



Office of the City Manager

## ACTION CALENDAR

November 18, 2014

To: Honorable Mayor and Members of the City Council  
 From: Community Environmental Advisory Commission  
 Submitted by: Max Gomberg, Chair CEAC  
 Subject: Fuel Station Carbon Dioxide Labels

### RECOMMENDATION

Request that the City Manager draft an ordinance within the next three months, enforceable under Berkeley Codes, to require climate change labels at fuel dispensing facilities, in compliance with applicable laws. The draft ordinance should be submitted to Community Environmental Advisory Commission and Energy Commission for review.

### FISCAL IMPACTS OF RECOMMENDATION

After enactment, the costs of running this program are expected to be limited to collecting data and enforcement. The program costs will be minimal and partially offset by penalties collected.

### CURRENT SITUATION AND ITS EFFECTS

Recent reports from the Intergovernmental Panel on Climate Change (IPCC) warn that without dramatic reductions in greenhouse gas (GHG) emissions average global temperatures could rise over four degrees Fahrenheit, leading to massive environmental changes that could threaten societal livelihoods around the globe. 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. (See: [http://www.ci.berkeley.ca.us/uploadedFiles/Planning\\_and\\_Development/Level\\_3\\_-\\_Energy\\_and\\_Sustainable\\_Development/CAP%20Work%20Session\\_2014\\_current.pdf](http://www.ci.berkeley.ca.us/uploadedFiles/Planning_and_Development/Level_3_-_Energy_and_Sustainable_Development/CAP%20Work%20Session_2014_current.pdf)) Currently, the City is not on track to meet its 2020 GHG reduction goal, having only reduced GHG emissions by 8% to date. Hence, more action is needed.

### BACKGROUND

The non-profit organization 350.org ([www.350bayarea.org](http://www.350bayarea.org)) brought the concept of a warning label on gasoline pumps to the Community Environmental Advisory Commission's (CEAC) attention. Over the course of multiple meetings, CEAC solicited information about the legal, regulatory, economic, social, and practical aspects of the proposal from City staff, state regulatory agencies, gas station owners, members of the public, and the Western States Petroleum Association. This proposal incorporates

concerns raised during CEAC's review process, and would ensure that the climate change labels would comply with all applicable laws and regulations. In particular, the labels would be designed to avoid placement on the sleeve on gasoline nozzles and would instead use a "flag" that will not impact California Air Resources Board regulations regarding free operation of nozzles. In addition, the labels would be required at all fuel dispensing facilities, since non-petroleum-based fuels (e.g., electricity and biofuels) also contribute to GHG emissions.<sup>1</sup> (See Attachment 1 for the list of these facilities).

The CEAC proposes an ordinance with penalties for failing to post the GHG label. To reduce staff time implementing the program, no inspections are required and enforcement follows verified complaints from the public. The CEAC proposes staff design, manufacture and distribute the labels to the fueling stations.

On June 12, 2014, the CEAC adopted this motion by the following votes:

Action: Motioned/Seconded/Carried (Amezcuca/ Magofña)

Votes: Ayes: Gregory Magofña, Liz Varnhagen, Andrew Torkelson, Max Gomberg, Michael Goldhaber, Luis Amezcuca. Noes: Eric Panzer. Absent: None. Abstain: None.

#### ENVIRONMENTAL SUSTAINABILITY

Although the link between motorized vehicle use and GHG emissions is widely known, making this information available at the point of purchase may contribute to behavioral changes to reduce motorized vehicle use. These labels are analogous to the health warnings placed on cigarettes. They are a contributing element to environmental sustainability, though their specific impact is difficult to measure.

---

<sup>1</sup> The California Air Resources Board has tabulated the direct and indirect carbon intensity values (or CIV measured in gCO<sub>2</sub>e/MJ) of various fuels at:

[http://www.arb.ca.gov/fuels/lcfs/lu\\_tables\\_11282012.pdf](http://www.arb.ca.gov/fuels/lcfs/lu_tables_11282012.pdf)

The CIV for various fuels is important to understand when considering how to limit GHG. Following are CIVs for common fuels used in California:

- Crude petroleum 99
- Ethanol from corn 77 to 120
- Brazilian sugarcane ethanol 58
- Landfill bio-methane 15.5
- California electricity averages 124
- Compressed Hydrogen 142

### RATIONALE FOR RECOMMENDATION

This proposal is a modest and low-cost step to help the City improve its GHG reduction efforts as specified in the CAP. It follows the general principle that people make the best decisions when they have access to complete information as a behavioral change strategy to encourage people to use alternative methods of transpiration.

### ALTERNATIVE ACTIONS CONSIDERED

CEAC considered placing GHG information on a sleeve over the fuel dispenser nozzle but having considered input from staff, the regulated industry and the fueling industry representatives, this idea was dropped in favor of the flags. CEAC also considered a California Proposition 65 like label on the dispenser but that was deemed unlikely to attract the attention of the customer.

**Minority Opinion:** CO<sub>2</sub> warning labels on gas pumps would not offer a clear and immediate course of action to those who view them. Rather than connect drivers with strategies to reduce their carbon footprint, such labels are more likely to be ignored or even regarded as a nuisance—not unlike Proposition 65 warnings. Warning labels on cigarettes, while somewhat effective, represent a poor analog to this proposal. The personal benefit of not buying and smoking cigarettes is immediately clear; whereas with climate change, any personal benefit of reducing one’s carbon footprint is extremely indirect and remote from the decision to purchase the gas. Without offering a clear nexus to personal benefit or immediate alternatives to driving, CO<sub>2</sub> warning labels are unlikely to result in changed behavior. Additionally, drivers who are receptive to the message will likely already have taken steps to reduce their carbon footprint, while drivers who are neutral or unreceptive are unlikely to be swayed by such messaging. Cognitive dissonance is a powerful effect, and instead of being moved to alter their behavior, drivers may become defensive and simply resist the message that their behavior has destructive consequences.

### 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 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* (2<sup>nd</sup> 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.* (9<sup>th</sup> 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

Max Gomberg, Chair, CEAC (916) 322-3052

Luis Amezcua, Commissioner, CEAC (661) 236-4005

Attachments:

1. Fuel Dispensing Facilities in Berkeley
2. Letter from Western States Petroleum Association, June 11, 2014

**Attachment 1: Fuel Dispensing Facilities in the City of Berkeley**

<b><i>FACILITY NAME</i></b>	<b><i>No.</i></b>	<b><i>STREET</i></b>	<b><i>Fuel</i></b>
<b>City of Berkeley Corp Yard</b>	1326	Allston Way	Petrol
<b>Alta Bates Medical Center</b>	2450	Ashby Ave	Petrol
<b>Bridgeway Service, Inc.</b>	3009	Ashby Ave	Petrol
<b>Chevron Station #0289</b>	3048	Ashby Ave	Petrol
<b>Unocal - Hong Du's #7331</b>	901	Ashby Ave	Petrol
<b>COB Public Library</b>	2030	Bancroft Way	Petrol
<b>Pacific Bell Safety</b>	2116	Bancroft Way	Petrol
<b>Lawrence Berkeley Nat Lab</b>	1	Cyclotron Rd	Petrol
<b>Shell - Campus Mini-Mart</b>	2200	Durant St	Petrol
<b>Kaiser Regional Lab.</b>	1725	Eastshore Hwy	Petrol
<b>PurEnergy/PE Berkeley</b>	1	Frank Schlessinger Way	Petrol
<b>Budget Rent-A-Car</b>	600	Gilman St	Petrol
<b>Berkeley Touchless</b>	2176	Kittredge St	Petrol
<b>COB Public Safety Building</b>	2100	M L King Way	Petrol
<b>Number One Gas</b>	1900	M L King Way	Petrol
<b>Del Tan Diversified (Chevron)</b>	1300	San Pablo Ave	Petrol
<b>Xtra Oil Company</b>	1399	San Pablo Ave	Petrol
<b>San Pablo Mini-Mart</b>	1580	San Pablo Ave	Petrol
<b>Berkeley Transfer Station</b>	1201	Second St	Petrol
<b>Xtra Oil Company</b>	2996	Shattuck Ave	Petrol
<b>US Smog and Gas</b>	3000	Shattuck Ave	Petrol
<b>Unocal - Solano #2218</b>	1830	Solano Ave	Petrol
<b>Chevron Station #90972</b>	2996	Telegraph Ave	Petrol
<b>Xtra Oil Company</b>	1201	The Alameda	Petrol
<b>University Shell</b>	1250	University Ave	Petrol
<b>Chevron Station #0877</b>	1500	University Ave	Petrol
<b>University Valero</b>	1894	University Ave	Petrol
<b>University Gas</b>	833	University Ave	Petrol
<b>Unocal - Dave's #3185</b>	849	University Ave	Petrol
<b>Propel Biofuels</b>	849	University Ave	Biodiesel
<b>Econo Gas</b>	950	University Ave	Petrol
<b>UC Berkeley</b>	317	University Hall	Petrol
<b>Biofuel Oasis</b>	1441	Ashby Ave	Biodiesel
<b>Trillium</b>	1101	Second St	CNG
<b>Whole Food Market</b>	3000	Telegraph Ave	Electric
<b>Center Street Parking Garage</b>	2025	Center St	Electric
<b>Extra Space Storage</b>	601	Cedar St	Electric



Western States Petroleum Association  
Credible Solutions • Responsive Service • Since 1907

**Catherine H. Reheis-Boyd**  
President

June 11, 2014

**Via E-Mail (NAIHadithy@CityofBerkeley.info; NALHadithy@ci.berkeley.ca.us)**

Mr. Nabil Al-Hadithy  
HazMat Manager  
City of Berkeley, Planning & Development  
2118 Milvia Street  
Toxics Management, 3rd Floor  
Berkeley, CA 94704

Re: Proposed Berkeley Municipal Code Section G11.64 (Gasoline Pump Labels)

Dear Mr. Al-Hadithy:

The Western States Petroleum Association (“WSPA”) appreciates this opportunity to provide comments on the City of Berkeley’s (City) proposed ordinance (Proposed Berkeley Municipal Code Section 11.64) to require gasoline pump “warning” labels disclosing the State’s of California’s position on the impacts of climate change. We have reviewed the draft legislation proposed to the City Council on March 11, 2014, and believe the City’s proposal compels speech in violation of the First Amendment of the United States Constitution. The City has not shown a compelling interest in forcing gasoline service stations to make statements advancing the political opinions of the City and State regarding the alleged impacts of greenhouse gases. Even if the City had a compelling interest in the widespread disclosure of the State’s opinions about greenhouse gas effects (which it does not), the City has not narrowly tailored its proposal to fulfilling that interest. Far less restrictive means exist to disseminate this information to the general public without imposing onerous restrictions on businesses and forcing unwanted speech in violation of the First Amendment.

Perhaps no city in our nation has as rich a tradition in the exercise of the First Amendment right to freedom of speech as the City of Berkeley. Throughout times of tremendous civil upheaval in this country, citizens of this City have exercised great courage in resisting efforts by those at all levels of state and federal government to force them to agree with or advance government opinions. Citizens of Berkeley well know that, in America, “freedom of speech prohibits the government from telling people what they must say.” *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 61 (2006); *see also United States v. United Foods, Inc.*, 533 U.S. 405, 410 (2001); *Riley v. Nat’l Fed’n of the Blind*, 487 U.S. 781, 795 (1988). Accordingly, the United States Supreme Court has found that the First Amendment prohibits the state from “requir[ing] an individual to participate in the dissemination of an ideological message

by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public. . . The First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster, in the way [the state] commands, an idea they find morally objectionable.” *Wooley v. Maynard*, 430 U.S. 705, 714-15 (1977).

Though commercial speech generally receives less protection than other forms of expression under the First Amendment, “[t]he fact that the speech is in aid of a commercial purpose does not deprive [a business] of all First Amendment protection . . . those whose business and livelihood depend in some way upon the product involved no doubt deem First Amendment protection to be just as important for them as it is for other discrete, little noticed groups in a society which values the freedom resulting from speech in all its diverse parts.” *United States v. United Foods, Inc.*, 533 U.S. 405, 410 (2001). Thus, courts have refused to uphold state laws that compel businesses to make forced disclosures on their products that do not convey “purely factual and uncontroversial information.” *See Video Software Dealers Ass’n v. Schwarzenegger*, 556 F.3d 950, 965-67 (9<sup>th</sup> Cir. 2009). Such forced disclosures may be permissible only if justified by a need to prevent consumer deception or confusion, and even then, the forced speech requirement still must be “reasonably related to the State’s interest in preventing deception of customers.” *Id.* at 966 (quoting *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985)).

The City’s proposal directly violates the First Amendment of the Constitution by forcing businesses to advance the State of California’s policy position (evidently shared by the City) that “global warming caused by greenhouse gases poses a serious threat to the economic well-being, public health, natural resources, and the environment of California.” *See* proposed Berkeley Municipal Code § 11.64.030A. Though the proposed ordinance calls these messages “warnings,” they are, in reality, forced reproductions of the State’s and City’s policy opinions. Notifying consumers of the State’s “determin[ation]” that climate change represents a “serious threat” to California resources is no more than an advertisement for the State’s opinion, and to call such messages “warnings” is to imply that such opinions should be accorded the status of “fact.” But the messages are not “purely factual and uncontroversial information” – they touch on issues that represent some of the most contentious issues in existence today, and they do not convey “fact” but instead convey a policy determination by the State of California.

Nor are the gasoline station messages designed to prevent any “deception of consumers.” Indeed, gasoline retailers make no statement *whatsoever* at the gasoline pump regarding the alleged impacts, reasons, or extent of climate change. The City has not contended, nor can it show, that retailers are engaging in any sort of consumer deception that can only be addressed with labels on gas pumps advancing the State’s policy position on climate change. This is the type of forced speech that the United States Supreme Court has ruled is absolutely unconstitutional.

Mr. Nabil Al-Hadithy

June 11, 2014

Page 3

WSPA believes consumers can and should educate themselves about the various political positions and science surrounding climate change. Fortunately, this information is widely available and may be read on demand through literally thousands of websites, blogs, newspapers, periodicals, books and other publicly accessible materials. The City itself is certainly not prohibited from posting this material to its own website, or from advertising to the public websites and resources the public may access to view the positions the City wishes to advance, in an attempt to persuade citizens to the City's preferred policies and points of view. Indeed, the proposed ordinance notes that the City's own "Climate Action Plan" describes "numerous ways that citizens can reduce their gas use." *See* proposed Berkeley Municipal Code § 11.64.010C.

All of these resources and methods represent constitutional and far less restrictive means to advance the opinions the City wishes to advance. WSPA urges the City to consider further supporting and funding these avenues of promoting its viewpoints, rather than adopting unconstitutional mandatory labels forcing gasoline retailers to convey the State's and the City's views on climate change.

WSPA thanks you again for the opportunity to comment on the proposed ordinance, and we look forward to working with you in developing more effective, legal ways to ensure that City residents have access to the full range of information about fuel choice in California, the importance of gasoline and refined petroleum products in present-day society, and the relative costs and benefits of other fuel choices in today's economy.

Very truly yours,



Catherine Reheis-Boyd  
President

