

California's Failure to Enforce its Regulations concerning Underground Storage Tanks

A Submission to the Commission on Environmental Cooperation Pursuant to Article 14 of the North American Agreement on Environmental Cooperation

October 14, 1999

Summary

California has a sophisticated regulatory and administrative structure to protect the environment, including water resources. Included are measures to prevent the release of hazardous materials, such as gasoline, from underground storage tanks (USTs). The legislation and regulations which comprise the regulatory and administrative structure are "environmental laws" for purposes of Articles 14(1) and 45(2) of the North American Agreement on Environmental Cooperation (the Agreement).

Gasoline is a complex product made up of a range of components and additives, and many of these, such as benzene, pose health risks in varying degrees. USTs represent a key component of the gasoline infrastructure, and a large proportion of all UST's contain gasoline.

California has failed to enforce its environmental laws related to USTs, allowing gasoline to be released into the environment from leaking USTs. This has resulted in past and ongoing gasoline releases causing contamination of California's environment. Furthermore, as only a portion of USTs are regulated, California has also failed to enforce its environmental laws related to environmental and water resource protection by not regulating all sources of environmental contamination.

In its December 17, 1998 report on California's Drinking Water¹, the California State Auditor roundly criticized state, regional and local officials for failing to enforce many of these environmental laws. The State Auditor noted that California's regulatory process is flawed and listed a range of serious problems of enforcement, or lack of enforcement, which have allowed USTs to release gasoline into the environment. That report did not investigate California's broader failure to enforce its environmental laws by not regulating all sources of environmental contamination.

¹ *California's Drinking Water: State and Local Agencies Need to Provide Leadership to Address Contamination of Groundwater by Gasoline Components and Additives*, California State Auditor, December 1998.

The State Auditor made a number of recommendations which, were they put into effect, could address the problem of leaking USTs and enhance protection of California's environment.

The State Auditor also issued a Report criticizing the Lahontan Regional Water Quality Control Board for its failure to effectively enforce UST regulations within its region.² This Report demonstrates that the best regulatory system is entirely ineffective if there is no administrative will to enforce it.

On March 25, 1999, California Governor Gray Davis issued Executive Order D-5-99 (“Executive Order”) requiring that Methyl Tertiary-Butyl Ether (“MTBE”) be phased-out of gasoline by no later than December 31, 2002.³ The Executive Order notes 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”⁴ (emphasis added). The Executive Order requires “The State Water Resources Control Board [to] seek legislation to extend the sunset date of the Underground Storage Tank Cleanup Fund to December 31, 2010”, more than eleven years after the date of the Executive Order and more than 22 years after the original Federal UST regulations were implemented. This Order acknowledges the UST issue, but focuses attention on one gasoline component, namely MTBE. It thus treats a symptom (MTBE) of gasoline leakage, rather than the leakage itself, deflecting attention from the State’s failure to enforce its environmental laws. Further, by noting that MTBE poses a risk to the environment because of leaking USTs, the Executive Order also effectively admits that California has failed to enforce its environmental laws.

Methanex is concerned with the harm which has been, and continues to be, caused to the environment by California’s failure to enforce its environmental laws. Methanex advocates strict enforcement of these environmental laws to protect the environment. Methanex believes that this is an important matter which should be addressed by the Commission Secretariat and by the Commission on Environmental Cooperation (CEC). The evidence that state officials are not enforcing their environmental law is clear. The harm caused by this lack of enforcement is also clear.

Therefore, Methanex requests that the Secretariat prepare a complete and thorough factual record for presentation to the CEC pursuant to Article 15 of the Agreement.

The Submitting Party

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² *Lahontan Regional Water Quality Control Board: Has Not Accomplished All of its Regulatory Work and Has Not Always Vigorously Acted Against Water Quality Violators*, California State Auditor, November 1998.

³ Executive Order D-5-99, March 25, 1999, paragraph 4

⁴ *Ibid*, page 1

Methanex Corporation (“Methanex”) was incorporated under the laws of the province of Alberta, which adheres to the Agreement, and is continued under the *Canada Business Corporations Act*, making it a federally-incorporated company.

Methanex produces just one product, methanol, which it exports (among other destinations) to the United States for sale and distribution to U.S. refiners and other manufacturers through its U.S. subsidiaries. A major portion of the methanol exported to the U.S. is used in the production of MTBE.

The Issues

Methanex submits that:

- The State of California and/or the United States of America, has failed to enforce California’s environmental laws and regulations related to water resource protection and to the regulation of USTs; and
- The State of California has failed to properly protect water resources by not regulating all USTs.

The environmental laws which are not being enforced by the State of California and/or the United States of America, include the following:

- Underground Storage Tank Regulations (California)
- California Water Code (California)
- Safe Drinking Water Act (U.S.)
- U.S. Clean Water Act (U.S.)

As a result of this failure to enforce existing laws and regulations, harm has been caused, and will continue to be caused, to the environment in the State of California.

The Regulatory and Administrative Framework

California has a complex infrastructure for the distribution and storage of gasoline in the state, and has in place a range of regulations which affect this system and/or are intended to protect the environment. The gasoline distribution system reportedly includes approximately 15,675 regulated USTs⁵; it is not known how many unregulated USTs exist. USTs are commonly used by service stations, but are also used by farms, institutions and public services.

Gasoline is a hazardous material which can easily contaminate the environment if not properly stored or handled. Gasoline is a complex product comprised of hundreds of components, many of which pose health risks in varying degrees. For example, benzene, a common gasoline component present in most every gallon of gasoline, is a known

⁵ Ibid, page 9.

human carcinogen. Gasoline released from USTs has contaminated California's environment.

Because of the potential risk posed by gasoline released from leaking USTs, California law requires that regulated USTs be installed under prescribed conditions and maintained in good order, including in theory, if not in practice, requirements related to the detection, reporting and prompt remediation of leaks. California also has an administrative structure, including state and local officials, to ensure compliance with the legislation and regulations by owners and operators of regulated USTs. California has not effectively enforced these laws and regulations.

In addition, many of the State's USTs are unregulated, and thus they are not subject to any controls.

(a) The Regulatory Structure

Beyond the specific provisions related to USTs in the Regulations, U.S. federal and state law has been adopted to protect the environment from contamination generally. The *California Water Code* specifically states,

“The Legislature further finds and declares that the health, safety and welfare of the people of the state requires that there be a statewide program for the control of the quality of all waters of the state; that the state must be prepared to exercise its full power and jurisdiction to protect the quality of the waters in the state from degradation originating inside or outside the boundaries of the state; ...”⁶

The *California Water Code* designates the State Water Resources Control Board and the nine regional boards as the principal state agencies with primary responsibility for the coordination and control of water quality.⁷ A copy of the relevant portions of the Code is attached as Annex A.

The U.S. *Safe Drinking Water Act* establishes federal standards for drinking water. Section 3 of the *Safe Drinking Water Act Amendments of 1996* states, “safe drinking water is essential to the protection of public health”.⁸ A copy of the relevant portions of the Act is attached as Annex B.

The U.S. *Clean Water Act* indicates that the state governments have the primary responsibility to “prevent, reduce and eliminate pollution”.⁹ However, Congress specifically stated that, among its objectives, the Act is intended to restore and maintain “the chemical, physical and biological integrity of the Nation's waters.” To achieve this objective, the Act states, “it is the national policy that the discharge of toxic pollutants in

⁶ California Water Code, Section 13000

⁷ Ibid, Section 13001.

⁸ 42 USC 201, Section 3(1).

⁹ U.S.C., Title 33, Section 1251(b).

toxic amounts be prohibited.”¹⁰ A copy of the relevant portions of the Act is attached as Annex C.

The primary legislative vehicle for addressing California’s USTs is in the *California Code of Regulations*. The *Underground Storage Tank Regulations* define UST as any one or combination of tanks, including pipes and connections, used for the storage of “hazardous substances” and which is “substantially or totally below ground”.¹¹

“Hazardous Substances” are defined in the Regulations as any liquid or solid substance, unless the Department, in consultation with the board, determines that the substance could not adversely affect the quality of the waters of the state. Gasoline is a hazardous substance for purposes of these regulations.¹²

The purpose of the Regulations is “to protect waters of the state from discharges of hazardous substances from underground storage tanks.”¹³ California reportedly has approximately 16,000 drinking water sources¹⁴ which are intended to be protected by this regulation.

This Regulation goes on to state,

“... construction requirements for new underground storage tanks; establish separate monitoring requirements for new and existing underground storage tanks; establish uniform requirements for unauthorized release reporting, and for repair, upgrade, and closure of underground storage tanks; and specify variance request procedures.”¹⁵

The remainder of the Regulations set out these specific rules related to USTs. A copy of the *Underground Storage Tank Regulations* is attached as Annex D.

(b) The Administrative Structure

The state and local officials charged with administration of these regulations include the California Environmental Protection Agency (Cal/EPA), the California State Water Resources Control Board and the nine Regional Water Boards, and the Department of Health Services.

The Mission Statement of Cal/EPA indicates that the Agency’s goal is to, “... improve environmental quality in order to protect public health, the welfare of our citizens, and California’s natural resources.” A copy of the Mission Statement is attached as Annex E.

¹⁰ Ibid, Section 1251(a)(3)

¹¹ California Code of Regulations, Title 23, Division 3, Chapter 16: Underground Storage Tank Regulations, Section 2610(x)(1).

¹² Ibid, Section 2610(f).

¹³ Ibid, Section 2620(a).

¹⁴ California Auditor’s Report, page 2

¹⁵ Underground Storage Tank Regulations, Section 2620(a)

The Mission Statement of the State Water Resources Control Board is to "... preserve and enhance the quality of California's water resources, and ensure their proper allocation and efficient use for the benefit of present and future generations."¹⁶ Virtually identical Mission Statements have been adopted by each of the nine Regional Boards.

In its 1998 Strategic Plan, Cal/EPA states, as an objective, the following:

"Enhance compliance by maintaining firm, fair and consistent enforcement of laws and regulations, including effective oversight policies to ensure environmental protection efforts at all levels are consistent with State requirements."¹⁷

Cal/EPA has also committed itself to ensuring compliance with California UST regulations.¹⁸ A copy of the 1998 Strategic Plan is attached as Annex F.

State and local officials are not only charged with administering the legislation and regulations respecting the environment and USTs, it is clear that they see enforcement of these regulations as one of their primary objectives.

The Measures at issue constitute "Environmental Law"

The cited legislation and regulations adopted by California and the U.S. federal government, and administered by the state agencies, are intended to protect the environment from releases of hazardous materials.

The California Water code is intended to protect water quality in general, while the *Underground Storage Tank Regulations* are specifically intended to protect water resources and especially drinking water from discharges of hazardous substances from USTs.

The stated objective of the various state agencies, and specifically of the Cal/EPA, is to ensure compliance with these regulations to achieve the regulatory objective.

Consequently, the legislation and regulations related to water quality and resource protection and specifically to USTs are "environmental law" for purposes of Articles 14 and 45(2) of the Agreement.

California has Failed to Enforce its Environmental Laws

Despite the regulatory and administrative structure to protect the environment from gasoline released from some USTs, state and local officials have failed to strictly enforce

¹⁶ Ibid.

¹⁷ Cal/EPA 1998 Strategic Plan: Objectives & Strategies.

¹⁸ Cal/EPA 1998 Strategic Plan: Cal/EPA Actions – Preventing Pollution and Stopping Polluters.

their environmental laws and have failed to regulate other USTs. USTs in California, both regulated and unregulated, continue to release gasoline into the environment.

This was the finding of the California State Auditor in its December 17, 1998 Report.¹⁹ A copy of the Report is attached as Annex G.

The Report was prepared at the request of the California Joint Legislative Audit Committee. It was intended to review improvements needed to better protect California's groundwater from contamination by gasoline components and additives.

The Report severely criticized state officials for failing to take adequate steps to protect California groundwater. It notes that the State has a "flawed regulatory process for ensuring that groundwater sources provide drinking water free of gasoline contamination."²⁰

At page 15, the Report states that,

"The State of California has missed opportunities to aggressively address the problem of gasoline contamination in our drinking water even though the State has had sufficient evidence that leaking storage tanks and gasoline additives pose a major threat to California's groundwater."

State officials were criticized for not promptly addressing contamination resulting from leaking storage tanks. Officials were criticized because they took no action despite "ample" evidence that gasoline is leaking from underground storage tanks resulting in contamination of numerous ground water sites and drinking water wells.²¹

The Report notes that the State UST programs require potential UST applicants to describe their safeguards for preventing or detecting leaks from their tanks.²² It also notes that officials are required to inspect each tank at least once every three years to determine whether it complies with construction standards, whether it complies with monitoring and testing requirements, and whether it is in safe operating condition.

Further, tank owners or operators are required to notify the local agency immediately about any leaks or spills into the soil or groundwater and then to submit a written report within five days documenting the incident. When a tank has leaked and the implementing agency has identified the contamination, the owner or operator must clean up the contaminated site.

¹⁹ *California's Drinking Water: State and Local Agencies Need to Provide Leadership to Address Contamination of Groundwater by Gasoline Components and Additives*, California State Auditor, December 1998.

²⁰ *Ibid*, page 23.

²¹ *Ibid*, pages 1 and R-19, point 2.

²² *Ibid*, page 13.

However, with respect to the operation of these programs, the Report found that,

- UST owners and operators are not promptly reporting threats to drinking water;²³
- regulatory agencies have not been “sufficiently aggressive” in taking action against individuals that violate water quality laws;²⁴
- state legislation designed to identify leaking USTs and ensure that officials require the owners or operators to clean up the leak promptly “is not producing the desired outcome”;²⁵
- a 1996 California study determined that “leaks are not discovered until the tanks [USTs] are removed, rather than detected as part of an ongoing monitoring program;”²⁶
- some tank owners and operators have not obtained required permits and would not be identified to state officials;²⁷
- for 11 of the 43 cases reviewed by the California State Auditor, contamination was discovered upon removal of an unpermitted, and consequently unmonitored, UST;²⁸
- a survey of USTs with permits found a 29 month gap between the most recent UST monitoring report and discovery of a leak, indicating a failure on the part of the owner/operator to monitor their UST.²⁹

All of these instances demonstrate the State’s failure to enforce its UST regulations.

The Report also noted that tank owners and operators were given ten years, ending December 22, 1998, to *remove, replace or upgrade* tanks that do not meet certain state and federal standards. After January 1, 1999, tank owners that have not upgraded by the deadline were not to receive petroleum products. As of September 30, 1998, the 27 implementing agencies surveyed by the California Auditor reported having issued upgrade certificates for only 18.5% of the 15,675 regulated tanks. At the time the deadline passed, EPA provided waivers for many non-complying tanks – to allow them to continue taking delivery of gasoline. In fact, a careful reading of Executive Order D-5-99, issued by California Governor Davis in March 1999, indicates an intention to permit a further more than eleven years for tank owners and operators to bring their tanks into compliance with state and federal law.³⁰ Such allowances demonstrate a lack of commitment by the State to enforce the UST regulations.

²³ Ibid, page 15.
²⁴ Ibid, page 15.
²⁵ Ibid, page 23.
²⁶ Ibid, page 23.
²⁷ Ibid, page 24.
²⁸ Ibid, page 25.
²⁹ Ibid, page 24.
³⁰ Executive Order, paragraph 9.

The Findings in the Report, at pages 1 to 2, are particularly damning. The Auditor's Report found that:

- in spite of mounting evidence of gasoline contamination of drinking water, the Department of Health Services and the State Water Resources Control Board missed opportunities to aggressively address the problem;
- the State has been inconsistent in its efforts to identify and clean up leaking underground storage tanks;
- the California Environmental Protection Agency's process for auditing local agencies responsible for issuing permits to storage tank operators and for monitoring tanks requires modification to ensure that the agencies catch all leaks and deficiencies;
- the Department of Health Services and the state and regional boards are not making certain that public water system operators, storage tank owners or operators, and regulatory agencies responsible for detecting and cleaning up chemical contamination are doing their jobs; and
- the Department of Health Services, the regional boards, and the local agencies have not vigorously enforced laws that require prompt follow-up monitoring for chemical findings and contaminated sites, notifying the public about chemicals found in groundwater, and managing the clean-up of chemical contamination of groundwater.

With respect to USTs and drinking water, the Report recommends (pages 2-4) the following:

California Environmental Protection Agency: that the Agency take the following steps with respect to underground storage tanks:

- ensure that local agencies increase their efforts to identify storage tanks without permits, issue permits as appropriate, monitor storage tank safety, and penalize owners or operators that delay reporting leaks; and
- modify procedures for evaluating local agencies' adherence to program requirements for leaking storage tanks by requiring its own evaluators to review these cases.

Department of Health Services: that the following steps be taken to manage threats to drinking water systems:

- strengthen its process for promptly obtaining and analyzing laboratory results from all public water systems so it can quickly notify other agencies of threats to drinking water;

- ensure that it assesses the safety of drinking-water sources for public water systems at least once every three years, as required by state regulations;
- consistently enforce the water quality laws by following up on corrective actions taken by the district officers and the local agencies; and
- establish a geographical information system (GIS) conforming to the federal Drinking Water Source Assessment Protection Program, help the State monitor risks to drinking-water sources, and allow for state and local agencies to exchange accurate information about these risks.

State Water Resources Control Board: that the following steps be taken to help prevent further contamination of drinking wells:

- assist in developing Health Services' GIS by correcting problems with the state board's Leaking Underground Storage Tank Information System (LUSTIS) so that this database is accurate and compatible with the GIS.

Regional boards and local oversight programs: that boards and oversight programs responsible for managing groundwater sites take the following action:

- to notify Health Services promptly about potential contamination;
- to use their enforcement authority to penalize storage tank owners or operators who do not comply with the law; and
- to continuously follow-up on enforcement actions and clean-up efforts.

Unfortunately, while identifying many serious issues pertaining to mostly regulated USTs, the Report does not directly address the issue of unregulated USTs and their inevitable significant contribution to environmental contamination. Not managing all sources of contamination (such as unregulated USTs) represents a perhaps even more serious failure by California to enforce its environmental laws.

The California State Auditor has also issued a Report, dated November 1998, which reviewed the performance of the Lahontan Regional Water Quality Board.³¹ In its Report, the State Auditor criticized the Board for not promptly updating or reissuing permits, performing inspections or receiving and reviewing monitoring reports from high-risk dischargers. The State Auditor found that this inaction is "reducing the effectiveness of preventive mechanisms established to identify water quality problems as early as possible".³² The State Auditor cited an example, at pages 20 and 22 of the Report, of the Board failing to take action to enforce clean-up and abatement orders issued to a gasoline service station. This Report also demonstrates that the lack of

³¹ *Lahontan Regional Water Control Board*, California State Auditor, November 1998

³² *Ibid*, page 12.

adequate enforcement of existing environmental laws is causing harm to the environment. A copy of the Report is attached as Annex H.

Further, in testimony to a public hearing on the University of California Report on the health and environmental effects of Methyl Tertiary-Butyl Ether, Mr. Jim White of Environmental Government Relations, a consulting firm, and President of the Orange County Industrial Environmental Coalition, stated,

“While public and political outrage are directed at MTBE and gasoline, we should all be outraged at the rate the tank systems are leaking and failing without detection.

I am further outraged that most of the proposed solutions do not address the root cause of this continuing threat to groundwater. That is a lack of enforcement leading to non-compliance. Most of the suggested underground tank program improvements propose increasing the severity of an already [existing] program. Without educated and consist[ent] enforcement, no amount of severity added to an already severe tank program is going to improve the fuel containment release detection of tank releases. While there are many other tank program adjustments to be considered, enforcement must be assured, to make the program work.”³³

A copy of the transcript for February 19, 1999 is attached as Annex I.

This testimony also underscores the point that regulatory systems are only effective if there is an administrative will to ensure enforcement. In California there appears no administrative will to enforce its environmental laws.

California has taken no steps to improve enforcement of its environmental laws. California Governor Davis issued Executive Order D-5-99, which is ostensibly intended to protect groundwater from contamination, but which is inadequate, because it does not address the UST problem, and wrong-headed, because it focuses attention away from the UST problem. The Executive Order recognizes the problem of leaking USTs and directs that a range of action be undertaken. But, it fails to address the requirement to improve enforcement of existing regulations, fails to recognize the need to regulate all USTs and fails to bring urgency to UST clean-up. Worse, it focuses attention away from the UST issue by phasing-out the use of MTBE. Rather than taking action to ensure enforcement of existing regulations, the Executive Order skirts the issue.

The Executive Order also states, “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.” [emphasis added] This statement is made in support of the phase-out of MTBE set out in the Executive Order. But, by recognizing that MTBE poses a risk because of leaking USTs, the Executive

³³ California Environmental Protection Agency, *Public Hearing to Accept Public Testimony on the University of California’s Report on the Health and Environmental Assessment of Methyl Tertiary-Butyl Ether (MTBE)*, Transcript of Proceedings, February 19, 1999, at pages 134 – 135.

Order effectively admits that California authorities have failed to enforce their own environmental laws. If USTs were not leaking, MTBE would not pose a threat. Consequently, the risk to the environment identified in the Executive Order is not from MTBE, but is from leaking USTs which in many instances are not even regulated, thus contravening California and federal environmental law. A copy of the Executive Order is attached as Annex J.

Further, Bill SB 989 was introduced and passed in the California State. The Bill, appears to require state officials to regulate USTs to ensure that they are properly permitted and inspected. However, the Bill does not address the underlying problem of a lack of administrative will. The problems in California are not related to the lack of a regulatory structure; regulations are in place and have been in place for at least ten years. The regulations are simply not being enforced. California has the ability, right now, to ensure compliance with its environmental laws, and it is simply refusing to take the necessary steps to deal with these issues. The new legislation does not address this issue.

Consequences of California's Failure to Enforce its Environmental Laws

Because officials have failed to enforce California's environmental laws respecting water protection and USTs, gasoline has been, and continues to be, released into the environment from leaking USTs.

Because California has failed to regulate all USTs, an unknown number of unregulated USTs have released and will continue to release gasoline to the environment.

Because of the Executive Order, California is deflecting attention from proper environmental protection.

As a result, gasoline poses an existing and ongoing threat to California's environment, which includes soil, air and water contamination.

Relief Sought

In light of the foregoing, Methanex requests that the Secretariat prepare a complete and thorough factual report pursuant to Article 15 of the Agreement.

Methanex submits that the matters raised in its submission are within the jurisdiction of the CEC. Methanex further submits that the matters raised in its submission meet the requirements of Article 14(2) of the Agreement. Consequently, the Secretariat can rely on the submission provided by Methanex to develop a factual record.

- (a) The Submission is within the Jurisdiction of the North American Commission on Environmental Cooperation

The matters raised in this submission meet the requirements of Article 14(1). First, the submission is made by a person resident within the NAFTA. Methanex is based in Vancouver, British Columbia, Canada, was incorporated pursuant to the laws of the province of Alberta and is continued under the *Canada Business Corporations Act*.

Second, the California measures in question are “environmental laws” for purposes of Articles 14 and 45(2)(a) of the Agreement.

Third, the submission is aimed at enforcement, and not at harassing any particular company or industry in the United States. Methanex notes that California authorities have failed to enforce their environmental laws with the result that gasoline released from USTs has and continues to contaminate the environment, including soil, air and water. By failing to enforce these laws, the bodies referred to in the submission have failed to, “protect waters of the state from discharges of hazardous substances from underground storage tanks”³⁴ and have failed to meet the objectives of their own Mission Statements. Methanex submits that active enforcement of California’s existing environmental laws will ensure that gasoline is not unnecessarily released into the environment from USTs and that such diligent enforcement of environmental laws will result in increased protection for the environment.

Fourth, after the Executive Order was issued, Methanex has issued a Notice of Intention to bring an investor-state dispute against the United States pursuant to the provisions of NAFTA Chapter 11, Section B. As a condition for taking this action, NAFTA Article 1121(1)(b) requires that Methanex waive certain rights it may have had to initiate or continue an action in a domestic court. The investor-state dispute could only result in a damage award, not in an Order directing California and/or the United States to enforce its regulations and legislation related to USTs. Methanex does not believe there is any U.S. domestic judicial administrative proceeding available to it, as a practical matter, which would require California or the USA to enforce the subject environmental laws and regulations.

Fifth, Methanex has communicated its concerns with California officials. In its letters to the Honorable Gray Davis, Governor of California, Methanex raised concerns with gasoline contamination caused by releases to the environment. Methanex also provided Governor Davis with a copy of the Methanex Five Point Plan, which discusses the serious problems associated with gasoline released from leaking USTs, and that they have been allowed to leak for far too long. In its Five Point Plan, Methanex also notes that for each gallon of MTBE released, at least a further eight gallons of other gasoline components are also released. Elimination of MTBE per the Governor’s Executive Order will not address the remaining eight gallons and the gallon of MTBE will merely be replaced by some other gasoline component. The net result is that gasoline contamination of the environment will continue. To date, Methanex has received no

³⁴ Ibid, Section 2620(a).

response. Methanex also publicly released its Five Point Plan, but, to date, there has been no comment or other response to the Plan from the U.S. or California governments. Copies of the correspondence and the Five Point Plan are attached as Annex K.

Finally, Methanex offers that the submission contains more than sufficient information to allow the Secretariat to conduct its review.

Therefore, Methanex submits that the North American Commission for Environmental Cooperation has the jurisdiction to accept and act on this submission.

(b) The Submission Meets the Requirements of Article 14(2) of the Agreement

Methanex believes that its submission meets the requirements of Article 14(2) of the North America Agreement on Environmental Cooperation

First, the submission clearly indicates that harm has resulted, and continues to result, from California's lack of enforcement of its environmental laws and regulations. Gasoline, which is a hazardous substance, continues to be released to the environment and continues to contaminate the environment; soil, air and water. As clearly pointed out by the California State Auditor, there is no need for this continuing contamination.

Second, the submission raises issues that would clearly advance the objectives of the Agreement. Specifically, the following objectives would be addressed:

Article 1(a), the objective to foster protection and improvement of the environment for future generations;

Article 1(d), the objective to support the environmental goals and objectives of the NAFTA;

Article 1(g), the objective to enhance compliance with, and enforcement of, environmental laws and regulations;

Article 1(j), the objective to promote pollution prevention policies and practices;

Third, the submission is not drawn at all from mass media reports. Rather, it is drawn from legislation and regulations, reports and other documents prepared by California agencies, including reports of the California State Auditor. These materials are compelling and have greater probative value than mass media reports.

Finally, Methanex is unaware of any judicial or administrative process underway which would result in an Order requiring California officials to enforce their existing legislation and regulations. As noted above, the notice of a potential proceeding under the NAFTA by Methanex pursuant to the NAFTA Article 1121(1)(b), provides only a potential for an

award of damages and cannot result in any order requiring California or the USA to enforce the subject environmental laws and regulations.

Methanex states that its submission meets the requirements of Article 14(2) of the Agreement.

(c) A Factual Record is not Precluded by Article 14(3)

As noted above, Methanex is unaware of any pending judicial or administrative proceeding that would require California to enforce the environmental laws which are the subject of this submission. Accordingly, Methanex submits that none of the contingencies in Article 14(3) preclude the CEC from preparing a factual record.

Conclusion

For the foregoing, Methanex requests the Commission to prepare a complete and thorough factual report pursuant to Article 15 of the North American Agreement on Environmental Cooperation.