

State of California
AIR RESOURCES BOARD

Resolution 04-40

November 18, 2004

Agenda Item No.: 04-10-5

WHEREAS, section 39003 of the Health and Safety Code identifies the Air Resources Board (ARB or Board) as the state agency charged with coordinating efforts to attain and maintain ambient air quality standards;

WHEREAS, sections 39600 and 39601 of the Health and Safety Code authorize the Board to adopt standards, rules, and regulations and to do such acts as may be necessary for the proper execution of the powers and duties granted to and imposed upon the Board by law;

WHEREAS, the Legislature enacted section 39612 of the Health and Safety Code as part of the California Clean Air Act of 1988;

WHEREAS, as originally enacted, Health and Safety Code section 39612 empowered the Board to assess fees on nonvehicular sources (facilities) that were authorized by air pollution control and air quality management district (district) permits to emit 500 tons per year or more of any nonattainment pollutant or its precursors, and the total amount of assessed fees was capped at \$3,000,000 per year;

WHEREAS, pursuant to Health and Safety Code section 39612, the Board approved fee regulations in 1989 and has collected fees from facilities each year since that time;

WHEREAS, in 2003, the Legislature enacted Assembly Bill 10X (AB 10X; Stats. 2003, ch. 1X) to shift more of the Board's stationary source budget from the General Fund to fee-supported programs;

WHEREAS, AB10X amended section 39612 of the Health and Safety Code to:
(1) increase the cap on stationary source permit fees from \$3 million to \$13 million for fiscal year 2003-2004, and allow the cap to be adjusted annually thereafter for inflation;
and (2) expand the universe of facilities subject to the fees by specifying that the fees are to be collected from facilities authorized by district permits to emit 250 tons or more per year of any nonattainment pollutant or its precursors (large facilities);

WHEREAS, AB10X also authorized the ARB for the first time to assess fees on manufacturers of consumer products and architectural coatings whose total sales of consumer products and architectural coatings will result in the emission in California of 250 tons or more per year of volatile organic compounds (large manufacturers);

WHEREAS, in 2003 the Board approved amendments to the fee regulations to implement the provisions of AB 10X;

WHEREAS, the amended fee regulations establish a process in which the ARB's Executive Officer assesses fees each year on large facilities and large manufacturers of consumer products and architectural coatings; the regulations specify that uniform fees (on a dollar per ton basis) are to be assessed on each source subject to the regulations;

WHEREAS, California law requires that there must be an adequate "nexus" between a fee and the program activities funded by the fee; if an adequate nexus does not exist, the "fee" may be an illegal "tax";

WHEREAS, the nexus for the fee regulations reflects the point at which the fees assessed on a source category (i.e., consumer products and architectural coatings) are greater than the resources expended on the control of emissions from that source category;

WHEREAS, in developing the amended fee regulations the ARB staff used two different approaches to calculate the nexus for consumer products and architectural coatings; the first method was based on emissions and the second was based on a determination of program costs;

WHEREAS, for fiscal year 2003-2004 the Legislature authorized the ARB to collect \$17.4 million in fees from large facilities and large manufacturers of consumer products and architectural coatings, and for fiscal year 2004-2005 the Legislature authorized the ARB to collect an additional \$2.6 million, for a total of \$20 million in fees;

WHEREAS, if the ARB were to collect the entire \$20 million on a uniform basis from all source categories under the existing fee regulations, the fees assessed on manufacturers of consumer products and architectural coatings would significantly exceed the lower emissions-based threshold for the nexus determination;

WHEREAS, assessing the additional \$2.6 million only on facilities (up to the statutory cap specified in Health and Safety Code section 39612(f)) would avoid any potential nexus problems with consumer products and architectural coatings;

WHEREAS, staff has proposed regulatory amendments to the existing fee regulations, set forth in Attachment A hereto, that would assess supplemental fees on facilities;

WHEREAS, the proposed amendments would:

Establish a procedure to collect supplemental fees from facilities in fiscal years where the State Legislature has authorized the ARB to collect fees in excess of \$17.4 million; the remaining \$17.4 million would continue to be collected on a uniform basis from facilities, consumer products manufacturers, and architectural coatings manufacturers, as specified in the existing fee regulations;

Specify that the proposed supplemental fees would be collected only in fiscal years where the Legislature has authorized the Board to collect fees in excess of \$17.4 million;

Clarify that under no circumstances will the total amount of fees collected from facilities exceed the amount authorized by Health and Safety Code section 39612(f) or other provisions of State law;

WHEREAS, the proposed amendments would also include two new provisions in order to address possible future changes in State law; these provisions would apply to both the existing fees and the supplemental fees, and would allow ARB to comply with possible future changes in State law without having to modify the regulations:

The first provision directs the ARB Executive Officer to comply with any future direction from the Legislature that particular amounts or percentages are to be collected from the categories of nonvehicular sources, consumer products, or architectural coatings; and

The second provision directs the ARB Executive Officer to use any modified emissions threshold (i.e., different from the existing 250 tons per year threshold) enacted by the Legislature.

WHEREAS, the California Environmental Quality Act and Board regulations require that no project that may have significant adverse environmental impacts be adopted as originally proposed if feasible alternatives or mitigation measures are available to reduce or eliminate such impacts;

WHEREAS, a public hearing and other administrative proceedings have been held in accordance with the provisions of chapter 3.5 (commencing with section 11340), part 1, division 3, title 2 of the Government Code and the Board has considered the testimony presented by interested persons and the staff;

WHEREAS, in consideration of the staff report, written comments, and public testimony it has received, the Board finds that:

The State of California is experiencing a significant imbalance between revenues and expenditures;

Recovering program costs is critical to the Board's mission of reducing air pollution;

Facilities, consumer products, and architectural coatings are large contributors in California of nonattainment pollutants or their precursors;

Assessing the supplemental fees only on facilities (up to the statutory cap specified in Health and Safety Code section 39612(f)) would avoid any potential nexus problems with consumer products and architectural coatings and reflects a conservative approach by insuring that lower emissions-based nexus threshold will not be exceeded for FY2004-2005 and in future years;

The supplemental fees assessed on facilities will be expended by the ARB only for the purposes of recovering the costs of state programs related to large nonvehicular sources (facilities), as specified in Health and Safety Code section 39612;

The proposed mechanism for identifying the supplemental fees to be assessed in each fiscal year will eliminate the need for future annual rulemakings, while assuring that affected companies have a meaningful opportunity to provide input on the emissions that serve as a basis for the assessments;

Adoption of the proposed amendments is necessary for the Board to carry out its legal responsibilities under division 26 of the Health and Safety Code;

The proposed amendments are consistent with the provisions of AB 10X and are necessary and appropriate to implement sections 39612 and 39613 of the Health and Safety Code;

The proposed amendments will not have a significant adverse economic impact on the affected companies or on other businesses or private persons affected;

The proposed amendments will not have an adverse impact on the development, adoption, implementation, and enforcement of environmental laws, regulations, and policies associated with the ARB's environmental justice program; and

No reasonable alternative considered by the ARB, or that has otherwise been identified and brought to the attention of the ARB, would be more effective in carrying out the purpose for which the amendments are proposed or would be as effective and less burdensome to affected private persons or businesses than the proposed action.

WHEREAS, the Board has determined, pursuant to the requirements of the California Environmental Quality Act and the Board's regulations, that this regulatory action will not have any significant adverse impact on the environment.

NOW, THEREFORE, BE IT RESOLVED that the Board hereby adopts new sections 90805 and 90806; and adopts proposed amendments to sections 90800.8 and 90803, title 17, California Code of Regulations, as set forth in Attachment A.

BE IT FURTHER RESOLVED that, to provide as much advance notice as possible before the operative date of the amendments, the Board directs the Executive Officer to provide preliminary written notification at the earliest practicable date to each facility operator of the expected supplemental fees to be assessed for the 2004-2005 fiscal year.

I hereby certify that the above is a true and correct copy of Resolution 04-40, as adopted by the Air Resources Board.

Lori Andreoni, Clerk of the Board

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Identification of Attachments to the Board Resolution

Attachment A: Proposed Amendments to the Nonvehicular Source, Consumer Products, and Architectural Coatings Fee Regulations (section 98000.75 - 90806, title17, California Code of Regulations), as set forth in Appendix A to the Initial Statement of Reasons, released October 1, 2004.