



February 11, 2009

Ms. Mary Nichols  
Chair, California Air Resources Board  
Via E-mail

**Subject: Comments Regarding AB 32 Administrative Fee Regulation, As Proposed January 27, 2009**

Dear Ms. Nichols:

The California Taxpayers' Association (Cal-Tax) respectfully submits the following comments in response to the California Air Resources Board's (CARB) proposal to impose administrative fees using "upstream" sources of greenhouse gas (GHG) emissions to cover the costs of its regulatory program under AB 32. The proposed fee structure raises serious constitutional concerns and should be reconsidered. Limiting the burden of funding the overall regulatory program to a few "upstream" industries runs counter to the requirement that a fee be reasonably apportioned among payors to avoid being a tax.

Article XIII A, Section 3 states in relevant part:

From and after the effective date of this article, any changes in state taxes enacted for the purpose of increasing revenues collected pursuant thereto whether by increased rates or changes in methods of computation must be imposed by an Act passed by not less than two-thirds of all members elected each of the two houses of the Legislature.

Case law interpreting Article XIII A requires that a fee bear a "fair and reasonable relationship to the payor's burdens on or benefits from the regulatory activity" in order to avoid being a tax. *San Diego Gas & Elec. Co. v. San Diego County Air Pollution Control Dist.*, 203 Cal. App. 3d 1132, 1145 (4th Dist. 1988). The California Supreme Court in *Sinclair Paint v. State Bd. of Equalization*, 15 Cal. 4th 866 (1997), opined "the police power is broad enough to include mandatory remedial measures to mitigate the past, present, or future adverse impact of the fee payer's operations, at least where, as here, the measure requires a causal connection or nexus between the product and its adverse effects" (emphasis in original). *Id.* at 877-78.

After *Sinclair*, the Third District Court of Appeal upheld a flat fee for each environmental review by the Department of Fish and Game in *Ca. Ass'n. of Professional Scientists v. Dep't of Fish and Game*, 79 Cal. App. 4th 935 (3rd. Dist. 2000). The Court concluded that "as long as the cumulative amount of the fees does not surpass the cost of the regulatory program or service and the record discloses a reasonable basis to justify the cost among payors, a fee does not become a tax simply because each payor is required to pay a predetermined fixed amount." *Id.* at 939. Specifically, the Court reasoned: "A regulatory fee does not violate California Constitution, Article XIII A when the fees collected do not surpass the costs of the regulatory

programs they support and the cost allocations to individual payors have a reasonable basis in the record.” *Id.* at 950.

The California Supreme Court is now considering the issue of fee apportionment in *Ca. Farm Bureau Fed’n v. State Water Resources Control Bd.*, S150518 (status pending). In that case, the Court is considering whether a fee schedule enacted to fund a water rights permit program is an unconstitutional tax where 40 percent of the fee payors are entitled to sovereign immunity and will not be subject to the fee. The appellate court held for the California Farm Bureau Federation.

Similar to the facts of *California Farm Bureau Federation*, the fee proposed by CARB would exempt many industries that create a regulatory burden with respect to GHG emissions. In its attempt to target “upstream” industries, it completely excludes lower level emitters, who nonetheless are subject to regulation. While the justification for such targeting is efficiency and an assumption that fee payors will pass costs on to “downstream” industries, neither avoids the fundamental constitutional problem that fees must be fairly apportioned among those who create the regulatory burden. The identified fee payors would be: 1) refineries; 2) natural gas utilities and/or direct purchasers of natural gas; 3) facilities that burn coal; 4) cement manufacturers; and 5) gasoline and diesel importers. Of the numerous emitting industries in California, CARB has chosen only five to fund the entire cost of the AB 32 regulatory program, exempting all other industries from direct payment. This structure results in an unconstitutional tax.

Finally, if CARB were to expand the fee base, it is expected that the amount of the fee per payor would be reduced, given that the overall cost of the regulatory program should not increase. As previously stated, fees should not “surpass the costs of the regulatory programs they support” to avoid being taxes. *Ca. Ass’n. of Professional Scientists, supra* at 950.

For these reasons, we urge you to reconsider the proposed fee structure to comport with California’s constitutional guidelines.

Respectfully submitted,



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Vice President and General Counsel

Cc: Members, California Air Resources Board  
Linda Adams, Secretary, California Environmental Protection Agency  
Eileen Tutt, Deputy Secretary, California Environmental Protection Agency  
Cindy Tuck, Undersecretary, California Environmental Protection Agency  
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Susan Kennedy, Chief of Staff, Governor Arnold Schwarzenegger  
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