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Governor

TO: Members of the Economic and
Allocation Advisory Committee

FROM: Ellen M. Peter 
Chief Counsel

DATE: August 12, 2009

SUBJECT: PROPOSITION 13 TAX LIMITATIONS AND REGULATORY FEES

A general question was raised by members of this advisory committee regarding the legal requirements and evolving case law for valid taxes and regulatory fees. Attached is a short, general description of the issue prepared by the Office of the California Attorney General.

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 our website: <http://www.arb.ca.gov>.

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August 12, 2009

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RE: Summary of state fee law

Dear Ms. Peter:

I am providing you with a brief summary of state fee law, as you requested.

I. PROPOSITION 13

Article XIII A ("Proposition 13"), section 3, of the California Constitution prohibits all new state taxes "enacted for the purpose of increasing revenues" unless passed by a two-thirds majority of the Legislature. A valid state regulatory fee, however, requires only a majority vote.¹

Unlike taxes, regulatory fees must be imposed in an amount reasonably related to benefits received or burdens created by the feepayer. Regulatory fees are not prohibited by Proposition 13 because they achieve the goal of tax relief by shifting the costs of regulation from the general public to the regulated industry.²

A. The Test for a Valid Regulatory Fee

To prove a regulatory fee is valid, the state must show (1) "the **estimated costs** of the service or regulatory activity, and (2) the basis for determining the **manner in which the costs are apportioned**, so that the **charges allocated** to a payor **bear a fair or reasonable relationship** to the payor's burdens on or benefits from the regulatory activity."³

The purpose of the test is to ensure that the amount of fees assessed and paid do not exceed "the reasonable cost of providing the protective services for which the fees [are] charged, or that the fees [are not] levied for unrelated revenue purposes."⁴

It is not necessary to determine precisely how much of the program's costs are attributable to each feepayer.⁵ "Legislators [and agencies writing regulations] need only apply sound judgment and consider probabilities according to the best honest viewpoint of informed officials in determining the amount of the regulatory fee."⁶

The regulatory program being funded must have a connection to the feepayers beyond the program's connection to the general public. The fee schedule must take into account the relative contribution of each class of fee payers to the burden addressed.

For example, a charge on retail sales to fund the construction of local justice facilities is not valid, because people engaged in retail sales contribute no more to the cost of local justice facilities than the general public.⁷ In contrast, a yearly rental unit fee imposed on landlords to pay the costs of providing and administering a hearing process required by a rent control ordinance is a valid regulatory fee, because only landlords charge rent subject to rent control.⁸

The most important state fee case to date is the *Sinclair Paint* decision by the California Supreme Court.⁹ The paint companies sought a refund of fees imposed by the Childhood Lead Poisoning Prevention Act of 1991 (the Act),¹⁰ enacted by a simple majority vote of the Legislature. Under the Act, the Department of Health Services assesses a fee on companies responsible for lead contamination in the environment to support a program to address the public health problem of lead poisoning in children. The fee paid by each company is determined by the amount of lead each company is estimated to have dispersed into the environment. The court upheld the fee, finding a fee may be assessed on those who are responsible for the condition to be remedied. The two major categories of fee payers, paint companies and oil companies, are reasonably deemed responsible for the large amount of lead remaining in the environment.

B. More examples of valid fees

- A county may assess a fee on surrounding landowners to fund a free dumpsite. The fee serves a valid regulatory function by encouraging the proper disposal of waste and reducing illegal dumping in the area.¹¹ The parcel charge is based on county studies showing that different types of land use produced different types and amounts of refuse; the cost of the landfill is divided among the landowners by type of land use and based on the estimated percentage of landfill waste contributed by each category.
- An air pollution control district may apportion the indirect costs of its permit programs (the actual costs of the monitoring program not reasonably identifiable with specific sources) among stationary pollution sources required to obtain operating permits according to a formula based on the amount of source emissions.¹² The court found it reasonable to "to allocate costs based on a premise that the more emissions generated by a pollution source, the greater the regulatory job of the district."¹³
- The Department of Fish and Game may collect a flat fee mandated by statute to cover the costs of its obligations under the California Environmental Quality Act; e.g., consultation

regarding whether an environmental impact report is required for a particular project, commenting on the report, and proposing programs to monitor the mitigation measures. The fee is not made invalid by the exemption of projects found to be de minimis in impact on fish and wildlife, although in fact about 68 percent of the projects are exempted.¹⁴ “[C]ost allocations are judged by a standard of reasonableness with some flexibility permitted to account for system-wide complexity.”¹⁵

II. FEE LAW IS UNSETTLED

Some of the principles of fee law presented here may be in flux or are unsettled, such as the standard of judicial review. The Supreme Court is presently considering a case that may help to clarify the law.¹⁶

Finally, the outcome of fee law cases is highly fact-driven. The more concrete the record supporting the fee regulations, the better.

Sincerely,



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¹ *Sinclair Paint Co. v. State Bd. of Equalization* (1997) 15 Cal.4th 866, 873.

² *San Diego Gas & Electric Co. v. San Diego County Air Pollution Control Dist.* (1988) 203 Cal.App.3d 1132, 1148-1149.

³ *Sinclair Paint Co.*, *supra*, 15 Cal.4th at p. 878, quoting *San Diego Gas & Electric Co. v. San Diego County Air Pollution Control Dist.*, *supra*, 203 Cal.App.3d at p. 1146.

⁴ *Sinclair Paint Co.*, *supra*, 15 Cal.4th at p. 881.

⁵ *California Assoc. of Prof. Scientists v. Dept. of Fish and Game* (2000) 79 Cal.App.4th 935, 945.

⁶ *Ibid.*

⁷ *Sec Rider v. County of San Diego* (1991) 1 Cal.4th 1.

⁸ *Pennell v. City of San Jose* (1986) 42 Cal.3d 365, 375.

⁹ *Sinclair Paint Co.*, *supra*, 15 Cal.4th 866.

¹⁰ Health & Saf. Code, § 105275 et seq.

¹¹ *Kern County Farm Bureau v. County of Kern* (1993) 19 Cal.App.4th 1416, 1424.

¹² *San Diego Gas & Electric Co. v. San Diego County Air Pollution Control Dist.*, *supra*, 203 Cal.App.3d 1132.

¹³ *Id.* at pp. 1147-1148.

¹⁴ *California Assoc. of Professional Scientists v. Department of Fish and Game*, *supra*, 79 Cal.App.4th at p. 943.

¹⁵ *Id.* at p. 949, quoting *Brydon v. East Bay Mun. Utility Dist.* (1994) 24 Cal.App.4th 178, 193.

¹⁶ *California Farm Bureau Federation v. California State Water Resources Control Bd.* (2007) 53 Cal.Rptr.3d 445, reh'g. den. Feb. 16, 2007, review granted Apr. 11, 2007, S150518.