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OPINION	:	No. CV 78-105
	:	
of	:	<u>March 2, 1979</u>
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SUBJECT: PHENOXY HERBICIDES—State and federal law both preempt and preclude Mendocino County from prohibiting the use, aerial or otherwise, of phenoxy herbicides in the county. This matter is governed by the provisions of section 14001 *et seq.* of the Food and Agricultural Code and related statutes and regulations.

The Honorable John A. Drummond, County Counsel, Mendocino County, has requested an opinion on the following question:

May either the Mendocino County Board of Supervisors, or the county voters through the initiative process, adopt an ordinance banning the application of phenoxy herbicides including, but not limited to “2,4-D,” “2,4,5-T” and silvex in Mendocino County, or is such matter governed exclusively by the provision of state law, specifically section 14001, *et seq.* of the Food and Agricultural Code?

The conclusion is:

Neither the Mendocino County Board of Supervisors nor the county voters through the initiative process may adopt an ordinance banning the application of phenoxy

herbicides, including but not limited to “2,4–D,” “2,4,5–T” and silvex, in Mendocino County as such matter is governed exclusively by the provisions of section 14001 *et seq.* of the Food and Agricultural Code and related statutes and regulations. Additionally, the matter appears to be preempted by federal law insofar as local agencies of the state are concerned.

ANALYSIS

A county has only those powers expressly granted to it by the constitution or the general laws of the state, or those powers which may be necessarily implied therefrom. (*Upton v. City of Antioch* (1959) 171 Cal. App. 2d 858, 861, and cases cited therein.) Generally speaking, the electorate of a county may adopt through the initiative process the same legislation as the board of supervisors may enact. Or stated otherwise, the initiative power is generally coextensive with the legislative power of the legislative body itself.¹ (*Galvin v. Board of Supervisors* (1925) 195 Cal. 686, 690–692; *Gibbs v. City of Napa* (1976) 59 Cal. App. 3d 148,157.)

The County Counsel of Mendocino County has rendered an opinion to the Board of Supervisors of that county concluding that the board has no power to ban the use of phenoxy herbicides in the County, including but not limited to “2,4–D,” “2,4,5–T” and silvex (hereinafter “phenoxy herbicides”). Despite this opinion, a group opposed to the use of phenoxy herbicides has circulated an initiative petition proposing that an ordinance be adopted prohibiting “[a]ny aerial application, in any amount, of phenoxy herbicides, including, but not limited to 2,4,5–T; 2,4–D; Silvex; or any herbicide containing the chemical Dioxin,” and making a violation of the ordinance a misdemeanor punishable by fine or imprisonment in the county jail.

In California, the local initiative is what may be described as an “indirect initiative.” A petition receiving the requisite number of signatures is not directly placed upon the ballot for consideration of the voters. The petition is first submitted to the legislative body, which has the option of either enacting the proposed ordinance without change or submitting the matter to the voters for their adoption or rejection (see Elec. Code, §§ 3701, 3709, 3711, 4001, 4010, 4011, 5152 and 5154). Thus, its course to the ballot is “indirect.”

The indirect nature of the local initiative makes it crucial for a board of supervisors to attempt to determine its own legislative powers independently of any question as to the validity of an initiative ordinance which ultimately may be adopted, since the board may decide to enact the ordinance itself.

¹ For exceptions to this general rule, see, e.g. 61 Ops. Cal. Atty. Gen. 51 (1978); 41 Ops. Cal. Atty. Gen. 115 (1963). No exceptions are pertinent herein.

It is the conclusion of this office that the adoption of an ordinance banning the application or use of phenoxy herbicides, through aerial application or otherwise, does not fall within the legislative powers of a county. Therefore, neither the County Board of Supervisors of Mendocino County nor the electorate of that county may validly adopt such an ordinance.²

The general laws of the state have not expressly granted a county the power to adopt the ordinance under consideration herein. Nor are we aware of any “implied power” of a county to do so arising from its express powers. Therefore, if Mendocino County, a general law county, were to adopt such an ordinance, it would have to rely upon its “police powers” granted to it by Article 11, section 7 (previously section 11) of the California Constitution, which provides:

“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. (Emphasis added.)

The crucial question for determination herein is whether an ordinance of Mendocino County prohibiting the application of phenoxy herbicides in the county would be “in conflict with general laws.”³

Perhaps the clearest recent summary by the California Supreme Court as to what constitutes “conflict with general law” is found in *Lancaster v. Municipal Court* (1972) 6 Cal. 3d 805, 807–808:

“ . . . Local legislation in conflict with general law is void. Conflicts exist if the ordinance duplicates (*Chavez v. Sargent*, 52 Cal. 2d 162, 176 [339 P.2d 801]; *In re Portnoy*, 21 Cal. 2d 237, 240 [131 P.2d 1]; *Pipoly v. Benson*, 20 Cal. 2d 366, 370 [125 P.2d 482, 147 A.L.R. 515]), contradicts (*Ex Parte Daniels*, 183 Cal. 636, 642–645 [192 P. 442, 21 A.L.R. 1 172]), or enters an area fully occupied by general law, either expressly or by legislative implication (*In re Lane, supra*, 58 Cal. 2d 99, 102; *Abbott v. City of Los*

² In so concluding we do not attempt to deal with procedural questions such as whether the county clerk must certify a petition containing a sufficient number of signatures or whether the board of supervisors may refuse to order an election. In this regard see generally, *People’s Lobby, Inc. v. Board of Supervisors* (1973) 30 Cal. App. 3d 869, 871–872; *Duran v. Cassidy* (1972) 28 Cal. App. 3d 574, 579–580; *Gayle v. Hamm* (1972) 25 Cal. App. 3d 250, 254–257.

³ Assuming no conflict with the general law, there is little doubt but that the banning of the use of phenoxy herbicides would fall within the usual concept of local “police powers” to protect the health, safety, and general welfare of the citizens of the county. This purpose is reflected in the “Findings” of the proposed initiative ordinance, in Section 10.10.010 thereof.

Angeles, supra, 53 Cal. 2d 674, 682–688; *Chavez v. Sargent, supra*, 52 Cal. 2d 162, 176–178). 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. . . .”

(See also *Birkenfeld v. City of Berkeley* (1976) 17 Cal. 3d 129, 140–141; *Carl v. City of Los Angeles* (1976) 61 Cal. App. 3d 265, for recent expressions of this rule; *People v. Commons* (1944) 64 Cal. App. 2d Supp. 925, 929–931 for an excellent summary and explanation of the concept of “conflict.”)

We thus must examine the general law with respect to the regulation of the use of herbicides in order to determine if an ordinance banning the application of phenoxy herbicides by air, or otherwise, would be in “conflict” therewith.

A. *The General Law*

The pertinent potentially applicable general law is found in Divisions 6 and 7 of the Food and Agricultural Code⁴ and the administrative regulations adopted by the Director of Food and Agriculture under the authority thereof. Division 6 (§§ 11701–11940) regulates the agricultural pest control business. Division 7 regulates agricultural chemicals, livestock remedies, and commercial feeds. Of particular interest to our inquiry is chapter 2 (§§ 12751–12944) and chapter 3 (§§ 14001–14098) of Division 7, which regulate “economic poisons” and “restricted materials” respectively and chapter 3.5 of Division 7, which regulates “environmentally harmful materials.” Comprehensive administrative regulations relating to the matters contained in Divisions 6 and 7 of the Food and Agricultural Code are found in Title 3, California Administrative Code, sections 2450–2487 and sections 3070–3145, which regulate “economic poisons” and agricultural pest control operations respectively.

Division 6 provides for state licensing of agricultural pest control operators by the Director of Food and Agriculture. (§§ 11701–11710)⁵ It further provides: for the

⁴ All further section references herein will be to the Food and Agricultural Code unless otherwise indicated.

⁵ “Pest Control” is broadly defined in section 11403 as follows:

“Pest Control” means the use or application of any pesticide. It also means the use of any substance, method, or device to do any of the following:

“(a) Control pests.

“(b) Prevent, destroy, repel, mitigate, or correct any pest infestation or disorder of plants.

“(c) Inhibit, regulate, stimulate, or otherwise alter plant growth by direct application

monitoring of the activities of agricultural pest control operators by the county agricultural commissioner, or the Director of Food and Agriculture in counties which have none, through a registration system. Thus, a registrant must detail the type of operations he will conduct in the county. (*Ibid.*) The county agricultural commissioner is given authority to refuse to grant or to cancel a registration for cause (§ 11735). The commissioner may also order cessation of any registrant's activities for certain enumerated causes (§§ 11737–11738). The commissioner is also empowered to adopt administrative regulations for pest control operations in his county supplemental to those of the Director of Food and Agriculture. However, these local regulations *must first be approved by the Director of Food and Agriculture* (§§ 11503–11512). Additionally any action by the county agricultural commissioner refusing to grant, or suspending or revoking a registration, as well as ordering the cessation of pest control operations, *may be appealed to the Director of Food and Agriculture* (§§ 11740–11741).

Division 6 also provides for licensing of agricultural pest control advisers by the state and contains a registration system at the county level. Any refusal by the county commissioner to permit registration, or any suspension or revocation thereof, is appealable to the *Director of Food and Agriculture* (§§ 12001–12054). Additionally, Division 6 provides for licensing by the state of pesticide dealers (§ 12101), and more pertinent for our purposes, for the licensing of pilots who engage in aircraft pest control operations (§§ 11901–11913). Finally, Division 6 contains extensive civil and criminal enforcement provisions, as provided in Statutes of 1978, chapter 1051 (§§ 11891–11897, 12996–12999, 13101).

As noted, chapters 2, 3, and 3.5 of Division 7 appear most relevant to the question of state regulation of the use of herbicides. Chapter 2 regulates the manufacture, delivery, and sale of “economic poisons,” which would include the usual agricultural pesticides and herbicides (§ 12752). It provides for licensing persons performing such functions with respect to “economic poisons” and registration of such poisons (§§ 12811–12826). Significantly, the Director of Food and Agriculture is charged with the duty, *inter alia*, of endeavoring “to eliminate from use in the state any economic poison which endangers the agricultural or nonagricultural environment” (§ 12824) and of refusing to register, or cancelling the registration of, any economic poison “[w]hich has demonstrated serious uncontrollable adverse effects either within or outside the agricultural environment . . .” or “[w]hich, when properly used, is detrimental . . . to the public health and safety” (§ 12825).

Chapter 2 of Division 7 further provides for the labelling and branding of economic poisons as to content and use (§§ 12851–12858), for the analysis or examination thereof by the Director of Food and Agriculture (§§ 12931–12934), for the seizure by the Director

to plants.”

of misbranded, adulterated, or otherwise illegal poisons (§ 12961), and it contains requirements that certain applicators be in possession of “written recommendations” for use thereof (§ 12971). Chapter 2 also permits the Director to “adopt regulations which govern the application in pest control or agricultural operations of any economic poisons which he finds necessary to carry out the purposes of *Division 6 . . .*” (§12979, emphasis added).

Chapter 3 of Division 7 (§ 14001 *et seq.*) requires the Director of Food and Agriculture “to control and otherwise regulate the use of restricted materials found to meet the criteria of Section 14004.5” (§ 14001). Section 14004.5 requires the Director, after investigation and hearing, to compile a list of “restricted materials” which are a danger to the public health or a hazard to applicators and workers, animals or crops, *or to the environment*. The Director is also to “adopt regulations which govern the application in pest control or other agricultural operation of any restricted material which he finds and determines is *injurious to the environment*, or to any person, animal or crop” (§ 14005, emphasis added). “The regulations shall prescribe the time when, and the conditions under which, a restricted material may be used or possessed in different areas of the state, *and may prohibit its use or possession in such areas . . .*” (§ 14006, emphasis added). With respect to herbicides, section 14033 provides that special regulations shall be adopted with respect to the use of 2,4–D “and any other herbicide which he [the Director] finds and determines is injurious to any crop that is being grown in any area of the state . . .” (§ 14033). Section 14032 provides generally that it is unlawful to use any form of 2,4–D or any other herbicide which is injurious to any crop other than as provided in Division 7. Section 14006.5 provides for the granting of permits by the county agricultural commissioner for use of pesticides and ‘restricted materials.’ Other sections (§§ 14010, 14012) regulate the sale and delivery of restricted materials by registrants to ultimate users. The actions of the commissioner with respect to these permits (granting, refusing, revoking, etc.) are appealable to the *State Director of Food and Agriculture* (§ 14009; Cal. Admin. Code, tit. 3, § 2463).

Chapter 3.5 provides that the “director shall prohibit or regulate the use of environmentally harmful materials, pursuant to the provisions of Chapter 2 (commencing with section 12751) and chapter 3 (commencing with section 14001)” and that “[i]n so doing, he shall consider the effect of all such materials on the environment, and shall take whatever steps he deems necessary to protect the environment” (§ 14102). In so doing, he is also to consult with “the Water Resources Control Board, the Departments of Public Health, of Fish and Game and of Conservation, and four outside experts of his selection from the fields of agriculture, biological, ecological, and medical sciences” (§ 14103).

B. *The Question of Direct Conflict With State Law*

As the court noted in *Lancaster v. Municipal Court*, *supra*, 6 Cal. 3d 805, a local ordinance will be in conflict with general law if it duplicates state law, contradicts it, or enters a field fully occupied by it.

We do not appear to be involved herein with a proposed ordinance which duplicates any of the provisions of the Food and Agricultural Code with respect to the use of herbicides.⁶ The question of occupation of the field, or preemption, will be discussed later herein in Part C. We now meet the question whether an ordinance banning the aerial use of herbicides, or otherwise banning their use, would “contradict” state law. In short, would local law and state law be in direct conflict?

A direct conflict will arise if the local ordinance attempts to permit what the state law prohibits. (See *In re Iverson* (1926) 199 Cal. 582, 587.) Conversely, a direct conflict will arise if the local ordinance attempts to prohibit what state law permits. (*Monterey Oil Co. v. City Court* (1953) 120 Cal. App. 2d 31, 36; *Markus v. Justice’s Court* (1953) 117 Cal. App. 2d 391, 396; 59 Ops. Cal. Atty. Gen. 461, 478 (1976).) It appears that this latter type of conflict would exist were the proposed ordinance banning phenoxy herbicides to be adopted in Mendocino County.

It is to be recalled that the Director of Food and Agriculture is mandated by state law to regulate the use of “restricted materials” (§ 14001 *et seq.*), which include by regulation phenoxy herbicides (Cal. Admin. Code, tit. 3, § 2450). Section 14006.5 provides with respect to the use of “pesticides” and “restricted materials”:

“Except as provided in Section 14006.6, no person shall use any pesticide for any agricultural use except under a written permit of the commissioner. No permit shall be issued for any restricted material for use in any manner other than pursuant to its registration without the approval of the director. In addition, no permit shall be granted if the commissioner determines that the provisions of subdivision (a), (b), or (c) of Section 12825 would be applicable to the proposed use.

⁶ An ordinance which duplicates state law is in conflict therewith because the result is a direct conflict of authority or jurisdiction as between the state and the local entity. (See *Piploy v. Benson* (1942) 20 Cal. 2d 366, 371; *In re Means* (1939) 14 Cal. 2d 254.)

For a comprehensive treatment of the rules and case law with respect to the question of “conflict with state laws” see, e.g., 59 Ops. Cal. Atty. Gen. 461 (1976); 58 Ops. Cal. Atty. Gen. 519 (1975).

“Before issuing a permit for any pesticide the commissioner shall consider local conditions including, but not limited to, the following:

“(a) Use in vicinity of schools, dwellings, hospitals, recreational areas, and livestock enclosures.

“(b) Problems related to heterogeneous planting of crops.

“(c) Applications of materials known to create severe resurgence or secondary pest problems without compensating control of pest species.

“(d) Meteorological conditions for use.

“(e) Timing of applications in relation to bee activity.

“(f) Provision for proper storage of pesticides and disposal of containers.

“Each permit issued for any pesticide shall include conditions for use in writing.”⁷ (Emphasis added)

Section 12825 is contained in the preceding chapter of the Food and Agricultural Code relating to the regulation of “economic poisons.” It provides, as pertinent:

“Pursuant to Section 12824, the director may, after hearing, cancel the registration of, or refuse to register, any economic poison:

“(a) Which has demonstrated serious uncontrollable adverse effects either within or outside the agricultural environment.

“(b) The use of which is of less public value or greater detriment to the environment than the benefit received by its use.

“(c) For which there is a reasonable effective and practicable alternate material or procedure which is demonstrably less destructive to the

⁷ Section 14006.6 provides an exception for certain “exempt materials,” certain nonhazardous materials, and for persons engaged in experimentation or research on pesticides. We note also that section 12825, subdivision (d) permits the Director of Food and Agriculture to refuse to register, or to cancel, the registration of any “economic poison” “[w]hich, when properly used, is detrimental . . . to the public health and safety.”

environment.”

Title 3, California Administrative Code, section 2452 additionally provides: that “[e]xcept as provided in this section [none of which would be particularly applicable to our consideration herein] restricted materials shall be possessed or used only under permit of the [county agricultural commissioner or under his direct supervision or under permit by the director in any county in which there is no commissioner. . . .” The immediately preceding section of these administrative regulations (§ 2451) defines the various categories of “applicators,” to wit, “private applicators,” “certified private applicators,” “commercial applicators,” and “certified commercial applicators.” The latter category includes licensed agricultural pest control operators and pilots holding valid certification of qualification from the Director of Food and Agriculture. Significantly, a restricted material may generally be used only under the supervision of a “certified applicator.” (Cal. Admin. Code, tit. 3, § 2465 *et seq.*) Thus, in addition to other licenses, an agricultural pest control operator, or a “crop duster” pilot, would have to obtain an additional certification for the type of pest control work he desires to do using “restricted materials” such as phenoxy herbicides.⁸

Finally, with respect to permits for the use of “restricted materials” such as phenoxy herbicides, section 14009 provides that “[a]ny interested person, upon request, is entitled to a hearing before the [State] [D]irector [of Food and Agriculture] to review the action of a commissioner in issuing, refusing, revoking, or suspending a permit, or in imposing any condition which is not expressly specified in the applicable regulations. . . .” The hearing is held in accordance with the Administrative Procedure Act in most respects.

Since our interest herein is specifically directed to herbicides, and the aerial use thereof, we note additionally that Title 3, California Administrative Code, section 2458 contains “herbicide restrictions.” It provides in part:

“2458. Herbicide Restrictions. (a) Unless expressly authorized by permit, no liquid herbicide specified in Section 2450(m) [which includes phenoxy herbicides] shall be:

“(1) Discharged more than ten feet above the crop or target . . .

“(2) Applied when wind velocity is more than ten miles per hour . . .

.”

⁸ Thus, section 2467 of the regulations provides eight categories of certifications, including such categories as right of way pest control and forest pest control, and requires passing an examination for certification.

Thereafter, detailed specifications follow with respect to aircraft nozzles and ground equipment nozzles. Also, special provisions are set forth with respect to the use of herbicides in the Central Valley and certain counties.

From the foregoing provisions of the Food and Agricultural Code and of the administrative regulations, it is clear that state law prescribes in detail which “restricted materials” and “pesticides” may be used, by whom, and under what conditions. It provides for the issuance of a permit to allow the use of these “restricted materials” in accordance with law and regulations and any conditions properly annexed thereto.

Clearly, a local ordinance banning the use of phenoxy herbicides, by air or otherwise, would interfere with state law. Such a ban would directly interfere with the power vested in the county agricultural commissioner [or the Director of Food and Agriculture, if there is none] to grant permits under the criteria provided by state law, subject to review by the state director. Such a ban would directly interfere with the state-granted authority of a permit holder to use phenoxy herbicides in the county. In short, such a local ordinance would prohibit what state law allows—the granting of a permit and the use of herbicides pursuant thereto. The local ordinance would, therefore, be in conflict with state law within the meaning of Article XI, section 7 of the California Constitution. (*Monterey Oil Co. v. City Court*, *supra*, 120 Cal. App. 2d at p. 36; *Markus v. Justice’s Court*, *supra*, 117 Cal. App. 2d at p. 396.)

An analogous situation was dealt with by the California Supreme Court in *La Franchi v. City of Santa Rosa* (1937) 8 Cal. 2d 331, under the milk control laws contained in the Agriculture Code. In that case, the City of Santa Rosa sought by local ordinance to exclude from sale any milk not pasteurized within the city limits. However, state law provided a plan or scheme for milk inspection services to be approved by the State Director of Food and Agriculture, which could have permitted inspection of the plaintiff’s pasteurization process outside of the city limits and thus would have satisfied milk inspection and grading requirements. With respect to its examination of the state law, the Court stated in holding the city ordinance invalid:

“Two things stand out in these provisions. The first is that the administration of the act and the supervision of the milk inspection services is in the hands of the director of agriculture. A health department of a city or county or any combination thereof must secure the approval of the director for the establishment of such a service which must be conducted in conformity with the act and rules and regulations promulgated by the director. He may order new services to be established and it is clearly within his power, by the exercise of his descretionary [sic] approval or disapproval, to fix the jurisdiction of the services. The second is that when milk has been

inspected and graded within the jurisdiction of a service it can be sold therein, although not within the jurisdiction of another service without its consent. And in this regard it is important to note that nowhere in the act is any distinction made between raw and pasteurized milk.

“It is obvious that where a milk inspection service or district has been established in accordance with the provisions of the Food and Agricultural Code it is without the power of any agency therein to limit or place restrictions in conflict with the state law upon the sale of milk, raw or pasteurized, which has been inspected and graded in accordance with the act. It therefore follows, assuming, as we must, that the allegations of the complaint are true, that the ordinance here involved is invalid as to the appellant. (Id. at p. 355, emphasis added.)

Likewise, in our case ‘two things stand out.’ The first is that the administration of the use of phenoxy herbicides is in the hands of the State Director of Food and Agriculture initially, and later, the county agricultural commissioner, whose actions are subject to review by the Director of Food and Agriculture. The second is that when a permit has been granted by the commissioner (subject to appeal to the Director), the permittee may use the particular pesticide or herbicide in the county under the conditions specified therein.

Another analogous situation may be found in the cases involving state licensees. Local license fees are permitted for revenue purposes. However, local licenses may not be required for regulatory purposes. (See, e.g. *Agnew v. City of Los Angeles* (1958) 51 Cal. 2d 1; *Agnew v. City of Los Angeles* (1952) 110 Cal. App. 2d 612.) As stated in the latter case:

“. . . a state license implies permission to the licensee to conduct his business at any place in the state, and this permission should not be prescribed by local authority.” (*Id.* at p. 617.)

And later, the court reasoned:

“Notwithstanding the state law which authorizes a contractor holding a state license to contract anywhere in the state, this ordinance limits his right to contract in Los Angeles unless he registers with the electrical division of the city, pays the city \$100, furnishes the bond, and obtains a permit from the city. The provisions of the ordinance do not come within the category mentioned in the *Horwith* case (74 Cal. App. 2d 433)—regulations as to the quality and character of installations. They do not in any way provide for the quality or character of installations or for inspection of work done, but

attempt to provide a means by which a contractor with a state license may be denied the right to contract or work in Los Angeles. *The general law is complete in itself. It is not simply prohibitory. It is also permissive. It authorizes contractors licensed by the board to engage in their occupations anywhere in the state. It clearly appears that the general law and the attacked provisions of the electrical code—the one permitting the other prohibiting, the same act, except on more onerous terms—are in direct conflict with each other.*” (*Id.* at p. 621, emphasis added.)

However, those who would wish to uphold the authority of the county to ban the use of phenoxy herbicides would, in all probability, argue that an ordinance banning use of phenoxy herbicides by aerial use, or otherwise, would be merely a new and additional regulation in furtherance of the general law and that such is permitted so long as state law does not fully occupy the field of regulation. (See, e.g., *Nat. Milk. Etc. Assn. v. City Etc. of S.F.* (1942) 20 Cal. 2d 101, 110; *Ex Parte Daniels* (1920) 183 Cal. 636, 645.) The question of preemption or occupation of the field aside, the doctrine of these cases is not applicable herein. The distinction is that these cases speak in terms of the state enacting a “prohibitory enactment” as to which the state law is merely supplementary thereto. The doctrine, however, is not applicable to the situation where there is affirmative permission by the state to do something. In short, a prohibition by the state as to a certain matter does not mean that that which is not prohibited is in fact permitted. Therefore, a more stringent local regulation would not be “in conflict.” However, where affirmative permission is given by the state as to a certain matter, any local restriction thereon would be in conflict with it. (See discussion of this concept in *Agnew v. City of Los Angeles*, *supra*, 110 Cal. App. 2d at 621; *Ex Parte Daniels*, *supra*, 183 Cal. at 647–648.) Accordingly, the Court in an analogous case, *La Franchi v. City of Santa Rosa*, *supra*, 9 Cal. 2d 331, discussed at length above, rejected the argument presented by the city that the ordinance was merely an additional ordinance in furtherance of the general law. We also reject such argument herein.

It is therefore concluded that an ordinance of Mendocino County, whether enacted by the board of supervisors or adopted by the people through the initiative process, would be in direct conflict with state law and hence would be invalid.⁹ We reach this conclusion without even considering the preemption doctrine, which will be discussed next.

⁹ We do note the reluctance of courts to hold an initiative measure invalid prior to its adoption. (See cases cited in dissenting opinion of Justice Manuel in *Schmitz v. Younger* (1978) 21 Cal. 3d 90, 96. See also note 2, *supra*.) We, however, must meet the question of substantive validity.

C. *The Question of Preemption By State Law*

As the Court noted in *Lancaster v. Municipal Court*, *supra*, 6 Cal. 3d 805, a local ordinance will also be in conflict with general law if it enters a field fully occupied by the state law (the preemption doctrine). Preemption may be express or implied. Since nothing in the Food and Agricultural Code expressly prohibits local legislation with respect to the use of herbicides, the issue of whether state law has preempted local regulations through occupation of the field is to be determined under the doctrine of “preemption by implication.”

The current tests for determining whether state law has preempted local regulation by implication were first set forth in *In re Hubbard* (1964) 62 Cal. 2d 119, 128, and later reiterated by the Court in *Galvan v. Superior Court* (1969) 70 Cal. 2d 851, 859–860 as follows:

“*In re Hubbard*, *supra*, 62 Cal. 2d 119, 128, established three tests to determine whether a subject has been preempted by the Legislature. ‘(1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the municipality.’”

The subject matter of the proposed ordinance is the use (or non-use) of phenoxy herbicides, a “restricted material” under the provisions of sections 14001 *et seq.* Therefore, it would appear proper to characterize the field as “the use of restricted materials in pest control and other agricultural operations,” and to determine whether this field has been preempted by general law.¹⁰

1. “*Hubbard Test One*”: The first test is to determine whether the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern. In our view, the field of restricted material use in pest control and other agricultural operations has been so covered. This is basically

¹⁰ As noted in *Galvan* (70 Cal. 2d at pp. 862–863) a field may be broad or narrow. We thus equate the field with the scope of the ordinance for purposes of analysis without attempting to preclude the definite possibility or probability that a broader field of state regulation of economic poisons or restricted materials exists, which is fully occupied by the state law.

the test set forth in *In re Lane* (1962) 58 Cal. 2d 99, 109, where the Court stated:

“It is thus apparent that the enactment by the state of a comprehensive and detailed general plan or scheme with respect to a subject serves, without more, to occupy the field to the exclusion of local regulations.”

The application of the *In re Lane* comprehensive plan or scheme test may present difficulties where one attempts, as did the plaintiffs in *Galvan*, to merely count statutes on a given subject. As noted in *Galvan* (70 Cal. 2d at p. 861): “To approach the issue of preemption as a quantitative problem provides no guidance. . . .” The Court in *Galvan* then basically refined the test as follows:

“The task is, as shown in *Hubbard*, to determine whether the state has occupied a relevant field—an area of legislation which includes the subject of the local legislation, and is sufficiently logically related so that a court, or a local legislative body, can detect a patterned approach to the subject. . . .” (*Id.* at p. 862.)

(See also, e.g., *Younger v. Berkeley City Council* (1975) 45 Cal. App. 3d 825, 831–832, finding such “patterned approach” as to criminal record dissemination.)

It is difficult to conceive of a more “patterned approach” than is found in the Food and Agricultural Code with respect to the use of restricted materials in pest control and other agricultural operations as has already basically been demonstrated above. The Director of Agriculture is to determine what are “restricted materials” (§ 14001) and to adopt regulations governing the use thereof, including regulations which govern the application of these materials in pest control or other agricultural operations (§§ 14005, 14033). The regulations may require that “restricted material” may be used only under a permit system (§ 14006). Such is specifically a requirement as to any pesticide used for agricultural purposes (§ 14006.5) except for “exempt materials” (§§ 14006.6, 14006.7). The permit which is issued must require compliance with all laws and regulations, and other conditions may be imposed (§§ 14006, 14006.5, 14011). Determination of whether a permit should be granted, or the conditions to be imposed, may include a consideration of all matters of public health and safety, including environmental safety. (*Ibid.*) Regulations have been adopted requiring (with certain specific exemptions) all persons to have a permit before they may use any “restricted material” (Cal. Admin. Code, tit. 3, § 2452). This requirement is integrated into other pest control laws so that not only is a permit required but “applicators” must also be examined and certified in one of eight categories including “Agricultural Pest Control” or “Forest Pest Control” (Cal. Admin. Code, tit. 3, § 2465 *et seq.*). This means that “commercial applicators,” that is, persons already licensed or certified under other provisions of law (i.e. § 11401 *et seq.*), must receive further

“licensing” (Cal. Admin. Code, tit. 3, § 2451). Once a permit is issued, the decision by the county agricultural commissioner to issue it, or any further actions with respect thereto by the commissioner is subject to scrutiny by an appeal to the State Director of Food and Agriculture (§ 14009; Cal. Admin. Code, tit. 3, § 2463). Finally, the permit actually gives permission to use the “restricted material” under the terms and conditions thereof.

This legislative scheme leaves, in our opinion, no room for local additional or supplemental legislation.

2. “*Hubbard Test Two*”: The second test stated in *Hubbard* is whether “the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action.”

Assuming arguendo that the first test in *Hubbard* is not met, it appears that, at a minimum, “*Hubbard Test Two*” would be met. Clearly, under the state permit system outlined above, it would not be possible to give complete effect to such state law if an ordinance were to prohibit the use of phenoxy herbicides by aerial use, or otherwise. For example, if an ordinance were adopted banning aerial use, then the state administrative regulation prohibiting use more than ten feet above the crop or target *without a permit*” (Cal. Admin. Code, tit. 3, § 2458) and the local ordinance would clash. The local ordinance would preclude the granting of the state permit at all. Such a pervasive conflict requires that state law predominate.

3. “*Hubbard Test Three*”: The third test stated in *Hubbard* is whether “the subject matter has been partially covered by general law and the subject matter is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the municipality.”

This test, of course, was exemplified in *In re Lane, supra*, 58 Cal. 2d at p. 111, where it was pointed out that “much unnecessary confusion and uncertainty would result if each locality were to enforce different rules with respect to the subject involved here [sexual conduct].” However, it is significant to note that at the same page the court began its reasoning with the statement: “The subject under consideration here requires uniform treatment throughout the state.” The third *Hubbard* test appears to restrict the matter to a consideration of the effect of an ordinance on the “transient citizen.” However, a recent Court of Appeal decision points out another facet of a need to have state wide uniformity, that is, in areas where the subject matter is of such a technical and specialized nature that it could not be expected that each county, and each city, could deal effectively with the problem. Thus in *Danville Fire Protection Dist. v. Duffel Financial & Consir. Co.* (1976)58 Cal. App. 3d 241, 248 the court stated with respect to “*Hubbard Test Three*” this

additional test:

“We also note that in 1967, the Governor’s Commission on the Law of Preemption recommended that the Legislature base its decision whether to preempt upon whether the need for statewide uniformity outweighed the need for local government to be permitted to regulate (Governor’s Commission on Law of Preemption, Rep. and Recommendations for the Governor of Cal. (1967) p. 8). The commission identified the following: two basic factors:

“1. The desirability of freedom of movement of persons or goods within the state: ‘Varying local regulation may create a patchwork of standards which would tend to cause confusion, obstacles to the movement of a transient population, and imposition of regulatory standards on individuals who cannot reasonably be expected to know varying standards as they move about the state.’ (Pp. 8–9.)

“2. *The desirability of a statewide consensus*: ‘We refer here to an examination of the nature of the conduct sought to be regulated and the desirability that, if such conduct is to be regulated, the regulation be based upon a statewide rather than a local consensus.’ (P. 9.)

“The regulation of building codes fits exceptionally well into either of these categories. A patchwork of varying code regulations would be extremely costly for the construction industry, particularly in metropolitan areas. *Second, building codes are technical matters based on the opinions of experts who are not always available to local entities.* The Uniform Codes specified by section 17922 represent at least a statewide, if not a national consensus.” (Emphasis added.)

The reasoning underscored above is further persuasive, in our opinion, to a finding of preemption by state law, since the categorization and regulation of “harmful materials” needs expertise not always available to local entities.¹¹

Accordingly, it is concluded that under one, two or all of the tests of *Hubbard* (as perhaps modified for test three, *supra*) state law preempts the field of regulation of the use of herbicides in pest control and other agricultural uses. Therefore, for this reason, as well as the matter of direct conflict between state law and the proposed ordinance, Mendocino

¹¹ See also discussion, *infra*, with respect to federal preemption, indicating that this is precisely the reason the federal law is intended to prohibit local governmental regulation.

County is not authorized to enact an ordinance banning the use of phenoxy herbicides in the county by aerial application, or otherwise.¹²

D. Preemption By Federal Law

The Federal Environmental Pesticide Control Act of 1972 provides for the comprehensive regulation of pesticides, including their registration and use. The legislative history of that act indicates that it did not intend to preempt states from legislating in the same field but it did intend to prohibit local entities of states from doing so. Section 24 of that Act provides (7 U.S.C. § 136v):

“(a) A State may regulate the sale or use of any pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter;

“(b) Such State shall not impose or continue in effect any requirements for labeling and packaging in addition to or different from those required pursuant to this subchapter; and

“(c) A State may provide registration for pesticides formulated for distribution and use within that State to meet special local needs if that State is certified by the Administrator as capable of exercising adequate controls to assure that such registration will be in accord with the purposes of this subchapter and if registration for such use has not previously been denied, disapproved, or canceled by the Administrator. Such registration shall be deemed registration under section 136a of this title for all purposes of this subchapter, but shall authorize distribution and use only within such State

¹² Insofar as one might argue that the state law did not intend to preempt local regulation by virtue of state law delegating the issuance of permits to the *county* agricultural commissioner, we note that it is clear that that officer is acting as the delegatee of the state in this function—and is therefore performing a state, not a county, function. (*Cf. Meridian, Ltd., v. Sippy* (1942) 54 Cal. App. 2d 214, 220, local health officer conducts *state* inspection of milk.) Stated otherwise, a county, as a subdivision of the state performs through its officers many functions which are *state functions*. *County of Los Angeles v. Riley* (1936) 6 Cal. 2d 625, 627–628.) That this is the case with respect to the county agricultural commissioner herein is also evident from the fact that (1) his actions are subject to appeal to the State Director of Agriculture, and (2) in counties having no such officer, the Director of Agriculture performs these otherwise delegated functions.

Additionally, we note that the general law, through the permit system, has demonstrated “paramount state concern” in that “‘local needs have been adequately recognized and comprehensively dealt with at the state level.’” (*Robins v. County of Los Angeles*, 248 Cal. App. 2d 1, 9 [56 Cal. Rptr. 8533.])” (*Galvan v. Superior Court, supra*, 70 Cal. 2d at p. 864.)

and shall not be effective for more than 90 days if disapproved by the Administrator within that period.”

(See also 7 U.S.C. § 136b (a) (2) regarding “state certification” of “state plans.”)

With respect to the 1972 federal law, Senate Report No. 92–838 stated in part:

“4. The Senate Committee considered the decision of the House Committee to deprive political subdivisions of States and other local authorities of any authority or jurisdiction over pesticides and concurs with the decision of the House of Representatives. Clearly, the fifty States and the Federal Government provide sufficient jurisdictions to properly regulate pesticides. Moreover, few, if any, local authorities whether town, counties, villages, or municipalities have the financial wherewithal to provide necessary expert regulation comparable with that provided by the State and Federal Governments. On this basis and on the basis that permitting such regulation would be an extreme burden on interstate commerce, it is the intent that section 24, by not providing any authority to political subdivisions and other local authorities of or in the States, should be understood as depriving such local authorities and political subdivisions of any and all jurisdiction and authority over pesticides and the regulation of pesticides.” (1972 U.S. Code Congr. & Admin. News at pp. 3993, 4008.)

(See also further indication of this legislative intent in Senate Report No. 92–970, wherein a proposed amendment is set forth and discussed to give “local governments the authority to regulate the sale or use of a pesticide beyond the requirements imposed by State and Federal authorities.” The amendment was, of course, not accepted as is evident from the report of the Conference Committee as well as the terms of Section 24 of the law as enacted. (See 1972 U.S. Code Congr. & Admin. News at pp. 4092, 4111, 4128, 4130, 4134.)

Accordingly, the legislative history of the Federal Environmental Pesticide Control Act of 1972 indicates virtually conclusively an intent that the federal law should preempt *any regulation of pesticides by any local entity of a state.*

CONCLUSION

State and federal law both preempt and preclude Mendocino County, either through its board of supervisors or the electorate from prohibiting the use, aerial or otherwise, of phenoxy herbicides in the county. Whether this is or is not wise policy is not for this office to determine, but is a question to be directed to the State Director of Food and Agriculture,

the State Legislature, the Environmental Protection Agency, and Congress.¹³

¹³ We note the news releases this date to the effect that the Environmental Protection Agency has in fact just used its emergency powers to impose a partial ban upon “2,4,5-T” and silvex. (See, e.g., San Francisco Chronicle, March 2, 1979, p. 4.)