



COUNTY OF ERIE

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February 3, 2016

Hon. John Mills, Chairman
Erie County Legislature
92 Franklin Street, 4th Floor
Buffalo, New York 14202

**Re: Local Law 3-2015
County Attorney Opinion - Preemption**

Dear Chairman Mills:

It has been brought to my attention that on Thursday, February 4, 2016, your Honorable Body will consider a resolution which purports to trigger the reverse preemption clause contained within Erie County Local Law 3-2015, a Local Law in Relation to Prohibiting the Sale of Personal Cosmetic Products Containing Microbeads in Erie County (3-2015). I understand that the rationale behind the action being considered is founded in the recent enactment of federal legislation commonly referred to as the Microbead-Free Waters Act of 2015 (MFWA). This federal legislation is being implemented with a staggered approach beginning on July 1, 2017 and once fully implemented will prohibit the manufacture and introduction or delivery for introduction into interstate commerce of rinse-off cosmetics containing intentionally-added plastic microbeads. Please be advised that it is the opinion of this office that the MFWA has no preemptive effect on the provisions contained within 3-2015 until July 1, 2018. In addition, the intent of 3-2015 (5) was to allow for preemption where 3-2015 was no longer needed to protect Lake Erie and other water bodies within Erie County because of redundancy given any presently applicable legislation of substantially similar effect.

Preemption Pursuant to MFWA subsection (c)

The MFWA provides at subsection (c) that:

...No State or political subdivision of a State may directly or indirectly establish under any authority or continue in effect restrictions with respect to the manufacture or introduction or delivery for introduction into interstate

*3130 commerce of rinse-off cosmetics containing plastic microbeads (as defined in section 301(ddd) of the Federal Food, Drug, and Cosmetic Act, as added by subsection (a)) that are not identical to the restrictions under such section 301(ddd) that have begun to apply under subsection (b).

Subsection (b)(1)(A) of The MFWA provides that the restrictions contained in the legislation will apply:

...with respect to manufacturing, beginning on July 1, 2017, and with respect to introduction or delivery for introduction into interstate commerce, beginning on July 1, 2018.

The two prong test provided for above in MFWA subsection (c) must be satisfied in order for preemption of local legislation to occur. First, the restrictions contained within the local legislation must not be identical to those restrictions provided for in the MFWA. Secondly, the MFWA restrictions must be presently applicable according to the staggered implementation formula provided for at subsection (b).

Since 3-2015 does not purport to regulate the **manufacture** of products containing microbeads, the implementation of manufacturing prohibitions by the MFWA as of July 1, 2017 has no application whatsoever to our analysis of 3-2015. 3-2015 specifically deals with prohibiting the sale of personal cosmetic products containing microbeads in Erie County.

Again, the first prong of the two prong test put forth in the MFWA provides that, in order for local preemption to occur, the restrictions provided for in the local legislation must not be identical to those found in the MFWA. Here, 3-2015 provides that "It shall be unlawful for any person, firm, corporation, or any other entity no matter how constructed to sell, offer or expose for sale, give or furnish any personal cosmetic product which contains microbeads as defined herein." The MFWA provides that "The manufacture or the introduction or delivery for introduction into interstate commerce of a rinse-off cosmetic that contains intentionally-added plastic microbeads" is prohibited. Since the respective restrictions contained in 3-2015 and the MFWA are not identical, the first prong under the MFWA (c) is satisfied.

The second prong for local preemption to occur under the MFWA (c) requires that the MFWA restrictions must be presently applicable according to the staggered implementation formula provided for at subsection (b). The MFWA at subsection (b) does not impose restrictions of the introduction or delivery for introduction into interstate commerce until July 1, 2018. Therefore, no restrictions found within the MFWA are presently applicable and the second prong for local preemption is not satisfied and no local preemption can occur pursuant to the MFWA.

Preemption Pursuant to 3-2015 (5)

Section 5 of 3-2015 states that:

This local law shall be null and void on the day that state-wide or federal legislation goes into effect, incorporating either the same or substantially similar provisions as are contained in this law, or in the event that a pertinent state or federal administrative agency issues and promulgates regulations preempting such action by the County of Erie. The Erie County Legislature shall determine by resolution whether or not identical or substantially similar state-wide legislation has been enacted for purposes of triggering the provisions of this section.

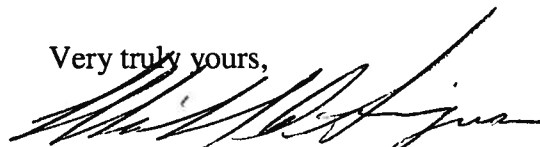
Although 3-2015 indicates that preemption shall occur on the day federal legislation goes into effect that contains substantially similar provisions, the staggered implementation of the MFWA was not contemplated at the time of its drafting. The clear intent of 3-2015 was to protect Lake Erie and other bodies of water within Erie County from pollution caused by the introduction of microbeads into such water bodies until such time as that local protection is no longer needed due to the application (not effective date) of other similarly restrictive legislation.

Your Honorably Body found and determined in Section 1 of 3-2015 that microbeads pose a serious threat to Erie County's environment and that without costly improvements to Erie County's sewage treatment facilities, microbeads will continue to pollute Lake Erie and other bodies of water within Erie County. Should an erroneous reading of 3-2015(5) construe 3-2015 to be presently preempted, there would be no protection afforded to Lake Erie or other water bodies in Erie County from pollutants caused by microbeads until July 1, 2018. This would be irresponsible and contrary to the stated findings and intent of 3-2015 Section 1. As such, I find that Section 5 of 3-2015 should be read to indicate that preemption occurs when state-wide or federal legislation containing substantially similar restrictions to those found in 3-2015 actually apply within Erie County.

In addition, the premise upon which the resolution in question is to be considered is flawed. Section 5 of 3-2015 states that the Erie County Legislature shall determine by resolution whether or not identical or substantially similar "**state-wide**" legislation has been enacted for purposes of triggering the provisions of this section. The MFWA is federal not state legislation and therefore 3-2015 affords no authority to the Erie County Legislature which would permit a determination triggering the reverse preemption of 3-2015 based on its enactment or implementation.

Given the above, I find that neither the preemption provisions of the MFWA nor the reverse preemption provisions of 3-2015 currently apply such that 3-2015 can be deemed to be null and void or preempted.

Very truly yours,



MICHAEL A. SIRAGUSA
Erie County Attorney