



Lincoln County District Attorney

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MEMORANDUM (#2)

TO: Councilman Guy Midkiff, City of Washington, Missouri

FROM: Rob Bovett, Chair, Oregon Meth Task Force

DATE: July 21, 2009

SUBJECT: City of Washington ordinance returning pseudoephedrine products to prescription only

I have just received a copy of a letter dated July 13, 2009, and sent to the Jefferson County Council by the Consumer Healthcare Products Association (CHPA). I am fully aware that your City Council may have already taken action or otherwise determined to take action. However, I would like to submit my comments in response to CHPA's letter, even if only for the record. Here goes (each part of the CHPA letter is quoted in *italics*; my quick response follows each quote):

"The Consumer Healthcare Products Association (CHPA)'s mission is to protect access to nonprescription medicines with as few barriers for consumers as reasonable. We supported the requirements in the Combat Meth Act that keep pseudoephedrine (PSE) products behind the counter and limit sales to 3.6 grams per day and 9 grams in 30 days. This is approximately the therapeutic dose, and it makes sense to allow consumers to buy PSE products that are approved by the Food and Drug Administration as nonprescription medicines without a prescription, as long as they stay within legal quantity limits."

That no longer makes sense in light of the resurgence of meth labs fed by the smurfing of PSE.

"We share your concerns about clandestine meth labs, however, and we do not want our products being used illegally. We are not satisfied with opposing prescription status for PSE without offering an alternative. We are approaching the state of Missouri to propose industry funding for a statewide electronic tracking system to ensure that illegal PSE sales are not made. We must respectfully oppose your proposed ordinance, and we encourage your consideration of this alternative approach."

The alternative will not stop smurfing.

"Right now there is no good system in place to stop a meth cook from walking into multiple pharmacies to exceed legal PSE sales limits. Placing limits on how much PSE a consumer can buy per month was good policy, but it lacks an effective enforcement mechanism."

Agreed.

“An electronic sales tracking system works like a credit card transaction: if you have already purchased your daily or monthly limit of PSE, you cannot buy more. It is not a passive compilation of purchase data that can only be used to generate leads to build cases against meth cooks. It is an active system that notifies the pharmacist before an illegal sale is made and instructs the pharmacist not to make the sale.”

The problem is that smurfers are getting around electronic tracking systems, primarily in two ways: (1) Multiple false identifications; and (2) mass amounts of smurfers, each purchasing a lawful amount.

“We have been working in several states to enact laws prohibiting the sale of over-the-counter (OTC) PSE in excess of state and federal quantity limits. This year, legislation enabling the use of a central, real-time database to block “smurfers” from having any ability to buy more PSE than legally allowed was signed into law in Illinois, Iowa, Kansas, and Louisiana. It passed in Missouri in 2008 but has not gone into effect. We are working to pass a similar bill in California.”

All true, and all very unfortunate for public safety, the environment, and drug endangered children. This is all a distraction from proven solutions to end smurfing.

“Because Oklahoma, Arkansas, and Kentucky already have these systems in place, Missouri will soon be surrounded by states that block illegal PSE sales. We are hopeful that by working with the state to implement an electronic tracking system, it could be fully functioning by January 1, 2010. Our member companies are providing support for this program because the sales limits are not being and cannot be enforced without it, and states need to act to control the illegal diversion of PSE for manufacturing meth. Blocking illegal sales with electronic tracking allows the state to keep the tax revenue legal PSE sales generate, it creates no new barriers for legitimate consumers, and it stops criminals from violating sales limits by “smurfing.””

That’s the problem. It doesn’t stop smurfing. Even if it could catch all smurfers that use multiple false identifications, which it can’t, it simply cannot stop smurfing through mass amounts of smurfers.

“While Missouri is a very small market for PSE, accounting for only about 1.8% of U.S. nonprescription PSE sales, it is important for this product to remain accessible to allergy sufferers in Missouri. While some products have been reformulated with a different decongestant, phenylephrine, the millions of people who still go through all the inconvenience of waiting in line at the pharmacy to buy PSE demonstrate that for them, PSE is their medicine of choice.”

Many of whom are smurfers.

“Phenylephrine cannot be formulated in an extended release formulation, so there is no comparable nonprescription substitute available for the most popular types of PSE allergy products.”

PSE is not a cure for cancer. It doesn’t even cure the common cold. It merely treats some symptoms, and there are plenty of alternatives.

“Since Oregon began requiring prescriptions for PSE in 2006, no other state has followed suit. While Oregon has seen a significant reduction in meth lab incidents, Oregon is one of 25 states that had less than 25 meth lab incidents in 2008. Their results are the norm, not the exception.”

This is misleading, at best, and CHPA already knows why: Oregon has eliminated smurfing and its meth lab incidents remain down. Other states, even including those with CHPA’s touted gold standard electronic monitoring, are experiencing a resurgence of smurfing and meth labs.

“Oklahoma had 1,068 meth lab incidents in 2003 when they were at their peak—twice as many as Oregon has ever recorded—and 102 incidents in 2008. This 90% reduction is due in part to their electronic tracking system, which has been in place since 2006.”

Misleading again. In 2004, Oklahoma and Oregon were the first two states to effectively control pseudoephedrine and reduce meth lab incidents. Oklahoma was the first to move pseudoephedrine behind the counter, followed by Oregon. Eventually, the two states went separate directions to control smurfing of pseudoephedrine. Oklahoma limits pseudoephedrine sales to pharmacies only, and has a fully integrated electronic monitoring stop sale system. Oregon moved pseudoephedrine to prescription-only. Oklahoma finished 2008 with 213 total meth lab incidents, up from 148 in 2007. That meth lab resurgence in Oklahoma is continuing: Oklahoma had 258 meth lab incidents during the first 5 months of 2009. Even with pseudoephedrine sales limited to pharmacies only and with a fully integrated electronic monitoring stop sale system, Oklahoma had more meth lab incidents in the month of May of 2009 (64) than Oregon had over the entire last three years combined (61).

“Kentucky has released data about the number of sales its system blocks because they would have been over the legal limit. Less than 2% of PSE sales are blocked in Kentucky. This demonstrates that the vast majority of PSE sales are legitimate.”

No. This demonstrates that the CHPA alternative is completely ineffective at stopping smurfing. Kentucky is experiencing the same tragic resurgence of smurfing and meth labs as Oklahoma. See Tab 4 at: www.oregondec.org

“We do not believe that it is appropriate or effective for policy regarding prescription status of medicines to be made at the local level.”

Unfortunately for CHPA, Congress disagrees. Federal law provides for uniformity in regulation of over-the-counter drugs. 21 USC § 379r. However, that same federal law specifically provides that the required uniformity “shall not apply to . . . any State **or political subdivision** requirement that a drug be dispensed only upon the prescription of a practitioner licensed by law to administer such drug.” 21 USC § 379r(c)(1)(B) (emphasis added).

Again, I realize this may only be for the record. However, I feel it is vitally important to put on the record, as I predict that smurfing and meth labs will continue on their resurgent pattern and I want it to be perfectly clear who is ultimately responsible for preventing and blocking proven solutions to that unfolding tragedy.