OUTDOOR POWER EQUIPMENT INSTITUTE

MEMORANDUM **January 13, 2011**

TO: **MR. DAVID OTT, CITY MANAGER**
SOLANA BEACH CITY COUNCIL
MAYOR OF SOLANA BEACH
CITY ATTORNEY FOR SOLANA BEACH

FROM: **JAMES MCNEW, SVP OF TECHNICAL SERVICES, OPEI**

RE: **ORDINANCE 399 – 2-CYCLE GASOLINE POWERED BLOWER BAN**

I am respectfully writing to you as Senior Vice-President of Technical Services for the Outdoor Power Equipment Institute (OPEI), the international trade association representing the manufacturers of lawn and garden equipment, including the major manufacturers of leaf blowers, such as Stihl, Echo, Husqvarna, and others. Because lawn and garden products are portable, they are deemed off-road, "mobile sources" under the federal Clean Air Act and are federally pre-empted from emissions regulation under local ordinance. Due to this fact, we ask the City of Solana Beach, in compliance with the federal Clean Air Act of 1990, to rescind the provision in ordinance 399 that bans the use of 2-cycle gasoline powered blowers.

The administrative record documented in the June 24th, 2009, meeting staff report from the City Manager, to the Mayor and City Council, demonstrates that the ban on 2-cycle gasoline-powered blowers is clearly an effort to regulate the emissions from these "mobile sources" under the provisions of a "noise abatement / storm water management" ordinance. Consequently, the City of Solana Beach has violated at least the federal pre-emption provisions established under the federal Clean Air Act (as well as potentially other federal legal requirements which are described below).

341 South Patrick Street • Alexandria, VA 22314
PH: 703.549.7600 • Fax: 703.549.7604 • www.opei.org

I. OVERVIEW

Obviously, national manufacturers of off-road equipment cannot build and national dealers and retailers cannot stock and sell specialized, niche products for each individual city or state. Consequently, Congress wanted to ensure national manufacturers could build, and national retailers could sell, uniform products that complied with one set of emission standards. As the U.S. Supreme Court has recently reaffirmed, Congress established a "carefully calibrated regulatory scheme" to protect the compelling federal interest in interstate commerce from being damaged by a potential "patchwork quilt" of different, conflicting, local emission regulations. Consequently, Congress granted U.S. EPA with exclusive or pre-emptive jurisdiction over mobile source emissions. As explained below, the Solana Beach ordinance violates the spirit and intent of Congress's careful legislative structure as recently interpreted and applied by federal courts in very similar circumstances.

II. ANALYSIS OF FEDERAL CLEAN AIR ACT

Section 209(e) of the federal Clean Air Act establishes broad federal pre-emption over the regulation of emissions from off-road mobile sources by stating -- "No State or any political subdivision shall adopt or enforce any **standard or other requirement** relating to the control of emissions" from non-road engines or vehicles. Under Section 209(e)(2), only the State of California (and not individual localities) may request U.S. EPA to formally waive a federal pre-emption and authorize California to "adopt and enforce standards and other requirements relating to the control of emissions from such [non-road] vehicles or engines." EPA has only waived its broad federal pre-emption under Section 209(e) vis-à-vis two, specific small engine exhaust regulations that were covered by two formal waiver requests from the California Air Resources Board (CARB).[1]

[1] U.S. EPA "authorized" the California Air Resources Board (CARB) (and only CARB) to "adopt and enforce" exhaust standards applicable to new gasoline-powered leaf blowers and other types of lawn and garden products.

Under California law, CARB is the exclusive "air pollution control agency for all purposes set forth in federal law." (*See* Ca. Health & Safety Code Ann. § 39602.) Obviously, Solana Beach has never applied for – nor could it legally apply for – a waiver under Section 209(e) for U.S. EPA to allow it to set unique or separate "standards or other requirements relating to the control of emissions from non-road engines or vehicles." Consequently, the Solana Beach ban on the use of gasoline blowers in residential areas would violate Section 209(e), if that ordinance amounts to a "standard or other requirement relating to the control of emissions."

III. FEDERAL PRECEDENT HOLDS THAT A LOCALITY CANNOT SET AN EMISSION STANDARD IN THE FORM OF A TECHNOLOGY-FORCING USE RESTRICTION

Settled federal case law holds that any technology-forcing restriction imposed on either the purchaser or the "user" of the equipment is a preempted "standard" under Section 209(e) in the same manner as an emissions-based prohibition imposed directly on the manufacture of a vehicle or equipment. In banning the use of leaf blowers, Solana Beach has imposed precisely the same type of use prohibition as found in this line of cases. As a result, the Solana Beach 2-cycle gasoline powered leaf blower ban will not withstand a preemption challenge.

Over the past several years, the U.S. Supreme Court has held a similar, local, California ban on the purchase and use (but not the manufacture) of diesel-powered trucks to constitute an "emissions standard" subject to Section 209's pre-emption. (*See Engine Manufacturers Association vs. South Coast Air Quality Management District*, 541 U.S. 246 (2004). Just like Solana Beach, the California South Coast Air Quality Management District (SCAQMD) attempted to force commercial operators to purchase or lease "alternative-fuel vehicles" and prohibited the purchase or lease of conventional engines – including those that had been certified as emissions–compliant by CARB. The SCAQMD argued that it was not subject to Section 209 because it was not imposing an emission "standard" or "production-mandate" on manufacturers, but instead

was only imposing a purchase or use prohibition on the downstream commercial operator. *Id.* The Supreme Court directly rejected that argument. Based on a careful review of the entire Clean Air Act and Congress's expressed intent, the Court concluded, "a standard is a standard even when not enforced through a manufacturer–directed regulation." *Id.* at 254. Consequently, the Court held:

> A command, accompanied by sanctions, that certain purchasers may buy only vehicles with particular emission characteristics is as much an "attempt to enforce" a "standard" as a command, accompanied by sanctions that a certain percentage of a manufacturer's sales volume must consist of such vehicles.

Id. at 255.

In reaching this decision, the Court specifically recognized the local purchase/use ordinance would not – by itself – prevent manufacturers from selling CARB-certified products in other parts of the State. *Id.* However, almost presciently anticipating the Solana Beach ban, the Court properly recognized:

> But if one State or political subdivision may enact such rules, then so may any other; and the end result would undo Congress's carefully calibrated regulatory scheme [of federal pre-emption].

Id. at 255.

Accordingly, the Court vacated and remanded the district court's decision, which had incorrectly held the purchase/use requirements were outside the scope of Section 209.

Courts have held that local bans on the "use" of construction equipment (which complied with EPA emission standards) similarly violated Section 209

of the Clean Air Act. (*See EMA vs. Robert Huston*, 190 F. Supp.2d 922, (W.D. Texas, 2001).) In this case, the State argued that their local use ban or "rule is not designed to reduce construction equipment's overall emissions, but rather only to bar emissions during the morning rush-hour time." (*See* 190 F. Supp.2d at 927.) The federal court directly rejected this argument and concluded that "the morning construction ban, as a standard or other requirement relating to emission control, is pre-empted by § 209(e) of the federal Clean Air Act." *Id.* at 927. In this same case, the State unsuccessfully argued that an "ultra-clean" commercial fleet requirement (analogous to the flawed SCAQMD program described above) "places no technology-forcing sales restrictions or sales quotes on non-road equipment manufacturers, and in fact achieves a "synergy" between federal standards and state controls for emissions and air quality". *Id.* at 928. Again, the federal court held "the regulation, despite TRRCC's [the State EPA's] attempts to portray it as merely an in-use control, is clearly an attempt by the State to control the emissions of non-road vehicles through a 'standard or other requirement.' *Id.* at 929. Consequently, the Court held these requirements were also invalid due to federal pre-emption arising under the Clean Air Act. *Id.*

IV. SOLANA BEACH CANNOT LEGALLY INTERTWINE NON-PREEMPTED WITH PRE-EMPTED REGULATIONS TO CIRCUMVENT FEDERAL PRE-EMPTION

In its defense, we recognize that Solana Beach may claim that its blower ban is intended primarily to address noise and/or water quality and not emissions from a "mobile source". However, as previously explained, the staff report from the city manager to the Mayor and Council members in the administrative record, and the language of the ordinance "on its face" clearly demonstrate the ban was primarily designed to impose an emission standard to control the emissions from 2-cycle gasoline-powered blowers.

Legal Precedent

Because the Solana Beach ordinance is at least partially (if not primarily) designed to regulate in an area that is clearly pre-empted under federal law, the entire ordinance is invalid. Recent legal precedent from a federal district court in California reaffirms that once a locality at least partially violates federal pre-emption, the entire resulting ordinance is tainted and invalid (even if part of the ordinance was grounded in a non-pre-empted area). For example, CARB's Electric Car or Zero Emissions Vehicle (ZEV) regulations were not expressed as a "fuel economy standard" because they were primarily developed to achieve CARB's air quality goals. On that basis, CARB argued that its electric car regulations did not violate or infringe upon the broad federal pre-emption over fuel efficiency for motor vehicles. The Court rejected this argument because CARB had admitted in the record that its electric vehicle program was in part "intertwined" with or linked to improved fuel efficiency. *Central Valley Chrysler-Plymouth v. California*, 2002 U.S. Dist. Lexis 20403, No. CV-F-02-5017 (E.D. Cal. June 11, 2002). The Court specifically concluded that "pre-emption cannot be avoided by intertwining pre-empted requirements with non-pre-empted requirements." *See Central Valley* at 12. Accordingly, the Court enjoined SCAQMD from its enforcing its legally defective ZEV mandates and granted a Summary Judgment Motion for the manufacturers and retailers. *Id.* Given the facts discussed below, we are confident a federal district court would reach the same conclusion in this case.

V. CONCLUSION

Efforts to restrict or ban tools that are efficient, environmentally responsible, and improve quality of life should be replaced by efforts to provide instruction on their safe and courteous use. OPEI would encourage any effort to instruct and inform the public in proper use and maintenance, as well as, train the professional users on the courteous use of leaf blowers. It is for this purpose; resources have been developed by OPEI and are available on our website at www.opei.org.

However, I do not want to leave you with a list of "what not to do" without providing some potential solutions that are measured, effective, and help accomplish the goals of Solana Beach without violating federal law.

1) Retain the generous time of use restrictions within ordinance 399. This is a reasonable way to provide times of intended quiet within the city.

2) Retain the restrictions on directing landscape debris into storm drains. Again, this is a reasonable expectation and a way of providing an environmental benefit to the community.

3) Training programs should be established for professional operators and landscaping companies on the safe and courteous use of leaf blowers and other landscaping and turf maintenance equipment to minimize the effect of entrained dust and particulates, the management of debris to prevent water contamination, and landscaping techniques to minimize the negative aspects while maximizing the environmental benefits that a well maintained landscape provides. In addition, emphasis on equipment maintenance should be highlighted to assure the equipment is operating efficiently.

4) Requiring "City-owned equipment" to be certified to the California Tier 3 requirements is a decision well within the jurisdiction of the City. This creates a requirement for the city to purchase and use the latest technology, or through contractual arrangements, companies doing landscape management for the city to use the latest technology, thus reducing the emissions.

5) Create trade-in / purchase incentives to replace older blowers and other landscape equipment with newer and cleaner CARB certified equipment and alternative technologies.

Today's outdoor power equipment, in compliance with California's

emissions regulations, are more than 70% cleaner than pre-regulated equipment. The noise levels of 2-cycle blowers have also been reduced significantly with many models available as low as 65 dBA (measured in accordance with ANSI B175.2). It is for the positive benefits that these products bring as enhancements to the quality of life in the City of Solana Beach and the potential negative legal ramifications that the current illegal ban creates, that I encourage the City to rescind the ordinance provision banning 2-cycle gasoline powered blowers and take actions as suggestions above.

Sincerely,

James McNew
Senior Vice-President of Technical Services
341 S. Patrick Street
Alexandria, VA, 22314
(703)-549-7600
www.opei.org
jmcnew@opei.org