

1. Legislative update from Ken Emanuels, the City's Legislative Advocate.

MATERIALS TO FOLLOW

TOBACCO-FREE AMERICA

Legislative Clearinghouse
1726 M Street, N.W., Suite 902
Washington, D.C. 20036
(2) 452-1184

Angeia T. Mickel
Director

John H. Madigan
American Cancer Society

Scott D. Ballin
American Heart Association

Fran Du Melle
American Lung Association

PREEMPTION

A preemption provision in state law removes the power and authority to regulate from a unit of local government.

Preemption clauses are attached to state legislation by the opposition (i.e. tobacco industry) to weaken these measures by:

- precluding further efforts and expense on their part to lobby in the localities;
- enlisting traditional opponents to tobacco-control legislation as supporters or co-sponsors of these weaker bills; and,
- luring tobacco-control advocates into legislation that is deemed more reasonable and, therefore, more likely to pass.

Such efforts, although promoted as leading to standardized statewide statutes, in fact:

- weaken stronger pre-existing local laws;
- preclude stronger local laws from being passed in the future; and,
- run contrary to the usual legislative procedure of setting minimum standards that local governing bodies may exceed.

* * * * *

For more information on the issue of preemption and/or advice on strategies to counter this well-known tobacco industry tactic, please contact the Tobacco-Free America Legislative Clearinghouse.

MAY 1990

A Public Policy Project Sponsored by



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BION M. GREGORY

Sacramento, California

April 25, 1990

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Honorable Nicholas C. Petris
5080 State Capitol

Cigarettes: Furnishing - #7058

Dear Senator Petris:

QUESTION

Would Assembly Bill No. 3967, as amended on April 23, 1990, if enacted, prohibit a city, county, or a city and county from adopting an ordinance or regulation prohibiting the free distribution of tobacco products; and, if so, what effect, if any, would the bill have on existing local ordinances or resolutions which include these prohibitions?

OPINION

Assembly Bill No. 3967, as amended on April 23, 1990, if enacted, would prohibit a city, county, or a city and county from adopting an ordinance or regulation prohibiting the free distribution of tobacco products. Moreover, effective January 1, 1991, any existing local ordinances or resolutions, which prohibit the free distribution of tobacco products or which are otherwise inconsistent with the provisions of the bill, would be preempted by the new state law, and thus, be ineffective.

ANALYSIS

Assembly Bill No. 3967, as amended on April 23, 1990 (hereafter, A.B. 3967), if enacted, would include legislative declarations stating that the purpose of the measure is to ensure that cigarette and tobacco product sampling is conducted in accordance with certain standards, including monitoring, to ensure that distribution to minors does not occur. In addition, A.B. 3967 would repeal Section 17537.3 of the Business and Professions Code regulating the advertising and distribution of

smokeless tobacco products with regard to persons under the age of 18 years and amend Section 308 of the Penal Code which, among other things, presently provides that it is a public offense, punishable as specified, to sell, give, or in any way furnish to any person who is under the age of 18 years, any tobacco, tobacco products, or smoking paraphernalia.

More specifically, in this regard, A.B. 3967 would add a new subdivision (e) to Section 308, regulating the advertising and distribution of tobacco products, rather than smokeless tobacco products, as follows:

"(e) Any person who commits any of the following acts is subject to either a criminal action for a misdemeanor or to a civil action brought by a city attorney, a county counsel, or a district attorney, punishable by a fine of two hundred dollars (\$200) for the first offense, five hundred dollars (\$500) for the second offense, and one thousand dollars (\$1,000) for the third offense:

"(1) Offers, as part of an advertising plan or program, promotional offers of tobacco products which require proof of purchase of a tobacco product unless it carries a designation that the offer is not available to minors. Each promotional offer shall include in any mail-in coupon a statement requesting purchasers to verify that the purchaser is 18 years of age or older.

"(2) Honors mail-in and telephone requests for promotional offers of tobacco products unless appropriate efforts are made to ascertain that a purchaser is over 18 years of age. For purposes of this paragraph, appropriate efforts to ascertain the age of a purchaser includes, but is not limited to, requests for a purchaser's birth date.

"(3) Distributes, by any means, as part of an advertising plan or program, free samples of tobacco products within a two block radius of any premises or facilities whose primary purpose is directed toward persons under the age of 18 years including, but not limited to, schools, clubhouses, and youth centers, when those premises are being used for their primary purposes.

"(4) Distributes, as part of any advertising

plan or program, unsolicited samples of tobacco products through a mail campaign."

Subdivision (e) of Section 308 of the Penal Code presently specifies that "[i]t is the Legislature's intent to regulate the subject matter of this section. As a result, no city, county, or city and county shall adopt any ordinance or regulation inconsistent with this section." The bill would redesignate subdivision (e) as subdivision (f).

With regard to the legislative authority of counties and cities, Section 7 of Article XI of the California Constitution provides, as follows:

"Sec. 7. A county or city may make and enforce within its limits all local, police, sanitary and other ordinances and regulations not in conflict with general laws."

The California courts have discussed the preemption of local regulation by state laws, as follows:

"It is well settled, however, that any local regulation that directly conflicts with a provision of state legislation is to that extent void. [Citations.] 'Conflicts exist if the ordinance duplicates [citations], contradicts [citations], or enters an area fully occupied by general law, either expressly or by legislative implication [citations]. If the subject matter or field of the legislation has been fully occupied by the state, there is no room for supplementary or complementary local legislation, even if the subject were otherwise one properly characterized as a "municipal affair." [Citations.]'" (Bamboo Brothers v. Carpenter, 133 Cal. App. 3d 116, 123, citing Lancaster v. Municipal Court, 6 Cal. 3d 805, 807-808.)

In addition, if the ordinance is, in substance, a criminal statute which attempts to prohibit conduct proscribed or permitted by state law either explicitly or implicitly, it is preempted (Cohen v. Board of Supervisors, 40 Cal. 3d 277, 293).

In this instance, as mentioned above, A.B. 3967, if enacted, would include legislative declarations stating that the purpose of the measure is to ensure that cigarette and tobacco product sampling is conducted in accordance with certain standards in order to prevent the unlawful distribution of those products to persons under the age of 18 years. In addition, the bill would

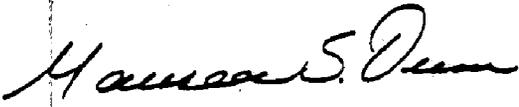
add subdivision (e) to Section 308 of the Penal Code regulating the offering, honoring of mail-in or telephone requests, and distribution of tobacco products, as part of a promotional or advertising plan, as specified. Any person who violates these provisions would be subject to either a criminal action for a misdemeanor or to a civil action, as specified. The bill also would redesignate subdivision (e) as subdivision (f). Thus, the bill would regulate the advertising and distribution of tobacco products in general. In addition, the bill would continue to include within Section 308, the specific preemption language. As a result, no city, county, or city and county would be able to adopt any ordinance or regulation inconsistent with the section.

Based on the above discussion, we think that the Legislature, in enacting A.B. 3967, would clearly indicate its intention to occupy the field governing the advertising and distribution of tobacco products, and, thus, preempt local regulation in this area. Local prohibition would be inconsistent with state law which allows this conduct as long as it is conducted as specified in Section 308.

Thus, it is our opinion that A.B. 3967, if enacted, would prohibit a city, county, or a city and county from adopting an ordinance or resolution prohibiting the free distribution of tobacco products. Moreover, effective January 1, 1991, any existing local ordinances or resolutions which prohibit the free distribution of tobacco products or which are otherwise inconsistent with the provisions of the bill would be preempted by the new state law, and thus, be ineffective.

Very truly yours,

Bion M. Gregory
Legislative Counsel

By 
Maureen S. Dunn
Deputy Legislative Counsel

MSD:dfb

Two copies to Honorable Richard Polanco,
pursuant to Joint Rule 34.



COUNTY OF SACRAMENTO

ENVIRONMENTAL MANAGEMENT DEPARTMENT

NORMAN D. COVELL, DIRECTOR

June 15, 1990

The Honorable Richard Polanco
California State Assembly
P.O. Box 942849
Sacramento, CA 94249-0001

Subject: AB 3967

Dear Assemblyman Polanco:

The Environmental Health Division, Sacramento County Environmental Management Department, is charged with enforcing the Sacramento County and Sacramento City Smoking Ordinances. Through passive enforcement procedures, community visibility, and a willingness to work with affected businesses, the Ordinances have been an effective tool in meeting the demands of the citizens of Sacramento relative to the use of tobacco products. The Ordinances not only regulate where individuals can and can't smoke, but the distribution of tobacco products to minors and the location of cigarette vending machines.

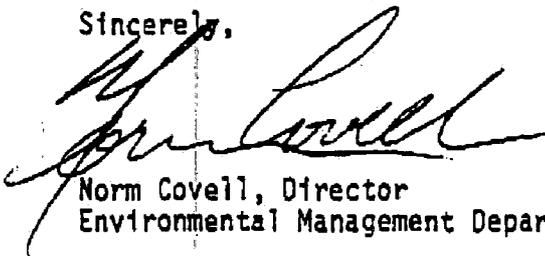
This Department agrees with the statewide need to better regulate the distribution of tobacco, tobacco products, and smoking paraphernalia to minors under the age of 18 years. However, the Department is opposed to your AB 3967 due to the inclusion of the following clause: "It is the Legislature's intent to regulate the subject matter of this section. As a result, no city, county, or city and county shall adopt any ordinance or regulation inconsistent with this section". The concept of state preemption over local smoking regulations is simply not acceptable. The communities of Sacramento have met in task force workgroups to discuss smoking, developed revisions to existing regulations for the Board of Supervisors and City Council consideration. These regulations have been subjected to intensive public hearings, and local determinations have been made as to where smoking is acceptable and where it is not acceptable.

AB 3967 also fails to identify what agency will be responsible for enforcing its provisions. By not identifying enforcement responsibility, enforcement will not occur. Local government should have the authority to delegate who they wish to be the enforcing agency.

The Honorable Richard Polanco
June 15, 1990
Page 2

I urge you to strongly reconsider the removal of the entire preemption and the delegation of enforcement authority clauses. Please do not hesitate to contact Kenneth C. Stuart, Chief, Environmental Health Division, at 916-386-6111 if you would like further input regarding our concerns.

Sincerely,



Norm Covell, Director
Environmental Management Department

NC:KCS:leh

cc: Assemblyman Lloyd Connelly
Supervisor Jim Streng
Karen Keane, CSAC
Yvonne Hunter, League of Cities

AMENDED IN ASSEMBLY MAY 2, 1990

SENATE BILL

No. 65

Introduced by Senator Kopp
(Principal coauthor: Senator Boatwright)
(Coauthors: Senators Ayala, McCorquodale, Seymour, and
Torres)
(Principal coauthor: Assembly Member Katz)

December 6, 1988

An act to amend Sections 25249.5, 25249.6, and 25249.11 of, and to add Sections 25249.15, 25249.16, 25249.17, and 25249.18 to, the Health and Safety Code, relating to toxic chemicals, and calling an election, to take effect immediately.

LEGISLATIVE COUNSEL'S DIGEST

SB 65, as amended, Kopp. Toxic chemicals: discharges.

The Safe Drinking Water and Toxic Enforcement Act of 1986 (Proposition 65) prohibits any person in the course of doing business from knowingly discharging or releasing a chemical known to the state to cause cancer or reproductive toxicity into water, except as specified, and prohibits any person in the course of doing business to knowingly and intentionally expose any individual to such a chemical without giving a specified warning. These provisions exclude from the definition of a "person in the course of doing business" a city, county, or district, a state or federal agency, or an entity in its operation of a public water system.

This bill would, subject to the approval of the electors, include public agencies, as defined, within these discharge or exposure prohibitions, except that the bill would also exclude discharges or releases which are governed by federal law to preempt state authority, specified discharges or releases by public water systems, specified discharges or releases of

surface runoff from a watershed, discharges or releases of stormwater runoff, discharges or releases resulting from activities undertaken in response to a public emergency or for public health purposes, and discharges or releases which take place within a specified period of time. The bill would delete the exclusion ~~for~~ of an entity in its operation of a public water system ~~from the definition of a "person in the course of doing business"~~ and would exclude ~~from this definition~~ publicly owned treatment works, as defined. The bill would also exempt, from these prohibitions, exposures which result from activities undertaken in response to a public emergency, as specified. The bill would exempt from the discharge, release, and exposure prohibitions certain discharges, releases, or exposures by public water systems which are owned or operated by entities which are not public agencies.

The bill would make a statement of legislative intent concerning the bill's effect on existing law with respect to discharges or releases into a publicly owned treatment works.

The bill would require the act to be submitted to the voters at a special election to be consolidated with the June 5, 1990, direct primary November 6, 1990, general election, notwithstanding any other provision of law.

The bill would call an election within the meaning of Article IV of the Constitution, to take effect immediately.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: no.

The people of the State of California do enact as follows:

- 1 SECTION 1. Section 25249.5 of the Health and Safety
2 Code is amended to read:
3 25249.5. No person in the course of doing business
4 shall knowingly discharge or release a chemical known to
5 the state to cause cancer or reproductive toxicity into
6 water or onto or into land where ~~such~~ the chemical passes
7 or probably will pass into any source of drinking water,
8 notwithstanding any other provision or authorization of
9 law except as provided in Sections 25249.9, 25249.15, and
10 25249.17.
11 SEC. 2. Section 25249.6 of the Health and Safety Code

1 is amended to read:

2 25249.6. No person in the course of doing business
3 shall knowingly and intentionally expose any individual
4 to a chemical known to the state to cause cancer or
5 reproductive toxicity without first giving clear and
6 reasonable warning to the individual, except as provided
7 in Sections 25249.10 and 25249.16.

8 SEC. 3. Section 25249.11 of the Health and Safety
9 Code is amended to read:

10 25249.11. Definitions.

11 For purposes of this chapter:

12 (a) "Business" means the conduct of activity,
13 including, but not limited to, commercial or proprietary
14 activities.

15 (b) "Person" means an individual, trust, firm, joint
16 stock company, corporation, company, partnership,
17 association, or public agency.

18 (c) "Person in the course of doing business" does not
19 include any person employing fewer than 10 employees
20 in the person's business or a publicly owned treatment
21 works.

22 (d) "Person in the course of doing business" includes,
23 but is not limited to, a public agency regardless of the
24 number of its employees.

25 (e) "Public agency" means a city, county, district,
26 government corporation, the state, or any department or
27 agency thereof, and, to the extent permitted by law, the
28 federal government, or any department or agency
29 thereof.

30 (f) "Publicly owned treatment works" means
31 treatment works, as defined in Section 1292 of Title 33 of
32 the United States Code, which are owned and operated
33 by a public agency.

34 (g) "Significant amount" means any detectable
35 amount except an amount which would meet the
36 exemption test in subdivision (c) of Section 25249.10 if an
37 individual were exposed to such an amount in drinking
38 water.

39 (h) "Source of drinking water" means either a present
40 source of drinking water or water which is identified or

1 designated in a water quality control plan adopted by a
2 regional board as being suitable for domestic or
3 municipal uses.

4 (i) "Threaten to violate" means to create a condition
5 in which there is a substantial probability that a violation
6 will occur.

7 (j) "Warning" within the meaning of Section 25249.6
8 is not required to be provided separately to each exposed
9 individual and may be provided by general methods such
10 as labels on consumer products, inclusion of notices in
11 mailings to water customers, posting of notices, placing
12 notices in public news media, and the like, provided that
13 the warning accomplished is clear and reasonable. In
14 order to minimize the burden on retail sellers of
15 consumer products including foods, regulations
16 implementing Section 25249.6 shall to the extent
17 practicable place the obligation to provide any warning
18 materials such as labels on the producer or packager
19 rather than on the retail seller, except where the retail
20 seller itself is responsible for introducing a chemical
21 known to the state to cause cancer or reproductive
22 toxicity into the consumer product in question.

23 SEC. 4. Section 25249.15 is added to the Health and
24 Safety Code, to read:

25 25249.15. Section 25249.5 does not apply to any
26 discharge or release by a public agency if any of the
27 following apply:

28 (a) The discharge or release is a substance, or the
29 byproducts of a substance, which is intentionally placed
30 into water by a public water system, as defined in Section
31 4010.1, for the purpose of protecting or promoting public
32 health.

33 (b) The discharge or release is by a public water
34 system, as defined in Section 4010.1, if the public water
35 system did not cause the presence of the substance in the
36 water which is discharged or released.

37 (c) The discharge or release is surface runoff from a
38 watershed where the substance is naturally present in
39 geological formations and is present in the surface runoff.

40 (d) The discharge or release is stormwater runoff

1 drained from underground vaults, chambers, manholes
2 storm drains, or detention basins into gutters or other
3 flood control or drainage systems.

4 (e) The discharge or release is governed by a federal
5 law in a manner which preempts state authority.

6 (f) The discharge or release results from activities
7 undertaken in response to a public emergency, including,
8 but not limited to, firefighting, or activities undertaken
9 for public health purposes.

10 (g) The discharge or release takes place less than 20
11 months subsequent to the listing of the chemical in
12 question on the list required to be published under
13 subdivision (a) of Section 25249.8 or before February 5
14 July 6, 1992, whichever date is later.

15 SEC. 5. Section 25249.16 is added to the Health and
16 Safety Code, to read:

17 25249.16. Section 25249.6 does not apply to any
18 exposure by a public agency, or by a public water system,
19 as defined in Section 4010.1, owned or operated by an
20 entity which is not a public agency, if either of the
21 following apply:

22 (a) The exposure takes place less than 12 months
23 subsequent to the listing of the chemical in question on
24 the list required to be published under subdivision (a) of
25 Section 25249.8 or before June 5 November 6, 1991,
26 whichever date is later.

27 (b) The exposure results from activities undertaken in
28 response to a public emergency, including, but not
29 limited to, firefighting. For purposes of this subdivision,
30 a response to a public emergency does not include the
31 routine disinfection of drinking water.

32 SEC. 6. Section 25249.17 is added to the Health and
33 Safety Code, to read:

34 25249.17. Section 25249.5 does not apply to any
35 discharge or release by a public water system, as defined
36 in Section 4010.1, owned or operated by an entity which
37 is not a public agency if any of the following apply:

38 (a) The discharge or release takes place less than 20
39 months subsequent to the listing of the chemical in
40 question on the list required to be published under

51

1 subdivision (a) of Section 25249.8 or before February 5
2 July 6, 1992, whichever is later.

3 (b) The discharge or release is a substance, or the
4 byproducts of a substance, which is intentionally placed
5 into water by a public water system, as defined in Section
6 4010.1, for the purpose of protecting or promoting public
7 health.

8 (c) The public water system did not cause the
9 presence of the substance in the water which is
10 discharged or released.

11 (d) The discharge or release is surface runoff from a
12 watershed where the substance is naturally present in
13 geological formations and is present in the surface runoff.

14 SEC. 7. Section 25249.18 is added to the Health and
15 Safety Code, to read:

16 25249.18. It is the intent of the Legislature in
17 amending Section 25249.11 by the act adding this section
18 and of the people in approving the act adding this section,
19 to include public agencies, except for publicly owned
20 treatment works, within the prohibitions of Sections
21 25249.5 and 25249.6, except as provided in Sections
22 25249.15 and 25249.16. It is not, however, the intent of the
23 Legislature in enacting the act adding this section, and of
24 the people in approving the act adding this section, to
25 affect in any manner existing statutory law with respect
26 to the prohibition of Section 25249.5 as it applies to any
27 person who, in the course of doing business, knowingly
28 discharges or releases a chemical known to the state to
29 cause cancer or reproductive toxicity into a publicly
30 owned treatment works. A state agency, when
31 implementing this chapter pursuant to Section 25249.12,
32 and a court of competent jurisdiction, when interpreting
33 this chapter, shall not construe the amendment by the act
34 adding this section, of subdivision (c) of Section 25249.11,
35 which excludes publicly owned treatment works from
36 the definition of person in the course of doing business,
37 as affecting in any manner existing statutory law with
38 respect to the prohibition of Section 25249.5 as it applies
39 to any person who, in the course of doing business,
40 knowingly discharges or releases a chemical known to the

1 state to cause cancer or reproductive toxicity into a
2 publicly owned treatment works.

3 SEC. 8. Sections 1 to 7, inclusive, of this act amend the
4 Safe Drinking Water and Toxic Enforcement Act of 1986
5 and shall become effective only when submitted to and
6 approved by the electors at a special election to be
7 consolidated with the June 5, 1990, direct primary
8 November 6, 1990, general election, pursuant to
9 subdivision (c) of Section 10 of Article II of the California
10 Constitution.

11 SEC. 9. Notwithstanding any other provision of law,
12 including, but not limited to, Sections 3525 and 3572 of the
13 Elections Code, Sections 1 to 7, inclusive, of this act shall
14 be submitted to the voters at a special election to be
15 consolidated with the June 5, 1990, direct primary
16 November 6, 1990, general election in accordance with
17 the provisions of the Government Code and the Elections
18 Code governing submission of statewide measures to the
19 voters at a statewide election.

20 SEC. 10. This act calls an election within the meaning
21 of Article IV of the Constitution and shall go into
22 immediate effect.

O

FISCAL IMPACT OF "POLITICAL REFORM" ON CITY COFFERS

For the last two election cycles, here's a break-out of what those elections would have cost the Sacramento taxpayer:

1987	Primary		Runoff		Total
	Lyla Ferris	\$60,000	Lyla Ferris	\$20,000	\$80,000
	other opponents		Josie Washington		
1987	Primary		Runoff		Total
	Kim Mueller	\$60,000	none		\$60,000
	Bill Smallman				
1987	Primary		Runoff		Total
	Anne Rudin	\$325,000	Anne Rudin	\$200,000	\$525,000
	Brian Van Camp		Brian Van Camp		
	Dave Shore				
	Pat Melarkey				
1989	Primary		Runoff		Total
	Heather Fargo	\$100,000	Heather Fargo	\$50,000	\$150,000
	Kate Karpilow		Kate Karpilow		
	Ray Tretheway				
	Dave Shore				
	Others				
1989	Primary		Runoff		Total
	Josh Pane	\$90,000	Josh Pane	\$60,000	\$150,000
	Bruce Pomer		Bruce Pomer		
	Larry Augusta				
TOTAL:					\$965,000

This financial break-out is based upon a political "subsidy" of \$30,000 each election for the true contending candidates for the city council and \$100,000 each election for the true contending candidates for the Mayors' office. The above totals also take into account lesser amounts for other less contending city candidates.