Statement of Reasons for Rulemaking
Including Summary of Comments and Agency Response**

PUBLIC HEARING TO CONSIDER AMENDMENTS TO THE CALIFORNIA
REFORMULATED GASOLINE REGULATIONS INCLUDING REFINEMENTS TO THE
PROHIBITIONS OF MTBE AND OTHER OXYGENATES

Public Hearing Date: December 12, 2002
Agenda Item No: 02-9-3

I. GENERAL

In this rulemaking the Air Resources Board (ARB or Board) is adopting amendments to the California Phase 3 Reformulated Gasoline (CaRFG3) regulations. The amendments will (1) revise the prohibitions of gasoline produced with the use of methyl tertiary-butyl ether (MTBE) or other prohibited oxygenates; (2) revise the schedule for implementation of allowable residual MTBE levels in California gasoline; (3) establish allowable residual levels for total weight percent oxygen supplied by oxygenates other than MTBE and ethanol; (4) add provisions for documentation of the presence or absence of ethanol in CaRFG delivered to retail outlets, and make other changes.

The rulemaking was initiated by the October 25, 2002 publication of a notice for a December 12, 2002 public hearing. A "Staff Report: Initial Statement of Reasons" (referred to as the Initial Statement of Reasons) was also made available for review and comment starting October 25, 2002. The Initial Statement of Reasons, which is incorporated by reference herein, contains an extensive description of the rationale for the proposal. Appendix A to the Initial Statement of Reasons contained the text of the proposed amendments to sections 2260, 2261, 2262.6, 2273, and proposed new section 2273.5, in title 13, California Code of Regulations (CCR). These documents were also posted by June 7, 2002 on the ARB's Internet site for the rulemaking: <http://www.arb.ca.gov/regact/mtberesid/mtberesid.htm>.

At the December 12, 2002 hearing, the Board received written and oral comments. At the conclusion of the hearing, the Board adopted Resolution 02-34, in which it approved amendments to the CaRFG3 regulations, including two minor modifications to the originally proposed amendments. These modifications were suggested by staff (one in response to public comments made after issuance of the original proposal) and were contained in Attachment B to the Resolution, which identified an additional wording change to one of the modifications. The Resolution directed the Executive Officer to incorporate the modifications into the proposed regulatory text, with such other conforming modifications as may be appropriate, and to make the modified text

available for a supplemental comment period. The Executive Officer was then directed either to adopt the amendments with such additional modifications as may be appropriate in light of the comments received, or to present the regulations to the Board for further consideration if warranted in light of the comments.

The texts of the modifications to the originally proposed regulatory amendments were made available for a supplemental 15-day comment period by issuance of a “Notice of Public Availability of Modified Text.”¹ This Notice, the attached Resolution, and an Attachment II showing the modified text of the two affected sections, were mailed by December 23, 2002 to all parties identified in section 44(a), title 1, CCR. The Notice advised interested parties that supplemental comments on the modifications would be accepted until January 10, 2003. The Notice and its two attachments were also posted on the ARB’s Internet site for the rulemaking on December 23, 2002, along with a separate document showing all of the proposed amendments with the modifications clearly identified. An email message announcing and linking to this posting was transmitted to the more than 200 parties that have subscribed to the ARB’s “fuels-general” List Server for notification of postings pertaining to motor vehicle fuels. One party submitted comments during the supplemental comment period; the comments did not pertain to the modifications or the originally proposed amendments. After close of the supplemental comment period, the staff identified additional needed editorial and nonsubstantial amendments to sections 2266.5 and 2272, title 13, CCR. The Executive Officer then issued Executive Order G-03-003, in which she adopted amendments to sections 2260, 2261, 2262.6, 2263, 2266.5, 2272, and 2273, and adoption of section 2273.5, in title 13, CCR. These regulatory changes reflected the originally proposed text with the modifications described in Section II below.

This Final Statement of Reasons updates the Initial Statement of Reasons by identifying and providing the rationale for the modifications made to the originally proposed amendments. It also summarizes and responds to comments submitted during the rulemaking.

Fiscal impacts. The ARB has determined that this regulatory action will not result in a mandate to any local agency or school district, the costs of which are or are not reimbursable by the state pursuant to part 7 (commencing with section 17500), division 4, title 2 of the Government Code.

Consideration of alternatives. The ARB has determined that no alternative considered by the agency or that has otherwise been identified and brought to the attention of the agency would be more effective in carrying out the purpose for which the regulatory action was proposed or would be as effective and less burdensome to affected private persons than the action taken by ARB.

¹ The modified text made available for supplemental comment also showed corrections to Barclays’ erroneous failure to print subsection headings in italics despite the fact that they had been shown in italics in the previous CaRFG rulemakings.

Identification of covered oxygenates. This rulemaking adds section 2262.6(c)(4), which identifies 11 different oxygenates that are covered by the section 2262.6a(c)(1)-(3) prohibitions of the use in California gasoline of oxygenates other than MTBE and ethanol that have not been successfully subjected to a multimedia review by the California Environmental Policy Council. These prohibitions become applicable starting December 31, 2003. The Initial Statement of Reasons explained on pp. 29-30 that the 11 listed oxygenates comprised all of the compounds listed in the test method for determining the presence of oxygenates in gasoline – ASTM D 4815-99 – except MTBE and ethanol. The existence of each listed oxygenate in Table 5 of ASTM D 4815-99 was the sole reason the oxygenate was included on the list of covered oxygenates in the regulation. The listing of an oxygenate is not intended to indicate that it has actually been used as an oxygenate in CaRFG in the past, or might reasonably be expected to be used as a gasoline oxygenate in California in the future.

II. MODIFICATIONS TO THE ORIGINAL PROPOSAL

At the conclusion of the December 12, 2002 hearing, the Board approved two minor modifications to the original proposal. One modification amends section 2263(b) to expressly provide that the test method to be used in determining the oxygen from the 11 oxygenates in section 2262.6(c)(4), title 13, CCR, is American Society of Testing and Materials (ASTM) D 4815-99. This is the same test method that has previously been identified as the method for determining the MTBE and ethanol content of gasoline. The Initial Statement of Reasons had indicated that the oxygenates listed in section 2262.6(c)(4) represented all of the oxygenates for which a test method was identified in ASTM D 4815-99. The second modification was to the proposed new section 2273.5, which will require that a person delivering gasoline to a retail gasoline outlet must provide to the outlet operator or responsible employee, at the time of the delivery, documentation stating whether a load of gasoline does or does not contain ethanol. The modification, made in response to public comment, makes clear that if neither the outlet operator nor a responsible employee is at the outlet at the time of delivery, the documentation may be left at a reasonably secure location at the outlet. It is necessary and appropriate to assure there is a mechanism that does not preclude gasoline deliveries when there is nobody at the gasoline outlet. As noted in footnote 1, the text made available for supplemental public comment also showed corrections to the way subsection headings are shown in Barclays California Code of Regulations.

After the supplemental 15-day comment period, the staff incorporated into the Final Regulation Order additional nonsubstantial modifications that were needed in two other sections of the CaRFG regulations. The first renumbers what had been section 2266.5(h)(2) and (3) and corrects the headings so that they accurately describe the texts of the subparagraphs. Subsection 2266.5(h)(2) describes two exceptions, the first addressing protocols and the second addressing blending to meet a cap limit. Second, the reference in the second line of section 2272(e)(1)(B) has been corrected to refer to subsection (e)(1)(A) rather than (d)(1)(A). There neither is nor has been a section 2272(d)(1)(A), and the gasoline referred to in section 2272(e)(1)(B) is clearly intended to

refer to the gasoline described in the immediately preceding subsection (e)(1)(A). Third, a closing quotation mark has been added at the end of section 2273(a)(1). Each of these changes clarify without materially altering the requirements, rights, responsibilities, conditions, or prescriptions contained in the regulatory text. (see section 40, title 1, CCR). The Final Regulation Order also included a few additional nonsubstantial modifications to the sections originally being amended; these are identified in Attachment A hereto.

III. SUMMARY OF PUBLIC COMMENTS AND AGENCY RESPONSES

The Board received four written comments during the 45-day comment period prior to and/or at the December 12, 2002 hearing, from the Western States Petroleum Association (WSPA), ConocoPhillips, the Methanol Institute, and the California Independent Oil Marketers Association (CIOMA). At the hearing, the Board received oral testimony from one commenter, Jay McKeeman, on behalf of CIOMA. During the supplemental comment period, one comment was received, an email transmittal from Francisco Da Costa titled "Alternative Fuel Program and Muni."

Set forth below is a summary of each objection or recommendation specifically directed at the proposed amendments or to the procedures followed by the ARB in proposing or adopting the amendments, together with the agency response. Comments not involving objections or recommendations specifically directed towards the rulemaking, are generally not summarized below.

A. COMMENTS PRESENTED PRIOR TO OR AT THE HEARING

1. Comment: We fully support the Board's proposal to raise the allowable residual MTBE levels. (Methanol Institute)

Agency Response: It is not altogether accurate to characterize the amendments as raising the allowable residual MTBE levels. They extend the current schedule for reducing residual MTBE levels. MTBE residual levels would now be reduced in four steps instead of the three steps currently required by the regulation. The amendments provide an additional stage, lasting 6 months from the beginning of the MTBE ban, during which the allowable residual MTBE level is 0.60 volume percent – the level currently used to label MTBE-free gasoline – instead of 0.30 volume percent. For the remaining three steps the amendments provide additional time to reduce the residual MTBE to the levels already specified in the current regulation.

2. Comment: We have one concern with the proposed amendments regarding the requirement that multimedia evaluations be performed before the use of any oxygenate other than ethanol will be allowed. It seems unduly burdensome that other oxygenates are held to a higher standard than ethanol. In the past, the Methanol Institute and others have documented significant multimedia concerns with the broad use of ethanol. Our November 1998 report on "*The Fate and Transport of*

Ethanol in the Environment' prepared by Malcolm Pirnie, found that the presence of ethanol in plumes from leaking underground storage tanks would lead to the extension of BTEX plumes of up to 34 percent. If the state feels fit to ban the use of MTBE because of concerns about the contamination of the state's groundwater resources, surely the role of ethanol in extending BTEX plumes is worthy of investigation. (Methanol Institute)

Agency Response: The conditional prohibition of California gasoline produced with the use of any oxygenate other than ethanol or MTBE unless a multimedia evaluation is conducted was included as part of the original 1999-2000 CaRFG3 regulations. As part of the CaRFG3 rulemaking, an environmental assessment was conducted of the potential air, water and health impacts of ethanol in gasoline. That assessment was reviewed by the Environmental Policy Council in accordance with Health and Safety Code section 43830.8(h), part of the 1999 statute that requires multimedia assessments when the ARB considers adoption of regulations establishing a specification for motor vehicle fuel.

The environmental assessment of ethanol in gasoline included an air quality analysis conducted by the ARB, a ground and surface water analysis conducted by the State Water Resources Control Board (SWRCB), and an analysis of the potential health risks of ethanol in California conducted by the Office of Environmental Health Hazard Assessment (OEHHA). The SWRCB's analysis included consideration of whether the preferential degradation of ethanol in groundwater may result in longer benzene plume lengths where gasoline has leaked into the ground, and the 1998 Malcolm Pirnie report was one of the studies referenced in the SWRCB's report. At the conclusion of a January 18, 2000 hearing on the subject, the Environmental Policy Council adopted a resolution approving the overall *Health and Environmental Assessment of the Use of Ethanol as a Fuel Oxygenate* and the individual elements prepared by the ARB, SWRCB and OEHHA. The resolution also expressed the Council's determination that "there will not be a significant adverse environmental impact on public health or the environment, including any impact on air, water, or soil, that is likely to result from the change in gasoline that is expected to be implemented to meet the CaRFG3 regulations approved by the ARB."

It was because of the environmental evaluation of ethanol in California gasoline conducted in conjunction with the CaRFG3 rulemaking (and the ban of the use of MTBE) that the ARB included the requirement of a multimedia evaluation of *other* potential oxygenates before they could be used in gasoline subject to the CaRFG3 standards. This remains an appropriate approach. However, the ARB has continued to monitor the potential environmental impacts of the use of ethanol in the state's gasoline in conjunction with the SWRCB and others, and will continue to do so in the future.

3. Comment: We need to obtain Office of Administrative Law (OAL) approval of the ARB's July 25, 2002 CaRFG3 regulatory amendment postponing the imposition of the CaRFG3 standards and the prohibition of MTBE and oxygenates other than

ethanol in gasoline until December 31, 2003. Our industry needs legal certainty with respect to the approval of regulatory amendments, so they can move forward with their plans. (WSPA, ConocoPhillips)

Agency Response: The final rulemaking package was submitted to OAL on November 8, 2002 with a request for an early effective date for the amendments. The amendments were approved by OAL and filed with the Secretary of State on December 24, 2002, and they became effective on that date. Notification of OAL's final action was provided on the ARB's Internet site for the rulemaking: <http://www.arb.ca.gov/regact/mtbepost/mtbepost.htm> and on the Fuels Program's web site <http://www.arb.ca.gov/cbg/meeting/2002/mtg2002.htm>, with a link to the rulemaking documents. Also, ARB staff used an e-mail message to notify subscribers to the ARB's Fuels List server of the OAL action.

4. Comment: We also request that the Board utilize whatever process is available to expedite approval of the regulatory amendments adopted in this hearing since some of our companies have publicly reported that they will make the transition to MTBE-free gasoline in early 2003. Our industry needs expedited approval of these amendments, so that companies can move their plans forward with legal surety in 2003. (Western States Petroleum Association, ConocoPhillips)

Agency Response: We have sought to expedite completion of this rulemaking and are requesting an early effective date for the amendments when we submit the rulemaking package to OAL.

5. Comment: We are concerned about the supply of gasoline for unbranded, independent retailers in 2003. Ethanol oxygenated gasoline cannot be mixed with MTBE gasoline during the Summer RVP control season. This non-fungible fuel supply complicates the logistics of fuel delivery, particularly for the small independent distributor and retailer who rely on unbranded gasoline. Refinery problems, ethanol supply problems, and distribution problems could all mean regional or statewide outages of ethanol or MTBE gasoline. In addition, the inability to mix these fuels creates limitations in fuel exchanges or trades that have previously helped balance fuel shortages. Any disruptions in supply of Phase 3 gasoline, ethanol or MTBE will have a major impact on the price and supply of gasoline. (CIOMA)

Agency Response: The ARB staff has been working with CIOMA and the California Energy Commission (CEC) staff to identify contingency plans to deal with any shortages. ARB staff will continue to work with CIOMA and CEC staff to monitor the supply situation and determine the need for relief for the unbranded, independent retailers.

6. Comment: We have an issue regarding section 2273.5, the new regulation requiring documentation of the ethanol content of gasoline at the time of delivery of the gasoline to the retail station. This requirement may be impossible to meet if the

delivery is made at night when the retail station is closed and there is no owner or employee of the station available to provide the documentation to. A sentence could be added at the end of the section to read: "If there is no outlet operator or responsible employee available at the time of delivery of the fuel, the documentation can be left at the station." (CIOMA)

Agency Response: We agree that regulatory language should be added to address this issue. As discussed in Section II above, at the December 12, 2002 hearing, the ARB approved amendments that make clear that if neither the outlet operator nor a responsible employee is at the outlet at the time of delivery, the documentation may be left at a reasonably secure location at the outlet.

ATTACHMENT A

ADDITIONAL NONSUBSTANTIAL MODIFICATIONS INCORPORATED INTO THE FINAL REGULATION ORDER

The Final Regulation Order includes the following nonsubstantial modifications to sections 2261, 2262.6, 2263, and 2273.5, title 13, California Code of Regulations, made after publication of the 15-day notice of public availability of modified text.

Section 2261(b)(3)(B)3.: In the first line, a closing parenthesis symbol is added after “(b”.

Section 2262.6(a)(1): The underlining of the period at the end of the subsection is deleted.

Section 2262.6(b)(1): The underlining of “(1)” is deleted.

Section 2262.6(c)(4): Underlining of the eleven listed oxygenates is added; it was clear from the context that this was part of the all new text of new subsections (c)(2) - (c)(6).

Section 2262.6(c)(5): At the beginning of the new subsection, underlining of “(5)” is added.

Section 2263(b)(1) Corrections of printing errors in Barclays are made in footnotes c and d following the table. In the fifth to the last line of footnote c, “Dilute” is changed to “Diluted.” In footnote d, the spelling of “sulfur” is corrected the three times it appears.

Section 2273.5: Two grammatical or editorial additions to the new text are added. In the second line, “at time of delivery” is changed to “at the time of delivery.” In the fourth line, “which may identify the volumetric amount of ethanol” is changed to “which may identify the volumetric amount of ethanol in the gasoline.”