



Berkeley Energy Commission

ACTION CALENDAR
November 18, 2014

To: Honorable Mayor and Members of the City Council
From: Berkeley Energy Commission
Submitted by: Neal De Snoo, Secretary, Berkeley Energy Commission
Subject: Fuel Station Carbon Dioxide Labels

RECOMMENDATION

Adopt a Resolution directing the City Manager to prepare an ordinance requiring climate change labels at fuel dispensing facilities.

FISCAL IMPACTS OF RECOMMENDATION

The costs of this program are expected to be less than \$20,000 in the first year and considerably less thereafter and would be limited to staff time to develop the ordinance, procure and distribute the labels, monitor compliance, and enforce the ordinance, as well as the non-personnel costs for the design, production and mailing of the labels.

Although the City appears to have the legal authority to require labeling, it is highly likely that the Western States Petroleum Association would file a lawsuit. The cost of defending the lawsuit would either be borne by existing staff time or outside Counsel. In the event a court ruled against the City, damages are unknown but could be considerable.

CURRENT SITUATION AND ITS EFFECTS

In 2009, the City Council approved the City's Climate Action Plan (CAP), which aims to reduce GHG emissions by residents, businesses, and institutions in Berkeley. The CAP has a target of reducing emissions by 33% from 2000 levels by 2020. GHG emissions from transportation account for over 50% of GHG emissions in the City. Currently, the community is not on track to meet its 2020 GHG reduction goal for the transportation sector and more action is needed.

BACKGROUND

The non-profit organization 350.org (www.350bayarea.org) brought the concept of a warning label at fuel dispensing facilities to the Energy Commission and the Community Environmental Advisory Commission's (CEAC) attention. The CEAC passed a motion recommending the program. A subcommittee of the Energy Commission considered the issue and after careful consideration, the Energy Commission decided that it supports the development of such an ordinance.

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The Commission expressed some concerns about the efficacy of the proposal but on September 30, 2014 passed a motion in support of the attached resolution (Motion: Lee. Second: Constantine. Carried: 7-1. Ayes: Bernhardt, Constantine, Hurst, James, Lee, Murray, Wang. Nay: Schlachter). Commissioner Schlachter issued a dissenting opinion as Attachment 2.

ENVIRONMENTAL SUSTAINABILITY

Although the link between motorized vehicle use and GHG emissions is widely known, making this information available at the point of purchase is intended to contribute to behavioral changes to reduce motorized vehicle use, thus contributing helping to accomplish the CAP's goals and helping to mitigate impacts on climate. These labels are analogous to the health warnings placed on cigarettes.

RATIONALE FOR RECOMMENDATION

Although the Commission has concerns about the potential effectiveness of the ordinance it sees some potential for long-term behavior change, particularly if the ordinance can be implemented in coordination with existing City programs and efforts to reduce CO2 emissions, such as those implemented through the Climate Action Plan. The Commission also recommends that measurement tools be implemented as part of the program, such as pre and post surveys, to determine the efficacy of the labeling program.

ALTERNATIVE ACTIONS CONSIDERED

The Commission considered not supporting the initiative and taking no position on the issue.

CITY MANAGER

The City Manager takes no position on the content and recommendations of the Commission's Report.

As noted above, the Western States Petroleum Association has threatened to file a lawsuit challenging this ordinance on the ground that it violates the First Amendment's prohibition against "compelled speech". This is an evolving theory under the First Amendment, The key principles are summarized below.

"The government may suppress commercial messages that do not accurately inform the public about lawful activity. The government may ban forms of communication more likely to deceive the public than to inform it, or commercial speech related to illegal activity." (*Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York* (1980) 447 U.S. 557, 563-64 [100 S.Ct. 2343, 2350, 65 L.Ed.2d 341], citations and footnote omitted.)

As an alternative to *prohibiting* misleading or deceptive speech, the government may require that such speech be accompanied by additional information that prevents it from being misleading or deceptive, as long as the additional information is reasonably

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related to the State's interest in preventing deception of consumers. (*Zauderer v. Office of Disciplinary Counsel of the Sup. Ct. of Ohio* (1985) 471 U.S. 626, 651 [105 S.Ct. 2265, 85 L.Ed.2d 652].)

In *Zauderer*, the Supreme Court relied on the distinction between a fact and a personal or political opinion to distinguish factual, commercial-speech disclosure requirements, to which courts apply a rational-basis rule, from the type of compelled speech on matters of opinion that is not permitted. (*Id.* at 650, citation omitted.) In distinguishing the regulation in *Zauderer* from those involving compelled speech, the Supreme Court stated, "Ohio has not attempted to 'prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.' The State has attempted only to prescribe what shall be orthodox in commercial advertising, and its prescription has taken the form of a requirement that appellant include in his advertising purely factual and uncontroversial information about the terms under which his services will be available." (*Id.* at 651.)

Since *Zauderer* was decided in 1985, lower courts have held that protection of the environment from pollutants (*National Elec. Mfrs. Ass'n v. Sorrell* (2nd Cir.2001) 272 F.3d 104, 113–14) and protection of public health and safety (*Discount Tobacco City & Lottery, Inc. v. U.S.* (6th Cir. 2012) 674 F.3d 509, 554 *cert. denied*, (U.S. 2013) [133 S.Ct. 1996, 185 L.Ed.2d 865]), were additional grounds for mandating disclosure of factual information in the context of commercial speech. As the U.S. District Court in San Francisco recently stated:

In the commercial marketplace, the First Amendment permits a government to require businesses to disclose accurate and uncontroversial facts as long as the disclosures are reasonably related to a governmental interest in preventing deception or in protecting public health and safety,

(*CTIA — The Wireless Association v. City and County of San Francisco* (N.D. CA 2011) 827 F.Supp.2d 1054, 1059, *aff'd.* (9th Cir. 2012) 494 Fed.Appx. 752

In sum, to "fit within the framework of *Zauderer*" a mandated disclosure or warning must be: (1) *factual*; and (2) reasonably related to a state interest that is recognized under *Zauderer* and its progeny.

The issue posed by the proposed ordinance is whether the specific message to be included on the climate change labels satisfies these legal requirements.

CONTACT PERSON

Neal De Snoo, Secretary, 981-7439

Attachments:

- 1: Resolution
- 2: Dissenting Opinion

RESOLUTION NO. ##,###-N.S.

GAS PUMP LABELING

WHEREAS, the State of California has determined that global warming caused by CO2 emissions poses a serious threat to the economic well-being, public health, natural resources and the environment of California; and

WHEREAS, gasoline consumption is the leading source of greenhouse gases in California and gas use is the largest component of a typical household's carbon footprint; and

WHEREAS, many Americans do not associate their own energy use with climate change and thus this connection must be made to move beyond awareness into understanding before individual action will be taken; and

WHEREAS, informational gas pump labels can be one tool toward increasing understanding of the link between driving, CO2 emissions and global warming and this understanding can help reduce greenhouse gas emissions.

NOW THEREFORE, BE IT RESOLVED that the Berkeley Energy Commission recommends that the Berkeley City Council request the City Manager to draft an ordinance to require climate change labels at fuel dispensing facilities, in compliance with applicable laws.

BE IT FURTHER RESOLVED that this labeling program should be implemented in coordination with existing City programs and efforts to reduce CO2 emissions, such as those implemented through the Climate Action Plan, and that measurement tools be implemented as part of the program, such as pre and post surveys, to determine the efficacy of the labeling program.

Fuel-Station Carbon-Dioxide Labels
A minority dissenting opinion from the Berkeley Energy Commission

The proposal to place climate-change labels on fuel-dispensing facilities in Berkeley is a well-meaning and sincere attempt to increase social awareness of the well-known link between combustion of gasoline and the release of carbon dioxide into the atmosphere.

There is considerable room for doubt as to whether this measure will change public awareness. Berkeley residents are generally well informed about the link between combustion of fossil fuel, release of carbon dioxide, and global climate change. The most likely result will be that the public ignores the labels, as is generally the case for similar labels--think Prop. 65. There is a possibility of an adverse reaction, as some citizens will no doubt not like being preached to when fueling their cars.

A bigger criticism is that the act of fueling a car is not generally a moment of choice, as it is a matter of either fueling the car or running out of gas. There is no other option possible at that moment. One cannot simply leave the SUV at the gas pump and drive away in a Prius. A better choice for labeling and information would be in automobile showrooms, where one is there to make a choice of vehicle, and the buyer might benefit from information or at least a reminder that a Volt may be a better choice than a Suburban, assuming price and utility needs could be met by either.

In fact not everyone is in a position to change vehicles, at least not in the short term. A new more-energy-efficient car may be too expensive or not meet the owner's needs. He/she may need a truck or large vehicle for work or to transport a large family. A driver may not be able to get to work on a bicycle or on public transportation. There are many reasons why guilt-induction (ignoring a warning or informative label) may not be appropriate to many poor or working-class people, or in fact to anyone who has a good reason for driving the vehicle they are driving.

Berkeley drivers may have a negative reaction to being lectured at the gas pump, and might choose to fill their tank in El Cerrito or Albany or Oakland, thus possibly reducing income for local businesses. The converse is unlikely, that a driver may choose to fill his/her tank in Berkeley just to be reminded of the link of gasoline with global climate change.

The *350bayarea* group presents, as an argument in favor of labeling, the labels on cigarette packages, "click-it-or-ticket" billboards for use of seat belts, alcohol consumption, and nutrition labels on packaged food. Their arguments are specious at best. There is no evidence which was presented that cigarette labels themselves are responsible or even contribute to the long-term trend of reduction of smoking in the US, even when the purchaser of a package of cigarettes can make the choice of leaving the point of sale without the cigarettes, unlike leaving the gas station without purchasing

gas. Additionally, smoking cigarettes damages the health of the individual, rather than is the case of global climate change, which affects everyone on the planet. Similarly, seat-belt-use ads contain a direct threat of issuance of a costly ticket, and the life you save may be your own. A consumer in a grocery store can choose organic granola rather than Sugar-Pops. Again there is a choice at the moment of selection, and the health improved is that of the purchaser and his/her family.

There are dozens or even hundreds of socially worthwhile causes, whose proponents will likely want to emulate gas-pump labels to promote their own favorite causes. Consider Coke/Pepsi machines, dispensing sugary drinks which contribute to obesity and eventually to the widespread incidence of diabetes in the US. Will Berkeley require warning labels on food-vending machines urging a healthy choice? At least one might opt for a healthier beverage at the point of sale, unlike the lack of choice at a filling station. How about requiring labels on mobile phones warning of the dangers of texting while driving? Signs in grocery and liquor stores warning that alcoholic beverages can lead to intoxication, drunk driving, and/or make a girl/woman vulnerable to rape or sexual assault in case of intoxication? The list is long, and it will be difficult to say no to any sincere well-meaning group once the Pandora's Box for fuel-dispensing labels is opened.

There is of course the risk of a lawsuit by gasoline companies, who are known to be litigious and who have deep pockets. Berkeley could end up spending a considerable sum defending a law suit, even if the City were to prevail. Look at the money being spent by the American Beverage Association opposing Measure D. Fear of law suits should not deter us from doing the right thing. The issue is whether a measure unlikely to have significant beneficial effect will be worth the price of a potential legal battle.

Summary: this is a well-meaning sincere proposal to do something which is unlikely to change behavior or awareness, and is likely to be ignored. Some people will react negatively to being preached to at a gas pump. And there is no choice at the point of sale, as filling the tank is the only option to get the driver and car home or to wherever is his/her destination. The risk of a costly legal battle to install labels of questionable value is not a prudent course of action for the City of Berkeley.

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