

State of California
AIR RESOURCES BOARD

**Notice of Public Availability of Modified Text and
Availability of Additional Documents**

PUBLIC HEARING TO CONSIDER ADOPTION OF A PROPOSED
AB 32 COST OF IMPLEMENTATION FEE REGULATION
AND
A PROPOSED AMENDMENT TO THE EXISTING REGULATION FOR THE
MANDATORY REPORTING OF GREENHOUSE GAS EMISSIONS

First Public Hearing Date: June 25, 2009
Second Public Hearing Date: September 25, 2009
Public Availability of Modified Text Date: February 26, 2010
Deadline for Public Comment: March 15, 2010

At its September 25, 2009 public hearing, the Air Resources Board (ARB or Board) approved the adoption of sections 95200 to 95207, title 17, California Code of Regulations (CCR), which comprise the AB 32 Cost of Implementation Fee Regulation (fee regulation). The fee regulation imposes fees on sources of greenhouse gas emissions to carry out Assembly Bill 32 (AB 32; Chapter 488, Statutes of 2006). The Board also approved an amendment to section 95104, title 17, CCR, which requires use of the ARB Greenhouse Gas Reporting Tool, or another reporting tool approved by the ARB Executive Officer, to report greenhouse gas emissions.

At the hearing, the Board adopted Resolution 09-36, which approved the fee regulation originally proposed in the Initial Statement of Reasons Staff Report released on May 8, 2009, with a number of modifications proposed by staff. The Board also approved the amendment to section 95104, title 17, CCR, with modifications identified at the hearing. Resolution 09-36 and other regulatory documents for this rulemaking action are available online at the following ARB website:

<http://www.arb.ca.gov/regact/2009/feereg09/feereg09.htm>

In accordance with Government Code section 11346.8, the Board directed the Executive Officer to take final action to adopt CCR, title 17, sections 95200 to 95207, with the modifications identified in Resolution 09-36, and other such conforming modifications as may be appropriate, after making the modified language and any additional supporting documents available to the public for a comment period of fifteen days. The Board also directed the Executive Officer to consider such written comments as may be submitted during this period; to make such modifications as may be appropriate in light of the comments received, and to present the regulations to the Board for further consideration if the Executive Officer determines that it is warranted.

Summary of Proposed Modifications

The staff's proposed modifications to the originally proposed regulations are summarized below and are set forth in detail in Attachment 1 to this notice. All references to sections 95200, 95201, 95202, 95203, 95204, 95205, 95206, 95207, and 95104 are to title 17, CCR. The following summary does not include modifications to correct typographical or grammatical errors, changes in numbering or formatting; nor does it include all of the nonsubstantive revisions made to improve clarity. For a complete account of all modifications in the proposed regulations, please refer to the underline and strikeout sections in Attachment 1.

A. Modifications section 95201. Applicability.

In response to public comments regarding imported electricity, the regulation was modified to calculate the fee for in-state and imported electricity in the same manner by using the "first deliverer" approach now specified in section 95201(a)(4). Modifications and clarifications were also made in other sections of the fee regulation to implement this approach, as discussed below.

Changing to the "first deliverer" approach for electricity means that changes are also needed in how fees are assessed on natural gas and coal to avoid "double charging" electrical generating facilities that will now be paying fees on the electricity that they generate from natural gas and coal. Accordingly, the regulation was modified to exempt payment of fees on natural gas or coal that is delivered to or consumed by electrical generating facilities.

Using the "first deliverer" approach also means that modifications must be made to the point of regulation as it applies to refinery process emissions. Previously, the point of regulation for by-products of the refining process (petroleum coke, catalyst coke and refinery gas) was at the refinery. However, the refinery by-products responsible for process emissions may be used as fuel at electrical generating facilities. Therefore, the regulation was modified to treat these by-products as separate fuels and feedstocks, and the point of regulation was moved to the facility that combusts or consumes these fuels. As with natural gas and coal, petroleum coke, catalyst coke and refinery gas used at electricity generating facilities are exempt from the fee. This modification eliminates the potential for "double charging" with respect to these fuels.

Additional modifications were also made with respect to the natural gas sector. The regulation was modified so that the fee will now apply to publicly-owned natural gas utilities, as well as public utility natural gas corporations. Also, the point of regulation for natural gas delivered by interstate natural gas pipelines was modified. The originally proposed regulation assessed the fee on owners or operators of interstate natural gas pipelines. Due to interstate commerce concerns and because interstate pipeline owners or operators may have difficulty passing along the cost of the fee to end users, ARB shifted the point of regulation to the end users of natural gas delivered by interstate pipelines. Owners and operators will still be required to report the end users

to which they supply natural gas, however, so that ARB will know the identities of the end users that are required to pay the fee.

To be consistent with the timing of data submittal for mandatory reporting, section 95201(c) was modified. Data from the most recent calendar year for which the mandatory reporting data verification process is completed will be used to determine the fees, except for fiscal year 2010/11. Data from 2008 will be used for fiscal year 2010/2011.

B. Modifications to section 95202. Definitions.

A number of definitions were added or modified. Many of the new or modified definitions are necessary to implement the “first deliverer” approach for the electricity sector. Definitions were also added or modified to improve clarity and to ensure that the terms used in the fee regulation are consistent with those used in ARB’s Mandatory Reporting Regulation.

C. Modifications to section 95203. Calculation of Fees.

Section 95203 specifies how the fees are calculated. Two modifications were made to section 95203(a). The first modification specifies that the debt (i.e., the loans obtained by ARB to carry out AB 32) will be repaid at the rate of \$27 million for each of fiscal years 2010/2011, 2011/2012, and 2012/2013, and the remaining debt will be repaid in fiscal year 2013/2014. This modification is necessary because many different repayment schedules are possible and the originally proposed regulation did not specify the amount of the debt that would be repaid in each fiscal year. The modified language ensures that roughly equal amounts of the debt would be repaid in each of the first three years with the remainder paid off in the fourth and final year of repayment. The modified language does not identify the exact amount that will be repaid in fiscal year 2013/2014, because the exact amount is unknown at this time due to variations that may occur due to timing of the loan payments and interest rates in the previous fiscal years.

The second modification to section 95203(a) clarifies that if ARB does not expend or encumber the full amount authorized by the California Legislature for any fiscal year, the amount not expended or encumbered in that fiscal year shall be carried over and deducted from the next year’s calculation of the Total Revenue Requirement. While ARB has always intended to do exactly what this new language requires, the originally proposed regulation did not clearly state this. The new language uses the word “encumber” because sometimes ARB enters into contracts where all of the work is not performed in the fiscal year that the contract is signed. Some of the payments on such contracts may not be made until future fiscal years even though ARB is legally obligated to pay the full monetary amount specified in the contract. In these limited situations, this amount should not be carried over and deducted from next year’s calculation of the Total Revenue Requirement.

Section 95203(b) was modified to reflect the shift to the “first deliverer” approach for the electricity sector. This shift required identifying the individual fuels used in calculating emissions at electricity generating facilities. Because the fees typically apply to fuels or emissions, it was necessary to exclude fuels or emissions associated with electricity generation to avoid potential “double charging.” Due to the shift to the “first deliverer” approach, it was also necessary to modify other related subsections in the regulation. Section 95203(b) was modified to be consistent with the use and meaning of the term “Quantity Refinery Gas Adjusted” (Q_{rga}) as it is used in 95204(f)(4). Subsection (d) was modified to reflect the emission factors from the additional individual fuels, and subsections (e) and (f) were modified to reflect a change from imported electricity to all (imported and in-state) electricity. Subsection (f)(1) was clarified to identify precisely which emissions would be used in calculating emission factors for specified sources of electricity, and subsection (g) was modified to be consistent with subsection (f).

Subsection (i) was added because in order to accommodate the change to the first deliverer approach it is necessary to apply the fee to each fuel specifically. Subsection (j) was modified to reflect the change from imported electricity to all delivered electricity to be consistent with the changes to section 95201.

Various other minor and non-substantive clarifications were also made to section 95203.

D. Modifications to section 95204. Reporting and Recordkeeping Requirements.

Subsection (a) was clarified and modified to be consistent with the changes to section 95104(e) that are described below in “H. Modifications to section 95104(e).”

Subsection (b)(1) was modified to ensure that ARB sends the fee invoice to the party responsible for payment.

Subsection (c) was modified to reflect the timing changes that are described below in “E. Modifications to section 95205. Payment and Collection.”

The parts of subsection (d) that were modified were changed in order so to account for the shift to the “first deliverer” approach for electrical generating facilities, and to avoid the potential for “double-charging” of fee payers. Subsection (d)(1) was modified to add the of publicly-owned natural gas utilities as a fee-paying entity. Subsection (d)(2) was modified and clarified to address the change in the point of regulation for natural gas delivered by interstate pipelines. Subsections (d)(3) and (d)(4) were added to account for the change in the point of regulation for natural gas delivered by interstate pipelines directly to end users.

Subsection (f)(4) was modified to be consistent with 95203(b) and to avoid potential for “double-charging” at refineries, to be consistent with 95203(i), and to account for the shift to the “first deliverer” approach for electrical generating facilities.

Subsection (g) was modified to reflect the change to first deliverer for electricity and to remove redundant language.

Subsection (h) was deleted to be consistent with 95203(i). Since the fee would apply to specific fuels at their point of use, these fuels would no longer be counted as process emissions at the refinery level.

New subsection (h) (subsection (i) in the originally proposed regulation) was edited for clarity.

E. Modifications to section 95205. Payment and Collection.

Section 95205(a) of the originally proposed fee regulation specified that by February 1, 2010, the Executive Officer would provide a written fee determination notice to each affected entity of the amount due for 2010. Section 95205(b) further provided that beginning in 2011, the Executive Officer would send out fee determination notices no later than 30 days after the end of each calendar year of the amount due for the current calendar year. An additional modification to this section was added which relieves ARB of the obligation to send a fee determination to affected entities whose fee, as calculated pursuant to section 95203, would be equal to or less than \$50 per year. This new language avoids an otherwise fiscally inefficient process for ARB and the fee payer.

Proposed section 95205 was modified to specify that beginning in fiscal year 2010/2011, and thereafter, fee determination notices will be provided to each affected entity within 30 days after the State Budget has been signed by the Governor. This modification shifts the date of fee collection from spring to fall for 2010 and each year thereafter. Once the budget is passed each summer and the Required Revenue is known, ARB will send out timely invoices as soon as possible, without delaying action until the next calendar year.

These provisions were modified because due to delays in the administrative process the fee regulation will not become legally effective by February 1, 2010. In addition, the modifications allow the state to receive funds needed to pay for the ongoing implementation of AB 32 earlier in the fiscal year, thereby avoiding potential cash flow problems at ARB and the other state agencies that will receive some of the fee revenues.

F. Modifications to section 95206. Enforcement.

No modifications were made to section 95206.

G. Modifications to section 95207. Severability.

Subsection (b) was added to ensure that ARB will be able to collect the full amount of fees necessary to carry out AB 32, in the event that any fee payer or group of fee payers is determined to be ineligible, by a court of law or statute, to pay the fees imposed by the regulation. If this occurs, subsection (b) specifies that the remaining fee paying entities are responsible to pay the entire amount of the fees to make up for the deficit. This is accomplished by using the formula contained in section 95203 to calculate the fees, without including the emissions associated with the ineligible fee payer or group of fee payers in the calculation.

H. Modifications to section 95104(e)

Section 95104 is part of ARB's Mandatory Reporting Regulation. Staff's original proposal was to modify section 95104 by adding a new subsection (e), which would require that ARB's web-based Greenhouse Gas Reporting Tool be used to electronically submit all data reports required by the Mandatory Reporting Regulation and the Cost of Implementation Fee Regulation. In response to public comments from the local air districts, proposed new subsection (e) was modified to allow the use of any other reporting tool approved by the Executive Officer, if the other reporting tool would guarantee transmittal and receipt of data required by ARB's Mandatory Reporting Regulation and Cost of Implementation Fee Regulation.

Additional Documents Added to the Rulemaking Record

During the comment period for this regulatory action, some commentors asserted that the rulemaking record did not contain sufficient information to substantiate the expenditures and costs incurred by ARB to implement AB 32. In response, staff is adding a number of documents to the rulemaking record in accordance with Government Code sections 11346.8(d) and 11347.1. In the interest of completeness, staff is also adding documents to the record in support of other aspects of the proposed action, such as the regulatory approach used for the electricity sector and for producers and importers of gasoline and diesel fuels. AB 32 related expenditures for contracts and equipment were updated based upon more current information, which is also now included in the record.

A list of all documents being added to the record is appended to this notice as Attachment 2. These documents are available on ARB's website at the following address:

<http://www.arb.ca.gov/regact/2009/feereg09/feereg09.htm>

Availability of the Attachments and Additional Documents

By this notice, the modified regulatory language (Attachment 1 to this notice) and additional documents (Attachment 2 to this notice) are being made available for public comment prior to final action by the Board's Executive Officer.

Comments

Written comments will only be accepted on the additional documents and the modifications identified in this notice, and may be submitted by postal mail or electronic mail submittal as follows:

Postal mail: Clerk of the Board, Air Resources Board
1001 I Street, Sacramento, California 95814

Electronic submittal: <http://www.arb.ca.gov/lispub/comm/bclist.php>

Please note that under the California Public Records Act (Gov. Code § 6250 et seq.), your written and oral comments, attachments, and associated contact information (e.g., your address, phone, email, etc.) become part of the public record and can be released to the public upon request. Additionally, this information may become available via Google, Yahoo, and any other search engines.

In order to be considered by the Executive Officer, comments must be directed to the Air Resources Board (ARB) in one of the two forms described above and received by ARB by 5:00 p.m., on the deadline date for public comment listed at the beginning of this notice. Only comments relating to the above-described modifications to the text of the regulations will be considered by the Executive Officer.

If you need this document in an alternate format (i.e., Braille, large print, etc.) or another language, please contact the Clerk of the Board at (916) 322-5594 or by facsimile at (916) 322-3928 no later than five (5) business days from the release date of this notice. TTY/TDD/Speech to Speech users may dial 711 for the California Relay Service.

Si usted necesita este documento en un formato alternativo (es decir, sistema Braille, letra grande, etc.) u otro idioma, por favor llame a la oficina del Consejo a (916) 322-5594 o envíe un fax a (916) 322-3928 no menos de cinco días después de la fecha de comunicado de este aviso. TTY/TDD/Personas que necesitan este servicio pueden marcar el 711 para la Servicio de Retransmisión de Mensajes de California.

Attachments (2)

The energy challenge facing California is real. Every Californian needs to take immediate action to reduce energy consumption. For a list of simple ways you can reduce demand and cut your energy costs, see ARB's website at [\[www.arb.ca.gov\]](http://www.arb.ca.gov).