

Followers of this blog know that, yesterday, UCLA Law released an [analysis](#) of Proposition 26's impacts on state funding for environmental and public health programs. Today, the Yes on 26 campaign struck back with a [press release](#) in which Maureen Gorsen suggested that we failed to understand Prop 26 and ignored facts.

(The Yes on 26 campaign has relied almost exclusively on Maureen Gorsen, now an attorney at Alston + Bird, for this type of legal analysis, probably because of her background as former director of California Department of Toxic Substances Control and former general counsel of CalEPA.)

In light of this ongoing controversy, I would like to examine some of Ms. Gorsen's claims in more detail.

First, a bit of background. Modern environmental programs do not merely impose penalties for noncompliance with environmental laws. Rather, environmental regulation recognizes that certain industries and business practices create environmental and public health externalities. Our state and local governments impose fees to capture those externalities and mitigate those harmful environmental and public health costs. In other words, polluters pay for the harms they cause.

For example, the Oil Spill Prevention and Administration Fund receives funding from a \$0.05 charge per barrel of oil offloaded at California marine terminals. That fee serves to reduce the risk of oil spills, by funding oil spill prevention programs and spill control technology.

Now, on to the Yes on 26 campaign's claims. Gorsen's most thorough analysis of Prop 26 seems to be the Yes on 26 campaign's "[environmental fact sheet](#)." Below, I examine three misleading claims from that fact sheet.

Misleading Claim #1: Environmental laws remain unaffected:

Prop 26 does not define all, or even most fees as taxes. Fees, such as those for licenses or permits, those for specific governmental services or products, those for fines and penalties, *or those reasonable regulatory fees necessary to implement and enforce California's environmental laws*, are excluded from the definition of tax in Prop 26.

If you expect to find similar language in the *actual* [Prop 26](#), you will be quite disappointed. Prop 26 defines “tax” quite broadly: “any levy, charge, or exaction *of any kind*.” Prop 26 lists five exceptions to a “tax” imposed by the State, of which two are relevant here:

Exemption (1): “A charge for a specific benefit conferred . . . which does not exceed the reasonable costs to the State of conferring the benefit . . . to the payor.”

Exemption (3): “A charge imposed for the reasonable regulatory costs to the State incident to issuing licenses and permits”

Using the oil spill fee as our example, exemption (3) is of little help. In no sense was the State attempting to recover incidental costs of licensing and permitting when it imposed the oil spill fee.

And how broadly can we construe exemption (1)? What precisely is the benefit conferred by charging \$0.05 per barrel of oil unloaded in California harbors? What does Prop 26 mean when it limits such a charge to “the reasonable costs to the State of conferring the benefit”? Will courts allow the State to include all conceivable environmental and health costs in the meaning of “reasonable costs to the State” when ruling on whether an oil spill fee is a Prop 26 “tax” or a fee?

The findings in section 1 of Prop 26 suggest a narrow definition of reasonable cost: fees that are “simply imposed to raise revenue for a new program” would be considered “taxes.” And that is what environmental fees like the oil spill fee seek to do: address the environmental and health costs of pollution by funding new programs to address these harmful effects through education, technological research, regulatory oversight, and emergency response.

The fact is, Prop 26 contains no language that protects the implementation of California’s environmental laws. And Maureen Gorsen has not pointed to a specific exemption or language in Prop 26 that would do so.

Misleading Claim #2: Relevance of the “primary purpose” test:

The “primary purpose” test adopted by the Supreme Court to determine if a regulatory fee is a tax will not be invalidated under Prop. 26: “[I]f revenue is the primary purpose, and regulation is merely incidental, the imposition is a tax, but

if the regulation is the primary purpose, the mere fact that a revenue is also obtained does not make the imposition a tax.”

This is beside the point. Courts will not continue to use the “primary purpose” test because they would be constitutionally obligated to instead interpret the language of Prop 26. And nowhere does Prop 26 reference the “primary purpose” test. So, while Prop 26 does not specifically invalidate the “primary purpose” test, it does make the test irrelevant. When asked to determine if a piece of legislation imposes a “tax” or a “fee”, courts would instead look to the definition contained in Prop 26.

Misleading Claim #3: Polluters would still pay:

The Legislature’s ability to require responsible parties to pay or to penalize those who have damaged the environment will not be affected by Prop. 26. California’s statutes to ensure responsible parties pay for necessary environmental remediation remain subject to current law.

This is a strawman argument. Yes, the legislature could still impose fines and penalties on polluters under Prop 26, without a 2/3 vote. But, as I mentioned above, modern environmental statutes do not merely impose fines and penalties. We have moved past after-the-fact penalties as the only effective regulatory tool. Modern environmental regulation uses fees to address environmental and health harms because by the time we get to fines and penalties, the harm is already done.

It is the self-proclaimed intention of Prop 26 backers to prevent taxpayers from paying “hidden taxes” in the form of fees. But when it comes to public health and environmental regulation, Prop 26 would accomplish just the opposite. Taxpayers would be forced to pay for the environmental and public health harms caused by industry pollution, because it would become increasingly difficult for the Legislature to obtain a supermajority vote to impose fees on those polluters.