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Cover Page Footnote

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A WOLF IN SHEEP'S CLOTHING: THE PLASTICS INDUSTRY'S "PUBLIC INTEREST" ROLE IN LEGISLATION AND LITIGATION OF PLASTIC BAG LAWS IN CALIFORNIA

JENNIE R. ROMER* & SHANNA FOLEY**

In the pantheon of lost causes, defending the plastic grocery bag would seem to be right up there with supporting smoking on planes or the murder of puppies. The ubiquitous thin white bag has moved squarely beyond eyesore into the realm of public nuisance, a symbol of waste and excess and the incremental destruction of nature.¹

I. INTRODUCTION²

In recent years, single-use plastic bag³ reduction ordinances have emerged as a lasting icon for the environmental movement.⁴ Despite fierce resistance from the plastics industry, premised primarily on the argument that such ordinances could potentially have harmful effects on

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¹ Belinda Luscombe, *The Patron Saint of Plastic Bags*, TIME, July 27, 2008, available at www.time.com/time/nation/article/0,8599,1827021,00.html.

² This article is a follow-up piece to *The Evolution of San Francisco's Plastic-Bag Ban*, 1 GOLDEN GATE U. ENVTL. L.J. 439 (2007), by Jennie Reilly Romer. Therefore, the series of events discussed in this article generally begin after the passage of San Francisco's original ordinance in 2007. Analysis herein is based on information available as of November 1, 2011.

³ The term "plastic bag" as used herein generally refers to single-use plastic checkout bags provided at the register.

⁴ See SUSAN FREINKEL, PLASTIC: A TOXIC LOVE STORY 141 (2011) ("[Plastic bags] do cause real harm, but their symbolic weight is even more significant. They've come to represent the collective sins of the age of plastic—an emblem 'of waste and excess and the incremental destruction of nature,' as *Time* magazine put it.").

the environment,⁵ the momentum to pass these ordinances remains strong. The plastics industry⁶ has spent millions lobbying against local ordinances and for statewide preemption of local ordinances, engaged in epic public relations campaigns,⁷ and sued or threatened to sue virtually every California municipality that has recently taken steps to adopt a plastic bag ordinance.⁸ Plastic bag manufacturers also sued a reusable bag manufacturer for “talking trash” about plastic bags.⁹ The seriousness with which the plastics industry is taking environmentalists’ attempts to restrict plastic bags demonstrates that this is a “tipping point” issue for the plastics industry, and the battle is far from over.

Plastic bag proponents have primarily relied on the California Environmental Quality Act (CEQA),¹⁰ arguing that plastic bag ordinances could potentially have significant negative environmental impacts by spurring the increased use of paper bags.¹¹ This litigation

⁵ See, e.g., *Save the Plastic Bag Coal. v. City of Manhattan Beach*, 254 P.3d 1005, 1008-10 (Cal. 2011) (where group representing the interests of the plastic bag manufacturing industry argued that the manufacturing of paper bags takes more energy than manufacturing plastic bags and therefore has greater environmental impacts).

⁶ This Article often refers to the plastics industry generally, of which the plastic bag manufacturing industry represents a small component. However, issues surrounding plastic bag ordinances go far beyond just the plastic bag manufacturing industry, so references to the plastics industry in general are appropriate, as discussed below. See *infra* Part II.

⁷ See Angela Modany, *Chemical Industry Succeeds in Defeating Ban on Plastic Bags in California*, DC BUREAU (Sept. 7, 2010), www.dcbureau.org/20100907982/bulldog-blog/chemical-industry-succeeds-in-defeating-ban-on-plastic-bags-in-california.html; Robin Hindery, *California Plastic Bag Ban Rejected by State Lawmakers*, HUFFINGTON POST (Sept. 1, 2010), www.huffingtonpost.com/2010/09/01/california-plastic-bag-ba_0_n_701952.html (discussing lobbying efforts and public relations campaigns by the plastics industry).

⁸ See, e.g., Petitioner’s Opening Brief in Support of Petition for Writ of Mandate Under the Cal. Env’tl. Quality Act at 3, *Coal. to Support Plastic Bag Recycling v. City of Oakland*, No. RG07339097 (Super. Ct. Alameda Cnty. Jan. 29, 2008), available at plasticbaglaws.org/wordpress/wp-content/uploads/2010/02/lit_Oakland_Petitioners-Opening-Brief-CEQA.pdf; Verified Petition for Writ of Mandate Under Cal. Env’tl. Quality Act & Request for Declaratory Relief at 1-2, *Save the Plastic Bag Coal. v. Cnty. of L.A.*, No. BS115845 (Super. Ct. L.A. Cnty. July 16, 2008), available at plasticbaglaws.org/wordpress/wp-content/uploads/2010/05/lit_LA-County_CEQA-Petition.pdf; Petitioner’s Opening Brief in Support of Petition for Writ of Mandate Under Cal. Env’tl. Quality Act & Declaratory Judgment, *Save the Plastic Bag Coal. v. Cnty. of Marin*, Superior Court for the County of Marin, CIV 1100996 (Super. Ct. Marin Cnty. July 26, 2011), available at plasticbaglaws.org/wordpress/wp-content/uploads/2011/03/lit_Marin_STPB-Opening-Brief-in-Marin-case.pdf.

⁹ Kristina Chew, *Plastic Bag Industry Says ChicoBag Is Talking Trash*, CARE2.COM (June 13, 2011), www.care2.com/causes/plastic-bag-industry-says-chicobag-is-talking-trash.html#ixzz1atw8ChU5; see Complaint, *Hilex Poly Co. v. ChicoEco, Inc.* 3:11-cv-00116-JFA (S.C. Dist. Ct. Jan. 14, 2011), available at plasticbaglaws.org/wordpress/wp-content/uploads/2011/06/Complaint.pdf.

¹⁰ CAL. PUB. RES. CODE §§ 21000–21178.1 (Westlaw 2012).

¹¹ See, e.g., *Save the Plastic Bag Coal. v. City of Manhattan Beach*, 254 P.3d 1005, 1008-10 (Cal. 2011).

technique has raised issues regarding whether entities representing corporate interests, unconcerned with true environmental advocacy, can bring CEQA cases, and whether cities proposing plastic bag ordinances need to prepare Environmental Impact Reports (EIRs).¹²

With the California Supreme Court's decision in *Save the Plastic Bag Coalition v. City of Manhattan Beach*,¹³ one small piece of this puzzle is in place and provides some guidance to California cities regarding how to proceed under CEQA. But this is just one step. This Article summarizes the current state of the movement to reduce plastic bag consumption and provides a framework for further efforts.

Part II of this Article explores the idea of plastic bag ordinances as an icon for a greater movement. Part III discusses types of plastic bag ordinances and briefly examines the most notable locations that have pursued each type. Part IV discusses how the plastic bag industry has used CEQA to defeat and delay local plastic bag ordinances in California. Part V examines the *Manhattan Beach* decision in detail and discusses what effect the decision may have on similar ordinances going forward. The Article concludes by discussing the social climate when the court decided the *Manhattan Beach* case, including legislation introduced at state and local levels, mobilization of advocacy groups focusing on plastic pollution, and concurrent litigation.

II. THE TIPPING POINT

The Tipping Point is the name given to the dramatic moment when everything can change all at once.¹⁴ The movement to draw attention to and reduce consumption of single-use plastic appears to be reaching that point. Plastic bags may represent a “miniscule fraction of the plastics business—about \$1.2 billion of the \$374 billion American plastics industry,”¹⁵ but the symbolic weight of plastic bags is much heftier. In an

¹² See *id.* at 1011-12; see also CAL. PUB. RES. CODE §§ 15080-15097 (Westlaw 2012) (specifying requirements for EIR preparation).

¹³ See *Save the Plastic Bag Coal. v. City of Manhattan Beach*, 254 P.3d 1005, 1008-10, 1018 (Cal. 2011) (plastic bag manufacturing industry group sued the City of Manhattan Beach, arguing that it should have prepared an EIR prior to passing its plastic bag reduction ordinance; the Supreme Court disagreed, finding no EIR was necessary).

¹⁴ MALCOLM GLADWELL, *THE TIPPING POINT: HOW LITTLE THINGS MAKE A BIG DIFFERENCE* 9 (2000).

¹⁵ FREINKEL, *supra* note 4, at 156 (explaining that the plastics industry is also closely associated with the oil and gas industry because plastic is made from ethylene, a byproduct created in the processing of crude oil and natural gas). “Most of today’s major resin producers—Dow Chemical, DuPont, ExxonMobil, BASF, Total Petrochemical—have their roots in the early decades of the twentieth century, when petroleum and chemical industries began to develop alliances or form vertically integrated companies.” *Id.* at 60.

attempt to preserve its livelihood, the plastics industry is fighting tooth and nail and spending millions to defeat (or at least slow down) strict regulation of its products.

In fact, the plastics industry groups have acknowledged plastic bag ordinances as a tipping point for a larger movement against its single-use products:

“We are at the tipping point,” [Society of the Plastics Industry] President William Carteaux warned thousands of industry members gathered for the group’s big annual meeting in 2009. “Legislation and regulation threaten to fundamentally change our business model . . . We can’t continue to fight back just at the reactive stage when things are emotionally charged. We have to take the offensive and react quicker.” Industrywide, people were realizing that it was time to get serious.¹⁶

This was not a new strategy as much as it was a rejuvenated effort. As far back as 2004, the California Film Extruders & Converters Association, a plastic bag manufacturing group, voiced its concern that “our industry needs to change the perception of plastic as bad for the environment” and stated that it was time to stop playing defense and go on offense to focus on “*prevention* instead of *reaction*” as “a far less costly, and more effective, strategy.”¹⁷

It seems that the plastics industry realizes that as soon as it is commonplace to ban or place a charge on plastic bags, forbidding the free flow of plastic water bottles and fast food containers may well be next. The fight over plastic bag ordinances in California is just one small part of a larger movement against single-use plastics that is gaining momentum around the globe. People bringing their own bags to the grocery store is seen as a gateway environmental activity that will spread.¹⁸

The tenacity and resources with which the plastics industry is currently engaging in this fight speaks to this larger fear. Shortly after San Francisco began developing its original single-use bag charge proposal in 2006, plastic bag manufacturers across the country started to take notice and several manufacturers, including Interplast, API, Sunoco, Superbag, and Vanguard, agreed to fund an extensive pro-plastic bag

¹⁶ *Id.* at 157.

¹⁷ California Film Extruders & Converters Ass’n, *Plastic Industry New Strategy: It’s Time to Play Offense!*, Die-Line, the CFECA Newsletter, www.roplast.com/documents/NewStrategy.doc (last visited Feb. 26, 2012).

¹⁸ *See id.* at 168.

public relations campaign.¹⁹ That group, which became known as the Progressive Bag Alliance (PBA), partnered with other plastics industry groups and began to mount a campaign against San Francisco's potential plastic bag charge with a proposed \$700,000 public-relations budget.²⁰

However, the American Chemistry Council (ACC) has by far been the biggest bulldog on the issue, spending \$5.7 million in California during the 2007 and 2008 legislative sessions and \$1 million in 2010 when the California legislature was considering a statewide ban.²¹ The ACC also succeeded in convincing other jurisdictions, including New York, to shelve proposed bans or charges on plastic bags in favor of adopting plastic bag recycling programs.²² Most notably, after the Seattle City Council passed a twenty-cent charge on plastic bags, the ACC spent over \$1.5 million on a successful ballot initiative to overturn the plastic bag charge.²³

The strategy to change the perception of plastic bags involved extolling the virtues of plastic bag recycling and marketing plastic bags as the environmentally superior choice, in part through forming groups with benign names like Coalition to Support Plastic Bag Recycling, Californians for Extended Product Responsibility, and Save the Plastic Bag Coalition.²⁴ Perhaps the best example of the plastics industry playing offense is the use of CEQA to delay and invalidate plastic bag ordinances in California, as discussed below.

Given this background, it is all the more important to continue efforts to ensure that plastic bag ordinances are as strong and far-reaching as possible. That does not always mean that bans are the best answer. Charges arguably have a more direct effect on personal habits because the customer is presented with an active choice of whether the plastic bag is worth five, ten, or even twenty-five cents. At that point, automatically taking a plastic bag with each purchase ceases to be second nature, and the bag is seen as a product.²⁵ That change in mindset is also more likely to lead to an overall reduction in single-use bag consumption. Also, the greater focus on the product being paid for can

¹⁹ *Id.* at 156.

²⁰ Jennie Reilly Romer, *The Evolution of San Francisco's Plastic-Bag Ban*, 1 GOLDEN GATE U. ENVTL. L.J. 439, 452 (2007).

²¹ FREINKEL, *supra* note 4, at 163.

²² *Id.*

²³ *Id.* at 164; for a detailed discussion of the Seattle fee, see *infra* Part III.A.i.b.

²⁴ See, e.g., *About Us*, SAVE THE PLASTIC BAG COALITION, savetheplasticbag.com/ReadContent522.aspx (last visited Feb. 28, 2012).

²⁵ See Romer, *supra* note 20, at 463.

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promote better product design.²⁶ These concepts have potential application far beyond the single-use bag. However, where imposing a charge is not an option, bans are a good alternative policy so long as jurisdictions are mindful of what types of bags are still allowed.

III. TYPES OF PLASTIC BAG REDUCTION ORDINANCES

Many cities and states have legislatively mandated waste reduction goals, and waste reduction policies are needed to achieve those goals.²⁷ The main policy options for reducing single-use bags are bans, charges,²⁸ credits for bags supplied by customers at check-out, and mandatory recycling laws. Plastic bag ordinances generally apply only to carryout bags taken at the register—not bags used inside the store for items such as produce or meat.

A. CHARGES²⁹

As discussed above, charges paid by the customer have a more direct effect on personal habits because the customer is presented with an active choice of whether the plastic bag is worth the amount of the charge. Charges on plastic bags are meant to reduce consumption and internalize the external costs of pollution.³⁰ Most single-use bag charge³¹

²⁶ See FREINKEL, *supra* note 4, at 151.

²⁷ See, e.g., *How to Reduce, Reuse, Recycle, and Buy Recycled in State Government: Introduction*, CALRECYCLE, www.calrecycle.ca.gov/stateagency/Assistance/4RsGuide/Intro.htm (last visited Dec. 12, 2011) (“Assembly Bill 939 (Sher, Chapter 1095, Statutes of 1989) requires every California city and county to divert 50 percent of its waste from landfills by the year 2000. Current law also requires State agencies to institute waste reduction and buy recycled activities to assist local governments in this effort. With less than a year remaining to attain the solid waste diversion goals of AB 939, California has reached a commendable statewide 33 percent waste diversion rate. (Note: As of 2000, the statewide rate was at 42 percent.)”); *Zero Waste*, SFENVIRONMENT.ORG, www.sfenvironment.org/our_programs/program_info.html?ssi=3 (last visited Dec. 12, 2011) (stating that San Francisco has adopted a goal of 75% landfill diversion by 2010 and zero waste by 2020; its plastic bag reduction ordinance is one aspect of achieving this goal).

²⁸ Charges, fees, and taxes are generally referred to herein as “charges.”

²⁹ In the United States, in order to be constitutional, a fee ordinance must be fairly priced, reasonably related to the activity, and without an undue burden on a group or people. See CAL. GOV. CODE § 50076 (Westlaw 2012) (in order not to be defined as a tax, a regulatory fee must not “exceed the reasonable cost of providing the service or regulatory activity for which the fee is charged and which is not levied for general revenue purposes”); see also *Sinclair Paint Co. v. State Bd. of Equalization*, 937 P.2d 1350, 1356-58 (Cal. 1997) (upholding regulatory fee where fee was reasonably related to activity and imposed company’s share of responsibility for mitigating activity).

³⁰ Pigou, an English economist, theorized that external costs of pollution could be internalized “by imposing a tax on the pollutant at the level which reduces emissions to the point where the marginal benefits of internalization equal the marginal costs of abatement.” Frank

ordinances include a five- to ten-cent charge for plastic bags only, but some require charges for all single-use bags.³² Charges are either supplier-based or consumer-based;³³ however, charges paid by the supplier are generally ineffective because the customer is not provided with a direct incentive to reduce bag use.³⁴

i. Examples of Charge Ordinances

a. Ireland: The First and Most Notable Charge on Plastic Bags

In 2002, the Irish government introduced what is widely regarded as the most successful charge on plastic bags.³⁵ The twenty-two-euro-cent levy (equivalent to thirty-three U.S. cents) applies to every plastic bag provided at checkout.³⁶ Rather than calculating external costs of plastic bags to determine the charge amount,³⁷ the charge was set sufficiently high to give consumers pause for thought.³⁸ Ireland has demonstrated an over 90% reduction in plastic bag consumption and considerable reduction in litter since the charge went into effect, including generating

Convery et al., *The Most Popular Tax in Europe? Lessons from the Irish Plastic Bags Levy*, 38 ENVTL. & RESOURCE ECON 1, 1 (2007), available at plasticbaglaws.org/wordpress/wp-content/uploads/2010/02/study_the-most-popular-tax-in-Europe-2007.pdf.

³¹ Fees imposed on plastic bags are also sometimes referred to as Pigovian taxes, a tax levied on a market activity that generates negative externalities. See Philip Newswanger, *Cities Contemplate Use of Plastic Bag Taxes*, INSIDE BUSINESS: THE HAMPTON ROADS BUSINESS JOURNAL (May 21, 2010), available at insidebiz.com/news/cities-contemplate-use-plastic-bag-taxes-cities-consider-plastic-bag-tax-idea-revenue-producer-.

³² See, e.g., D.C. OFFICIAL CODE § 8-102.03(a)(1) (imposing five-cent fee for all disposable carryout bags).

³³ For a more detailed discussion of supplier-based fees, see *infra* Part VI.A.ii (discussing S.B. 531, legislation proposed in California with a minimal supplier based fee for single-use bags).

³⁴ See Rebecca Fromer, *Concessions of a Shopaholic: An Analysis of the Movement to Minimize Single-Use Shopping Bags from the Waste Stream and a Proposal for State Implementation in Louisiana*, 23 TUL. ENVTL. L.J. 493, 509-11 (2010) (stating that S.B. 531 “does little to affect the single-use bag markets; it does little to reduce the number of single-use bags actually being produced”). For an additional discussion of S.B. 531, see *infra* Part VI.A.ii.

³⁵ Convery et al., *supra* note 30.

³⁶ See *Plastic Bags, Current Levy*, IRISH DEP’T OF THE ENV’T, HERITAGE, & LOCAL GOV’T, available at www.environ.ie/en/Environment/Waste/PlasticBags/#Current%20Levy (scroll down to the “Current Levy” heading) (last visited Dec. 12, 2011); see also Letter from Kirsten James, Water Quality Director, and Sonia Diaz, Legislative Associate, Heal the Bay, to Senator Mark DeSaulnier, at 2 (Apr. 23, 2009) (on file with authors).

³⁷ Such a calculation would be required under general U.S. law. See *Sinclair Paint Co. v. State Bd. of Equalization*, 937 P.2d 1350, 1356-58 (Cal. 1997).

³⁸ Convery et al., *supra* note 30, at 3.

an estimated ten million euros in revenue in the levy's first year.³⁹ In the first years of implementation, retailers were generally neutral or positive about the charge, in part because additional implementation costs were generally less than the savings from purchasing fewer plastic bags.⁴⁰ In recent years, the charge has proved so popular with the Irish public that it would be politically damaging to remove it.⁴¹

b. Seattle: What Would Have Been the United States' First Single-Use Bag Charge Ordinance Overturned by a Voter Initiative Funded by the Plastics Industry

On July 28, 2008, the Seattle⁴² City Council passed an ordinance imposing a twenty-cent charge for each single-use bag provided to customers at all grocery, drug, and convenience stores with annual gross sales of \$1 million.⁴³ The charge applied to both plastic and paper bags.⁴⁴ Before the charge was scheduled to go into effect, opponents of the charge gathered enough signatures to require the issue be put before the voters⁴⁵ where it failed by fifty-eight percent.⁴⁶ Supporters of the charge blamed the loss on the opponents' 15-to-1 spending.⁴⁷ The Coalition to Stop the Seattle Bag Tax⁴⁸ campaign gathered more than \$1.4 million, including the American Chemistry Council's contribution of more than \$1.5 million.⁴⁹

³⁹ *Irish Bag Tax Hailed Success*, BBC NEWS (Aug. 20, 2002), available at news.bbc.co.uk/2/hi/europe/2205419.stm.

⁴⁰ Convery et al., *supra* note 30, at 7-8.

⁴¹ *Id.* at 2.

⁴² Although slanted toward economic policy and industry concerns, the SEATTLE BAG TAX website, www.seattlebagtax.org, provides a wealth of information regarding all plastic bag laws, including the text of ordinances and bills.

⁴³ Seattle, Wash., Ordinance 122,752, § 1.A (July 28, 2008), available at www.seattlebagtax.org/bagordinance_8-14-2008.pdf. Also, stores with sales of under \$1 million were given the option to impose the fee and retain 100% of the fee collected. *See id.* at § 1.D.2.

⁴⁴ *Id.*

⁴⁵ Marc Ramirez, *Seattle Voters Don't Buy Shopping-Bag Charge*, SEATTLE TIMES, Aug. 19, 2009, available at seattletimes.nwsourc.com/html/politics/2009686467_elexseabagfee19m.html.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *See Coalition to Stop the Seattle Bag Tax*, SOURCEWATCH.ORG, www.sourcewatch.org/index.php?title=Coalition_to_Stop_the_Seattle_Bag_Tax (last visited Dec. 12, 2011) ("The Coalition to Stop the Seattle Bag Tax is a front group funded by the Washington Food Industry, 7-Eleven, Inc. and the Progressive Bag Affiliates of the American Chemistry Council. The latter two groups both represent the interests of plastics manufacturers.")

⁴⁹ Peter Nickerson & Randy Rucker, Editorial, *Seattle's Bag Tax Is a Bad Idea Without Substantive Environmental Impact*, SEATTLE TIMES, Aug. 4, 2009, available at

c. Washington D.C.: The First Successful Single-Use Bag Charge in the United States

On January 1, 2009, Washington D.C.'s five-cent charge on paper and plastic carryout bags at all food and liquor retailers went into effect.⁵⁰ District of Columbia Council member Tommy Wells initially gained support for the bill by showing his colleagues pictures of the Anacostia River's islands of floating trash, which are composed of 21% plastic bags in the River and 47% in tributaries.⁵¹ Businesses retain one or two cents of the charge, depending on whether the business offers a reusable bag credit to customers that bring their own bags, and the remainder goes to the Anacostia River Cleanup Protection Fund.⁵² Even in a tough economy and with several powerful opponents, the bill passed, probably due in part to the relatively low charge amount.⁵³

Washington D.C.'s charge has been a great success and reduced plastic bag consumption by at least 80%, according to one survey, and generated \$1,068,100 for the Anacostia River Cleanup Protection Fund in six months alone.⁵⁴ A study conducted after the charge went into effect found that 75% of consumers were using fewer bags, that "[b]usinesses are not very bothered by the new law, and neither are their customers Instead, businesses are using many fewer bags and like the impact of that on their bottom line."⁵⁵

This success was a game-changer in that it showed even a small five-cent charge could change consumer behavior.⁵⁶ Before this, many advocacy groups were operating on the premise that a twenty-five-cent charge would be necessary to yield notable changes. However, as the

seattletimes.nwsourc.com/html/opinion/2009598747_guest05nickerson.html; see also FREINKEL, *supra* note 4, at 154.

⁵⁰ Annie Gowen, *D.C. Bags Wasteful Shopping Habit with Tax on Paper and Plastic*, WASH. POST, Jan. 2, 2010, available at www.washingtonpost.com/wp-dyn/content/article/2010/01/01/AR2010010101673.html.

⁵¹ *Id.*

⁵² *Id.*

⁵³ See Vandana Sinha, *Five Cent Bag Tax Wins Final Council Vote*, WASH. BUS. J., June 16, 2009, available at washington.bizjournals.com/washington/stories/2009/06/15/daily41.html.

⁵⁴ *DC Implements Successful Per-Bag Fee*, SUSTAINABLE PLASTICS?, available at www.sustainableplastics.org/dc-passes-bill (last visited Dec. 12, 2011).

⁵⁵ Memorandum from Opinion Works to Tracy Bowen, Exec. Dir. of Alice Ferguson Fund, Public Perceptions and Willingness to Address Litter in the District of Columbia (Feb. 15, 2011), available at www.scribd.com/doc/49486109/AFF-DC-20ResearchMemo021511.

⁵⁶ See Press Release, Alice Ferguson Foundation, Study of U.S Capital's Plastic Bag Fee Indicates Behavioral Change and Positive Support (Feb. 23, 2011), available at www.sustainableplastics.org/files/documents/AFF%20litter_opinion_survey%20Press%20Release%20022311%20FINAL.pdf.

success of D.C.'s charge shows, a small charge may be sufficient in some circumstances to spark the public's interest in the issue of single-use bag waste and remind consumers to bring reusable bags.

ii. *California-Specific Charge Ordinance Issue: Assembly Bill 2449⁵⁷ Makes Local Charges on Plastic Bags Illegal Until at Least 2013*

In 2006, Governor Arnold Schwarzenegger signed into law California Assembly Bill (A.B.) 2449, the Plastic Bag and Litter and Reduction Act.⁵⁸ A.B. 2449, which was sponsored by groups associated with the plastic bag industry, mandated in-store plastic bag recycling programs for California grocery stores and preempted all local plastic bag charges in California.⁵⁹ As a result, California cities are in a tough position, because they cannot impose a charge for the distribution of bags, but they face CEQA challenges (discussed below) when they try to bypass the charge approach and ban the distribution of plastic bags. A.B. 2449 sunsets in 2013, and if the law is not renewed California municipalities may adopt charges on plastic bags at that time.⁶⁰

B. CREDITS

Jurisdictions may also mandate that stores provide customers with a credit for each bag supplied at checkout by the customer. Some stores offer bag credits voluntarily.⁶¹ For instance, a program at Whole Foods Market offers a credit of at least a nickel for each checkout bag a

⁵⁷ A.B. 2449, 2005-2006 Gen. Assem., Reg. Sess. (Cal. 2006). Although A.B. 2449 has since been codified into California state law, *see* CAL. PUB. RES. CODE §§ 42250-42257 (Westlaw 2012), it will be referred to by its bill number throughout this article.

⁵⁸ *See* A.B. 2449, § 1, 2005-2006 Reg. Sess. (Cal. 2006), codified as CAL. PUB. RES. CODE § 42250(d) (Westlaw 2012).

⁵⁹ *See id.*; *see also* AB 2449 (Levine) Plastic Bag Litter and Waste Reduction, CALIFORNIANS AGAINST WASTE, www.cawrecycles.org/issues/current_legislation/ab2449_06 (last visited Dec. 12, 2011); *see also* Romer, *supra* note 20, at 455-56. At that time San Francisco was considering a seventeen-cent fee on plastic bags, which was precluded by the passage of A.B. 2449, so San Francisco opted instead to enact a ban on all single-use plastic carryout bags. S.F. ENV'T CODE §§ 1701-1709 (2007), *available at* [www.amlegal.com/nxt/gateway.dll/California/environment/chapter17plasticbagreductionordinance?f=templates\\$fn=default.htm\\$3.0\\$vid=amlegal:sanfrancisco_ca](http://www.amlegal.com/nxt/gateway.dll/California/environment/chapter17plasticbagreductionordinance?f=templates$fn=default.htm$3.0$vid=amlegal:sanfrancisco_ca); *see* Mike Verespej, *San Fran's Bag Plans Skirt State*, PLASTICS NEWS, Jan 29, 2007, at 1, *available at* www.plasticsnews.com/headlines2.html?id=07012900102&q=San+Fran%27s+Bag+Plans+Skirt+State.

⁶⁰ *See* A.B. 2449, § 1.

⁶¹ *See, e.g.,* *Nickels for Nonprofits*, WHOLE FOODS, wholefoodsmarket.com/stores/cleveland/store-calendar/ (last visited Jan. 14, 2012) (the Whole Foods in Cleveland offers a five-cent credit per reusable bag used by the customer, which the customer can opt to donate to a non-profit).

customer supplies.⁶²

In 2006, the Rhode Island state legislature considered a bill aimed at encouraging consumers “to utilize reusable bags through a three-cent retailer-funded rebate for each bag an individual brings to the store.”⁶³ The bill sought to reward customers for supplying reusable bags, by creating a direct economic disincentive for the continued use of wasteful single-use packaging.⁶⁴ The three-cent credit was criticized on one hand as insufficient to change consumer habits because it was much less than the price of many checkout bags,⁶⁵ and on the other because retailers would be responsible for funding the program.⁶⁶ The Rhode Island bill did not pass.⁶⁷

In 2009, San Francisco considered an ordinance to require all supermarkets and pharmacies covered by San Francisco’s plastic bag ban to provide a bag credit.⁶⁸ That proposal faced opposition by retailers and was shelved in favor of moving forward with expanding the scope of the city’s plastic bag ban and adding a charge for paper bags.⁶⁹

Credits may work best as part of a more comprehensive ordinance, like Washington D.C.’s ordinance, under which retailers are given the option to retain a larger portion of the bag charge if they offer a bag credit program.⁷⁰

C. PLASTIC BAG BANS

Plastic bag bans focus on eliminating the most environmentally harmful form of single-use bags. The appeal of plastic bag bans relates in part to their simplicity, because collection and reporting of charges and

⁶² *Green Mission*, WHOLE FOODS, www.wholefoodsmarket.com/values/green-mission.php (last visited Dec. 12, 2011).

⁶³ Adam Akullian et al., *Plastic Bag Externalities and Policy in Rhode Island*, BROWN POLICY REVIEW 1 (2006), available at seattlebagtax.org/referencedpdfs/en-akullianetal.pdf.

⁶⁴ *Id.* at 2.

⁶⁵ Opponents pointed out that plastic bags cost only about one cent each for retailers to buy, “so it is clearly in each retailer’s self-interest to *discourage* customers from bringing their own bags.” *Id.* at 4.

⁶⁶ *Id.*

⁶⁷ See R.I. GEN. LAWS ANN. §§ 23-18.11-1 to 23-18.11-6 (Westlaw 2012) (regulating the use of plastic bags but not including the three-cent rebate).

⁶⁸ S.F., Cal., Proposed Ordinance File No. 092211, available at plasticbaglaws.org/wordpress/wp-content/uploads/2010/05/SF-plastic-bag-credit1.pdf.

⁶⁹ See Rachel Gordon, *S.F. May Expand Ban on Disposable Plastic Bags*, S.F. GATE (Aug. 3, 2010), available at articles.sfgate.com/2010-08-03/news/22010241_1_plastic-bags-large-supermarkets-and-chain-american-plastics-council.

⁷⁰ See Wash. D.C. Ordinance, § 4(B)(i) (2001 & Supp. 2009), available at plasticbaglaws.org/wordpress/wp-content/uploads/2010/02/leg_Washington-DC.pdf.

credits are not required.⁷¹ Plastic bag bans are often criticized for simply transitioning customers from plastic to paper bags. Thus, plastic bag bans are most effective if combined with a charge on paper bags, and even more so by instituting bag credits to further encourage the use of reusable bags.

i. Many Bans Focus on Thin Plastic Bags Because They Present the Greatest Harms

Bans of plastic bags are popular in developing countries where implementation of charges can present formidable obstacles. Many of these bans apply only to thin plastic bags, based on the reasoning that thin bags pose an especially great threat to the environment because they are more likely to be blown by the wind and end up as litter.⁷² Manila banned plastic bags below fifty microns “because they cannot be recycled and cause flooding.”⁷³ Similarly, India banned plastic bags of less than sixty microns thickness.⁷⁴ In Kenya, the National Environmental Management Authority recommended a ban on the use of plastic bags thinner than thirty microns.⁷⁵

The United Nations Environment Programme (UNEP) has also called for a worldwide ban on thin-film plastic bags.⁷⁶ UNEP Executive Director Achim Steiner recommended that thin-film plastic bags “should be banned or phased-out rapidly everywhere—there is simply zero justification for manufacturing them anymore, anywhere.”⁷⁷

⁷¹ See FREINKEL, *supra* note 4, at 154 (“The popularity of bans was also surely enhanced by what one writer called their ‘righteous simplicity.’ Unlike a fee, a ban didn’t ask much of anyone—except the plastics industry.”).

⁷² Susan Anyangu-Amu, *Kenya: Plastic Bags: Convenience Costing the Earth*, INTER PRESS SERVICE NEWS AGENCY (Jan. 21, 2010), available at www.ipsnews.net/africa/nota.asp?idnews=50061.

⁷³ Czarina Nicole Ong, *Manila Seeks to Ban Thin Plastic Bags*, MANILA BULLETIN PUBLISHING CORPORATION (Oct. 2, 2010), available at www.mb.com.ph/node/280155/manila-.

⁷⁴ *Coming Soon, Blanket Ban on Thin Plastic Bags*, THE NEW INDIAN EXPRESS (June 6, 2011), available at ibnlive.in.com/news/coming-soon-blanket-ban-on-thin-plastic-bags/157017-60-120.html.

⁷⁵ Susan Anyangu-Amu, *supra* note 72.

⁷⁶ Press Release, United Nations Environment Programme, Report Brings to the Surface the Growing Global Problem of Marine Litter (Aug. 6, 2009), available at www.unep.org/ecosystemmanagement/News/PressRelease/tabid/426/language/en-US/Default.aspx?DocumentID=589&ArticleID=6214&Lang=en.

⁷⁷ *Id.*

ii. *Smart Policy in China: Combining Bans on Thin Plastic Bags with Charges on Thicker Plastic Bags*

China banned ultra-thin plastic bags in 2008 and established a policy requiring stores to charge customers for thicker plastic bags.⁷⁸ Since the ban has been put in place, many shoppers now carry their own bags; research from one China environmental organization found that about 40% of consumers preferred to take their own bags when they shopped.⁷⁹ Additionally, China has reported a 66% drop in plastic bag use, equivalent to 40 billion bags, and saved an estimated 1.6 million tons of petroleum.⁸⁰

iii. *California's "Second Generation" Ordinances: Ban on Plastic and Charge on Paper*

Spurred by threats of CEQA litigation based on the argument that paper bags are worse for the environment than plastic bags, many California cities added a small charge (five to ten cents per bag) for paper bags to offset such claims. Los Angeles County was the first California municipality to adopt a hybrid ordinance,⁸¹ and now these hybrid ordinances have become the standard in California.

a. *Proposition 26 May Restrict Charges on Paper Bags*

In California, charges for paper bags are arguably restricted by an industry-sponsored proposition passed by California voters in November 2010. Proposition 26 redefines regulatory fees as taxes.⁸² This means that new regulatory fees must be treated like taxes in that they must be approved by a legislative supermajority at the state level and a voter supermajority for local measures.⁸³

Proposition 26 thus makes it much harder to pass regulatory fees that are commonly used as a way to charge polluters for the environmental damage they cause, such as carbon fees used to address health impacts of pollution or hazardous waste fees used to support waste

⁷⁸ *Researchers: Plastics Bags Ban Needs Strengthening*, CRIENGLISH.COM (May 30, 2011), available at english.cri.cn/7146/2011/05/30/2702s640058.htm.

⁷⁹ *Id.*

⁸⁰ Ben Block, *China Reports 66-Percent Drop in Plastic Bag Use*, WORLD WATCH INSTITUTE, available at www.worldwatch.org/node/6167 (last visited Dec. 12, 2011).

⁸¹ LOS ANGELES COUNTY CODE Ch. 12.85 (2011), available at search.municode.com/html/16274/index.htm (follow "Title 12. Environmental Protection" link).

⁸² See CAL. CONST. art. XIII C, § 1(e).

⁸³ See *id.* at XIII C § 2(b), (c).

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disposal.⁸⁴ At the time of the election, there was a concern that Proposition 26 could be used to impede efforts to ban plastic bags because, in order to address CEQA concerns, many current plastic bag ordinances contain a charge for paper bags.⁸⁵

b. Changes to Ordinance Language in Response to Proposition 26

In response to Proposition 26, many cities restructured their bag ordinances by removing any requirement that the government collect any portion of the paper bag charge.⁸⁶ This approach is consistent with the opinion of San Jose's City Attorney, who found that Proposition 26 does not apply to bag ordinances that do "not result in revenue to the state or local government Rather, like the sale of any other product, the retail establishment retains the revenue from the sale without any requirement that the retailers pay for governmental activity."⁸⁷

This differentiation is also supported by the California Supreme Court case *Sinclair Paint Co v. State Board of Equalization*,⁸⁸ in which the court noted that revenues from both taxes and regulatory fees go to the government.⁸⁹ Thus, there is a very strong argument that fees that do not go to the government are not regulatory fees subject to Proposition 26.

c. Plastics Bag Manufacturer Casts Itself in Another Role: Defender of Constitutional Rights

In 2011, Hilex Poly, a large plastics manufacturer, and four individual named plaintiffs who claim to have been "harmed" by paying the ten-cent store charge for paper bags in unincorporated Los Angeles County filed a Complaint against Los Angeles County. The complaint requests the invalidation of the County's single-use bag ordinance on the

⁸⁴ See *Prop 26 FAQs*, NO ON PROP 26, consumercal_blog.live.radicaldesigns.org/?page_id=55 (scroll down to question four) (last visited Dec. 12, 2011).

⁸⁵ See, e.g., LEAGUE OF CALIFORNIA CITIES PROPOSITION 26 IMPLEMENTATION GUIDE 31 (Apr. 2011), available at www.cacities.org/resource_files/29700.Proposition26ImplementationGuide1.1.pdf.

⁸⁶ See Los Angeles County Model Ordinance, ladpw.org/epd/PlasticBags/pdf/BagOrdinanceasAdopted.pdf (amended to provide that revenues from the fee go to the retailer, not the government).

⁸⁷ Memorandum from Richard Doyle, San Jose City Attorney, to Mayor and City Council, on Single-Use Carryout Bags (Dec. 2, 2010), available at sanjoseca.gov/clerk/Agenda/20101214/20101214_0702.pdf.

⁸⁸ *Sinclair Paint Co. v. State Bd. of Equalization*, 937 P.2d 1350 (Cal. 1997).

⁸⁹ *Id.* at 1353-54.

grounds that it is an unconstitutional special tax under Article XIII C of the California Constitution.⁹⁰

The complaint alleges that the charge imposed on paper bags by Los Angeles County's ordinance is a tax and, pursuant to Proposition 26, cannot be imposed without voter approval.⁹¹ The complaint further states that the ten-cent paper bag charge is precisely what Proposition 26 sought to prohibit—taxes characterized as 'fees' or 'charges' in order to avoid the California Constitution's voter approval requirements.⁹² The complaint seeks declaratory and injunctive relief.⁹³ As of the print time of this Article, the Los Angeles County Superior Court has not yet ruled on this case, but any ruling will likely provide valuable insight into how Proposition 26 will impact single-use bag charges in California.

D. MANDATORY PLASTIC BAG RECYCLING ORDINANCES AND IN-STORE RECYCLING PROGRAMS

Mandatory recycling laws have a place as part of any comprehensive carryout bag policy, but plastic bag recycling should not take the place of bans and economic incentives to reduce overall consumption.⁹⁴ Unfortunately, plastic bag recycling ordinances are often industry-sponsored and often include preemption language preventing local jurisdictions from enacting other policies relating to plastic bags.⁹⁵

E. VOLUNTARY EDUCATIONAL PROGRAMS

Educating the public on the environmental harms caused by plastic bags is the easiest and simplest method of reducing plastic bag consumption, but education alone is often not enough.⁹⁶ Since voluntary

⁹⁰ See Verified Complaint for Writ of Mandate, Injunctive Relief, & Declaratory Relief, at 1, 8, *Schmeer v. L.A. Cnty.*, No. BC-470705 (L.A. Super. Ct. Oct. 3, 2011), available at plasticbaglaws.org/wordpress/wp-content/uploads/2010/05/lit_LA-County_Prop-26-Complaint.pdf.

⁹¹ See *id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ See Akullian, *supra* note 63.

⁹⁵ See, e.g., A.B. 2449, 2005–2006 Reg. Sess. (Cal. 2006), available at www.leginfo.ca.gov/pub/05-06/bill/asm/ab_2401-2450/ab_2449_bill_20060930_chaptered.pdf (“The bill would prohibit a city, county, or other public agency from adopting, implementing, or enforcing an ordinance, resolution, regulation, or rule that requires a store to collect, transport, or recycle plastic carryout bags or conduct additional auditing or reporting, or imposing a plastic carryout bag fee upon a store, except as specified.”).

⁹⁶ Tyler Hayden, *Carpinteria Bans Bad Bags: City Council Votes to Go All Reusable All the Time*, SANTA BARBARA INDEPENDENT, Oct. 12, 2011, www.independent.com/news/2011/oct/12/carpinteria-bans-bad-bags/ (“We’ve tried education, tried persuasion, tried setting examples for

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schemes have largely proven unsuccessful,⁹⁷ many communities have chosen to enact mandatory laws that directly regulate the use of plastic bags.

IV. THE POLITICAL CLIMATE PRIOR TO THE *MANHATTAN BEACH* DECISION: PLASTIC BAG MANUFACTURERS MARKET THEMSELVES AS ENVIRONMENTALISTS

In 2004, the California Film Extruders & Converters Association, a plastic manufacturing group, voiced its concern that “our industry needs to change the perception of plastic as bad for the environment” and stated that it was time to stop playing defense and go on offense, focusing on “*prevention* instead of *reaction*” as “a far less costly, and more effective, strategy.”⁹⁸ The industry’s focus was on changing the perception of plastic bags so that plastic bag manufacturing could continue unfettered by government regulation. The strategy to change the perception of plastic bags involved extolling the virtues of plastic bag recycling and marketing plastic bags as the environmentally superior choice, in part through forming groups with benign names like Coalition to Support Plastic Bag Recycling, Californians for Extended Product Responsibility and Save the Plastic Bag Coalition.⁹⁹ Perhaps the best example of the plastics industry playing offense is the use of CEQA to delay and invalidate plastic bag ordinances in California, as discussed below.

V. CALIFORNIA ENVIRONMENTAL QUALITY ACT

CEQA was enacted to provide a high-quality environment and was premised on the need to understand the relationship between the maintenance of ecological systems and the general welfare of

people, but it just hasn’t been enough.”).

⁹⁷ Siel Ju, *L.A. County Board of Supervisors to Consider Plastic Bag Ban*, SOUTHERN CALIFORNIA PUBLIC RADIO (Nov. 11, 2010), www.scpr.org/blogs/environment/2010/11/11/l-county-board-supervisors-consider-plastic-bag-ban/ (“The plastic bag industry failed to meet its own voluntary reduction goals for plastic bag use.”); Anthony Clark, *Scotland Has a Change of Heart on Bag Ban*, WASTE & RECYCLING NEWS, Aug. 18, 2011, www.wasterecyclingnews.com/email.html?id=1313672253 (“[V]oluntary measures to cut bag use are failing to cut demand at a sufficient rate.”); Sean Poulter, *Boris Calls for Plastic Bag Ban Across London in Fight Against “Poisonous” Waste and Litter*, DAILY MAIL, Aug. 5, 2011, available at www.dailymail.co.uk/news/article-2022632/Boris-calls-plastic-bag-ban-London-fight-poisonous-waste-litter.html (Mayor of London calls for plastic bag ban after voluntary efforts do not work).

⁹⁸ California Film Extruders & Converters Ass’n, *supra* note 17.

⁹⁹ See, e.g., *About Us*, SAVE THE PLASTIC BAG COALITION, savetheplasticbag.com/ReadContent522.aspx (last visited Feb. 28, 2012).

California's population.¹⁰⁰ The legislature recognized the environment's limited capacity and found that the government must "take immediate steps to identify any critical thresholds for health and safety of the people of the state and take all coordinated actions necessary to prevent such thresholds being reached."¹⁰¹ To meet this goal, CEQA requirements apply to all state agencies that regulate activities of private individuals, corporations, and public agencies "so that major consideration is given to preventing environmental damage, while providing a decent home and satisfying living environment for every Californian."¹⁰²

A. CEQA'S BASIC REQUIREMENTS

CEQA requires that every project with a "potentially significant effect" on the environment undergo a review process, typically in the form of an Environmental Impact Report (EIR).¹⁰³ The purpose of the EIR is to examine and disclose environmental impacts associated with the selected project.¹⁰⁴

The lead agency must determine whether the activity qualifies as a project under CEQA. According to the Public Resources Code that implements CEQA, a "project" is defined as "an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment," which is directly undertaken by a public agency, a person supported by assistance from a government agency, or involves the issuance of a permit or other use entitlements by a public agency.¹⁰⁵ The Supreme Court of California has found that plastic bag ordinances are an activity undertaken by a public agency that may cause a direct or reasonably foreseeable indirect physical change in the environment.¹⁰⁶ Thus, the CEQA review requirements apply to plastic bag ordinances.

Generally, CEQA requires that every "project" that does not fall

¹⁰⁰ CAL. PUB. RES. CODE § 21000(b), (c) (Westlaw 2012).

¹⁰¹ CAL. PUB. RES. CODE § 21000(d) (Westlaw 2012).

¹⁰² CAL. PUB. RES. CODE § 21000(g) (Westlaw 2012).

¹⁰³ CAL. PUB. RES. CODE § 21080(d) (Westlaw 2012); *see also* CAL. PUB. RES. CODE § 21082.2(a) (Westlaw 2012) ("The lead agency shall determine whether a project may have a significant effect on the environment based on substantial evidence in light of the whole record.").

¹⁰⁴ *See* CAL. PUB. RES. CODE § 21002.1 (Westlaw 2012); *see also* *Rio Vista Farm Bureau Ctr. v. Cnty. of Solano*, 7 Cal. Rptr. 2d 307, 312 (Ct. App. 1992) ("The EIR has been described as the 'heart of CEQA'; it is an 'environmental alarm bell' which has the objective of alerting the public and governmental officials to the environmental consequences of decisions before they have reached ecological points of no return.").

¹⁰⁵ CAL. PUB. RES. CODE § 21065 (Westlaw 2012).

¹⁰⁶ *Save the Plastic Bag Coal. v. City of Manhattan Beach*, 254 P.3d 1005, 1016 (Cal. 2011).

within an “exemption” or qualify for a Negative Declaration must complete an EIR before implementation. Depending on the project, an EIR¹⁰⁷ can be a lengthy and expensive document.¹⁰⁸

i. Ordinances Covered by Categorical Exemptions Are Exempt from the CEQA Provisions

There are several exceptions to the need to prepare an EIR. First, an agency may find that a proposed project is subject to a categorical exemption.¹⁰⁹ Categorical exemptions are classes of projects “which have been determined not to have a significant effect on the environment and which shall, therefore, be exempt from the provisions of CEQA.”¹¹⁰ There are multiple types of categorical exemptions,¹¹¹ but the exemptions relevant to single-use bag ordinances (Class 7¹¹² and 8¹¹³) are projects that are intended to benefit the environment, will have a beneficial impact on the environment, and have no reasonable likelihood of significant adverse impacts.¹¹⁴ If an agency finds that a categorical

¹⁰⁷ See CAL. PUB. RES. CODE § 21061 (Westlaw 2012) (“An environmental impact report is an informational document which, when its preparation is required by this division, shall be considered by every public agency prior to its approval or disapproval of a project. The purpose of an environmental impact report is to provide public agencies and the public in general with detailed information about the effect which a proposed project is likely to have on the environment; to list ways in which the significant effects of such a project might be minimized; and to indicate alternatives to such a project.”).

¹⁰⁸ Press Release, Flexible Plastic Association, An Update on Proposed Plastic Bans (Nov. 1, 2007), available at www.flexpack.org/INDUST/PRESS_RELEASES/2007/112007/Update_on_proposed_plastic_bag_bans.pdf; see also Romer, *supra* note 20, at 460-61.

¹⁰⁹ See CAL. CODE REGS. tit. 14, § 15300 (Westlaw 2012).

¹¹⁰ CEQA Guidelines, CAL. CODE REGS. tit. 14, § 15300 (Westlaw 2012).

¹¹¹ For instance, CAL. CODE REGS. tit. 14, § 15301, exempts “the operation, repair, maintenance, permitting, leasing, licensing, or minor alteration of existing public or private structures, facilities, mechanical equipment, or topographical features, involving negligible or no expansion of use beyond that existing at the time of the lead agency’s determination.” Section 15306 exempts “Information Collection,” and § 15309 exempts “Inspections.” CAL. CODE REGS. tit. 14, §§ 15301, 15306, 15309 (Westlaw 2012).

¹¹² CEQA Guidelines, CAL. CODE REGS. tit. 14, § 15307 (Westlaw 2012) (“Class 7 consists of actions taken by regulatory agencies as authorized by state law or local ordinance to assure the maintenance, restoration, or enhancement of a natural resource where the regulatory process involves procedures for protection of the environment. Examples include but are not limited to wildlife preservation activities of the State Department of Fish and Game. Construction activities are not included in this exemption.”).

¹¹³ CAL. CODE REGS. tit. 14, § 15308 (Westlaw 2012) (“Class 8 consists of actions taken by regulatory agencies, as authorized by state or local ordinance, to assure the maintenance, restoration, enhancement, or protection of the environment where the regulatory process involves procedures for protection of the environment. Construction activities and relaxation of standards allowing environmental degradation are not included in this exemption.”).

¹¹⁴ See CAL. CODE REGS. tit. 14, §§ 15307, 15308 (Westlaw 2012).

exemption is applicable it need not prepare an EIR.¹¹⁵ There are several exceptions to categorical exemptions, and the exceptions applicable to plastic bag ordinances are discussed later in this Article.¹¹⁶

These categorical exemptions are consistent with the legislative intent of CEQA, which is aimed at protecting the environment,¹¹⁷ because it would be contrary to the intent to CEQA to impede environmentally beneficial projects.

ii. Alternatives to EIRs: Negative Declarations and Mitigated Negative Declarations

An agency can also choose to prepare a Negative Declaration¹¹⁸ or a Mitigated Negative Declaration.¹¹⁹ A Negative Declaration is appropriate if the project does not qualify for a categorical exemption, but after completing an initial study the agency finds no substantial evidence that the project would have a significant adverse effect on the environment.¹²⁰

A Negative Declaration is defined as “a written statement briefly

¹¹⁵ See CAL. CODE REGS. tit. 14, § 15300 (Westlaw 2012).

¹¹⁶ See *infra* Part V.B.i.

¹¹⁷ See CAL. PUB. RES. CODE § 21000 (Westlaw 2012) (“The Legislature finds and declares as follows: (a) The maintenance of a quality environment for the people of this state now and in the future is a matter of statewide concern.”); CAL. PUB. RES. CODE § 21001 (Westlaw 2012) (“The Legislature further finds and declares that it is the policy of the state to: (a) Develop and maintain a high-quality environment now and in the future, and take all action necessary to protect, rehabilitate, and enhance the environmental quality of the state.”).

¹¹⁸ See CAL. PUB. RES. CODE § 21064 (Westlaw 2012) (“‘Negative declaration’ means a written statement briefly describing the reasons that a proposed project will not have a significant effect on the environment and does not require the preparation of an environmental impact report.”).

¹¹⁹ See CAL. PUB. RES. CODE § 21064.5 (Westlaw 2012) (“‘Mitigated negative declaration’ means a negative declaration prepared for a project when the initial study has identified potentially significant effects on the environment, but (1) revisions in the project plans or proposals made by, or agreed to by, the applicant before the proposed negative declaration and initial study are released for public review would avoid the effects or mitigate the effects to a point where clearly no significant effect on the environment would occur, and (2) there is no substantial evidence in light of the whole record before the public agency that the project, as revised, may have a significant effect on the environment.”).

¹²⁰ See CAL. CODE REGS. tit. 14, § 15070 (Westlaw 2012) (“A public agency shall prepare or have prepared a proposed negative declaration or mitigated negative declaration for a project subject to CEQA when: (a) The initial study shows that there is no substantial evidence, in light of the whole record before the agency, that the project may have a significant effect on the environment, or (b) The initial study identifies potentially significant effects, but (1) Revisions in the project plans or proposals made by, or agreed to by the applicant before a proposed mitigated negative declaration and initial study are released for public review would avoid the effects or mitigate the effects to a point where clearly no significant effects would occur, and (2) There is no substantial evidence, in light of the whole record before the agency, that the project as revised may have a significant effect on the environment.”); see also CAL. CODE REGS. tit. 14, § 15071 (Westlaw 2012) (describing necessary contents of a Negative Declaration).

describing the reasons that a proposed project will not have a significant effect on the environment and does not require the preparation of an environmental impact report.”¹²¹ For example, under a city ordinance, if a lead agency determines that a proposed project would not have a significant effect on the environment, the lead agency would adopt a Negative Declaration if “[t]here is no substantial evidence, in light of the whole record before the lead agency, that the project may have a significant effect on the environment.”¹²²

A Mitigated Negative Declaration is appropriate for a project if the initial study identified potentially significant impacts but the impacts identified can be mitigated to the point where they are not significant.¹²³ Mitigation measures can include avoidance of the identified impact altogether by modifying aspects of the project, rectifying the impact by restoring the impacted environment, reducing the impact over time by “preservation and maintenance operations during the life of the action,” or compensating for the impact by “replacing or providing substitute resources or environments.”¹²⁴

iii. Tiering EIRs and Negative Declarations

Agencies can also choose to tier EIRs and Negative Declarations.¹²⁵ Generally, this occurs when multiple agencies undertake similar projects, with one agency having previously completed an EIR or Negative Declaration.¹²⁶ In sum, an agency that subsequently undertakes the same project can “tier” on the initial EIR, utilizing the same research and information, adding supplemental information only if necessary.¹²⁷ This process allows agencies to avoid unnecessary expense and duplication of

¹²¹ CAL. PUB. RES. CODE § 21064 (Westlaw 2012).

¹²² CAL. PUB. RES. CODE § 21080 (b)(16)(1) (Westlaw 2012).

¹²³ See CAL. PUB. RES. CODE § 21157.5(a) (Westlaw 2012) (“A proposed mitigated negative declaration shall be prepared for any proposed subsequent project if both of the following occur: (1) . . . (2) Feasible mitigation measures or alternatives will be incorporated to revise the proposed subsequent project, before the negative declaration is released for public review, in order to avoid the effects or mitigate the effects to a point where clearly no significant effect on the environment will occur.”).

¹²⁴ CAL. CODE REGS. tit. 14, § 15370 (d), (e) (Westlaw 2012). For example, in order to mitigate greenhouse gases (GHG) associated with the manufacturing and distribution of paper bags, the County of Santa Cruz included a mitigation measure regarding continuing outreach and education efforts to promote reusable bag use. Mitigated Negative Declaration Draft, County of Santa Cruz Planning Department 59 (Feb. 15, 2011), *available at* www.sccoplanning.com/pdf/BagOrdinanceInitialStudyMNDComplete.pdf.

¹²⁵ See CAL. CODE REGS. tit. 14, § 15152 (Westlaw 2012).

¹²⁶ See CAL. PUB. RES. CODE § 21094 (Westlaw 2012).

¹²⁷ See CAL. PUB. RES. CODE § 21094 (Westlaw 2012).

information.¹²⁸

Tiering EIRs often occurs in the context of one agency or jurisdiction having prepared a general plan or overall policy; specific projects underneath that plan or policy can then tier subsequent documents on the original document, and limit review to impacts relevant to the original project if not already fully analyzed in the original document.¹²⁹

No California municipality has relied on tiering to comply with CEQA in passing a single-use bag ordinance. However, of the California cities that have passed bag ordinances, the City of Long Beach adopted its plastic bag ordinance via a strategy that, while not technically relying on a CEQA tiering provision, resembled that strategy, as discussed below.¹³⁰

iv. Standard of Review

If an agency chooses not to prepare an EIR before adopting a plastic bag ordinance and a petitioner seeks a writ of mandate to have a superior court review the agency's decision, the court will evaluate whether there is a "fair argument" that the project will have potentially significant impacts; if so, an EIR must be prepared.¹³¹ Through this process, an agency's decision to apply a categorical exemption or prepare a Negative Declaration in lieu of an EIR is subject to judicial review.¹³² The burden is on the petitioner to demonstrate the existence of substantial evidence supporting a "fair argument" of significant environmental impact, and an

¹²⁸ CAL. PUB. RES. CODE § 21093(a)(1) (Westlaw 2012) (tiering promotes "(1) streamlining regulatory procedures, (2) avoiding repetitive discussions of the same issues in successive environmental impact reports, and (3) ensuring that environmental impact reports prepared for later projects which are consistent with a previously approved policy, plan, program, or ordinance concentrate upon environmental effects which may be mitigated or avoided in connection with the decision on each later project. The Legislature further finds and declares that tiering is appropriate when it helps a public agency to focus upon the issues ripe for decision at each level of environmental review and in order to exclude duplicative analysis of environmental effects examined in previous environmental impact reports."); CAL. PUB. RES. CODE § 21093(b) (Westlaw 2012) ("To achieve this purpose, environmental impact reports shall be tiered whenever feasible, as determined by the lead agency.").

¹²⁹ STATE OF CAL., GOVERNOR'S OFFICE OF PLANNING & RESEARCH, THE PLANNER'S GUIDE TO SPECIFIC PLANS, PART THREE: CEQA AND SPECIFIC PLANS, *available at* ceres.ca.gov/planning/specific_plans/sp_part3.html (last visited Dec. 12, 2011).

¹³⁰ *Education & Outreach: Information for Retailers*, LITTER FREE LONG BEACH, www.litterfreelb.org/tote_bags/retailers.shtml (last visited Dec. 12, 2011).

¹³¹ See *Sierra Club v. Cal. Dep't of Forestry & Fire Prot.*, 59 Cal. Rptr. 3d 9, 18 (Ct. App. 2007).

¹³² See, e.g., *Save the Plastic Bag Coal. v. City of Manhattan Beach*, 254 P.3d 1005, 1008 (Cal. 2011).

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abuse-of-discretion standard of review applies.¹³³ Whether the record contains sufficient evidence to support a “fair argument” is a question of law.¹³⁴ If the court finds substantial evidence that the project might have such an impact, but the agency failed to prepare an EIR, the agency’s action is set aside as an abuse of discretion.¹³⁵

B. HOW CEQA IS BEING USED AGAINST ENVIRONMENTALISTS

CEQA is often used as a tool of the environmental community to minimize the detrimental impacts of a proposed project.¹³⁶ However, in the plastic bag context, CEQA has been used by the plastics industry as a tool to slow down or discourage jurisdictions from passing plastic bag ordinances.

i. How the CEQA Lawsuit Plan Developed

In 2007, in the face of well-funded public relations campaigns and statewide preemption of local charges on plastic bags, San Francisco adopted an ordinance that banned single-use plastic carryout bags at all supermarkets and large chain pharmacies.¹³⁷ A few months later, the City of Oakland adopted a similar ordinance.¹³⁸ In the interim, the plastic bag industry tried a more creative approach to stop the adoption of plastic bag ordinances. They formed the Coalition to Support Plastic Bag Recycling (CSPBR) and sued Oakland under CEQA, demanding an EIR.¹³⁹ CSPBR’s argument under CEQA, that the ordinance could potentially have significant adverse impacts on the environment, was primarily based on life-cycle assessments that suggested paper bags are potentially worse for the environment than plastic.¹⁴⁰ CSPBR’s lawsuit was a test case. Oakland lost.¹⁴¹

¹³³ CAL. PUB. RES. CODE § 21168.5 (Westlaw 2012); Architectural Heritage Ass’n v. Cnty. of Monterey, 19 Cal. Rptr. 3d 469, 481 (Ct. App. 2004).

¹³⁴ Valley Advocates v. City of Fresno, 74 Cal. Rptr. 3d 151, 172 (Ct. App. 2008).

¹³⁵ See CAL. PUB. RES. CODE § 21168.5 (Westlaw 2012); Friends of “B” St. v. City of Hayward, 165 Cal. Rptr. 514, 522-23 (Ct. App. 1980).

¹³⁶ See, e.g., Luke Cole, *Environmental Justice Litigation: Another Stone in David’s Sling*, 21 FORDHAM URB. L.J. 523, 528 (1994) (discussing using CEQA to oppose a toxic waste incinerator).

¹³⁷ See Romer, *supra* note 20, at 457.

¹³⁸ Oakland, Cal., Ordinance No. 12818 CMS (July 17, 2007), available at [www.oaklandcityattorney.org/PDFS/PLASTIC%20BAG%20ORD%20\(F\).pdf](http://www.oaklandcityattorney.org/PDFS/PLASTIC%20BAG%20ORD%20(F).pdf).

¹³⁹ Petitioner’s Opening Brief in Support of Petition for Writ of Mandate Under the Cal. Env’tl. Quality Act, Coal. to Support Plastic Bag Recycling v. City of Oakland, *supra* note 8, at 1.

¹⁴⁰ *Id.* at 1-4.

¹⁴¹ Order Granting Petition for Writ of Mandate Under Cal. Env’tl. Quality Act at 2, Coal. to Support Plastic Bag Recycling v. City of Oakland, No. RG07339097 (Super. Ct. Alameda Cnty.

ii. *Save the Plastic Bag Coalition*

In 2007, shortly after San Francisco's ordinance was adopted, plastic bag manufacturers approached attorney Stephen Joseph to help them defeat plastic bag ban initiatives.¹⁴² In June 2008, Save the Plastic Bag Coalition (SPBC) was formed, with Stephen Joseph acting as counsel and campaign administrator for the group.¹⁴³ SPBC claims that it "was formed to counter myths, misinformation and exaggerations about plastic bags by various groups purporting to promote environmental quality."¹⁴⁴ The author of an article in *Time* magazine described Mr. Joseph as follows:

In the pantheon of lost causes, defending the plastic grocery bag would seem to be right up there with supporting smoking on planes or the murder of puppies. The ubiquitous thin white bag has moved squarely beyond eyesore into the realm of public nuisance, a symbol of waste and excess and the incremental destruction of nature. But where there's an industry at risk, there's an attorney, and the plastic bag's advocate in chief is Stephen L. Joseph, head of the quixotically titled Save the Plastic Bag campaign.¹⁴⁵

SPBC has sued or threatened to sue virtually every California municipality that subsequently considered adopting a plastic bag ordinance. These lawsuits led to a variety of reactions from municipalities. For example, while waiting for the outcome of the *Manhattan Beach* case the majority of municipalities refrained from adopting plastic bag ordinances. Three cities prepared full EIRs (two at a cost of over \$100,000 each), two relied on Los Angeles County's EIR, two went forward with Negative Declarations, and one used a categorical exemption. The plastic bag industry found a new and creative way to fight environmentalists in California—by suing under an environmental

Apr.17, 2008), available at plasticbaglaws.org/wordpress/wp-content/uploads/2010/02/lit_Oakland_CEQA-Order-tentative1.pdf.

¹⁴² *About Us, SAVE THE PLASTIC BAG COALITION*, savetheplasticbag.com/ReadContent522.aspx (last visited Dec. 12, 2011).

¹⁴³ Verified Petition for Writ of Mandate at ¶ 30, *Save the Plastic Bag Coal. v. City of Palo Alto*, No. 1-09-CV-140463, (Super. Ct. of Santa Clara Cnty., Apr. 20, 2009), available at plasticbaglaws.org/wordpress/wp-content/uploads/2010/05/lit_Palo-Alto_CEQA-Petition1.pdf

("Petitioner coalition was formed by Stephen Joseph on June 3, 2008 for the sole and exclusive purpose of responding to the myths, misinformation, and exaggerations about the environmental impact of plastic bags. He became the campaign administrator and counsel.")

¹⁴⁴ *Save the Plastic Bag Coal. v. City of Manhattan Beach*, 105 Cal. Rptr. 3d 41, 46 (Ct. App. 2010), *rev'd*, 254 P.3d 1005 (Cal. 2011).

¹⁴⁵ Luscombe, *supra* note 1.

law.

C. LOCAL CALIFORNIA PLASTIC BAG ORDINANCES LEADING UP TO THE *MANHATTAN BEACH* DECISION¹⁴⁶

San Francisco's ban was not challenged in court, but virtually every other California municipality that adopted a plastic bag ban was sued or threatened to be sued by groups related to the plastic bag industry claiming to act in the public interest.¹⁴⁷ Even threats of such lawsuits caused municipalities to withdraw proposed plastic bag bans.¹⁴⁸

As an increasing number of cities in California have passed ordinances regulating the use of single-use bags, and have faced legal challenges as a result, cities have learned from the experiences of prior efforts. As a result, many cities have refined their approaches. For instance, drawing from CEQA challenges that were premised on the argument that the increased use of paper bags has a significant environmental impact, many cities are beginning to craft ordinances that ban the use of plastic and impose a charge on paper bags.¹⁴⁹

i. City and County of San Francisco

On April 20, 2007, the City and County of San Francisco adopted its original plastic bag ordinance.¹⁵⁰ The original ordinance banned plastic bags at all supermarkets and chain pharmacies and set standards for paper, compostable plastic, and reusable bags.¹⁵¹ The ordinance was adopted pursuant to a categorical exemption and was not challenged.¹⁵²

¹⁴⁶ This Article covers only California plastic bag ordinances that were adopted and litigation that occurred on or before Nov. 1, 2011.

¹⁴⁷ The only exception is Malibu's ban.

¹⁴⁸ See CAL. PUB. RES. CODE § 21080(d) (Westlaw 2012) ("If there is substantial evidence, in light of the whole record before the lead agency, that the project may have a significant effect on the environment, an environmental impact report shall be prepared.").

¹⁴⁹ See, e.g., LOS ANGELES COUNTY CODE Ch. 12.85 (2011), available at search.municode.com/html/16274/index.htm.

¹⁵⁰ S.F. ENV'T CODE §§ 1701-1709 (2012), available at [www.amlegal.com/nxt/gateway.dll/California/environment/chapter17plasticbagreductionordinance?fn=templates\\$fn=default.htm\\$3.0\\$vid=amlegal:sanfrancisco_ca](http://www.amlegal.com/nxt/gateway.dll/California/environment/chapter17plasticbagreductionordinance?fn=templates$fn=default.htm$3.0$vid=amlegal:sanfrancisco_ca).

¹⁵¹ *Id.*

¹⁵² In 2010, then San Francisco Supervisor Mirkarimi introduced amendments to San Francisco's ordinance that would expand the scope to include all retailers and impose a minimum ten-cent charge on paper bags and reusable bags. Adoption of the ordinance was delayed pending the *Manhattan Beach* and *Marin County* court decisions. In November 2011, Supervisor Mirkarimi re-introduced the ordinance. See San Francisco Proposed Checkout Bag Ordinance, File No. 101055 (Nov. 16, 2010), available at plasticbaglaws.org/wordpress/wp-content/uploads/2010/11/leg_SF_checkout-bag-charge-ordinance-revised.pdf. San Francisco's

ii. *City of Oakland*

On July 27, 2007, the City of Oakland adopted its plastic bag ordinance, which was almost identical to San Francisco's ordinance.¹⁵³ Oakland relied on Class 7 and 8 categorical exemptions,¹⁵⁴ which exempt actions taken to protect the environment.¹⁵⁵ As discussed above, the Coalition to Support Plastic Bag Recycling (CSPBR), a coalition primarily made up of plastics manufacturers, sued the City, claiming reliance on categorical exemptions was improper.¹⁵⁶

The court found reliance on the categorical exemptions was proper.¹⁵⁷ However, the court also found that the ordinance fell into an exception to the use of categorical exemptions: reliance on categorical exemptions is improper where there is a "reasonable possibility" that the project will have a significant effect on the environment due to "unusual circumstances."¹⁵⁸ The court found that "[a] shift in consumer use from one environmentally damaging product to another constitutes an 'unusual circumstance' of an activity that would otherwise be exempt from review under CEQA as activity undertaken to protect the environment."¹⁵⁹

CSPBR presented uncontroverted evidence regarding potential environmental issues associated with the ban, including a claim that there would not be enough compostable plastic resin available to supply Oakland with enough compostable plastic bags.¹⁶⁰ Put another way, Oakland failed to present substantial evidence¹⁶¹ in the record to support its use of a categorical exemption.¹⁶² Perhaps in a rush to pass its bag ban, Oakland had not gathered information on the potential for an

ordinance was eventually adopted on February 7, 2012 pursuant to a categorical exemption.

¹⁵³ Oakland, Cal., Ordinance No. 12818 CMS (July 17, 2007), available at [www.oaklandcityattorney.org/PDFS/PLASTIC%20BAG%20ORD%20\(F\).pdf](http://www.oaklandcityattorney.org/PDFS/PLASTIC%20BAG%20ORD%20(F).pdf).

¹⁵⁴ Petitioner's Opening Brief in Support of Petition for Writ of Mandate Under the Cal. Env'tl. Quality Act, *Coal. to Support Plastic Bag Recycling v. City of Oakland*, *supra* note 8, at 3.

¹⁵⁵ CEQA Guidelines, CAL. CODE REGS. tit. 14, §§ 15307, 15308 (Westlaw 2012).

¹⁵⁶ Petitioner's Opening Brief in Support of Petition for Writ of Mandate Under the Cal. Env'tl. Quality Act, *Coal. to Support Plastic Bag Recycling v. City of Oakland*, *supra* note 8, at 1.

¹⁵⁷ Order Granting Petition for Writ of Mandate Under Cal. Env'tl. Quality Act at 11, *Coal. to Support Plastic Bag Recycling v. City of Oakland*, *supra* note 141.

¹⁵⁸ *Id.*; see also CAL. CODE REGS. tit. 14, § 15300.2(c) (Westlaw 2012).

¹⁵⁹ Order Granting Petition for Writ of Mandate Under Cal. Env'tl. Quality Act at 11, *Coal. to Support Plastic Bag Recycling v. City of Oakland*, *supra* note 141.

¹⁶⁰ *Id.* at 7.

¹⁶¹ Substantial evidence means "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached." CEQA Guidelines, CAL. CODE OF REGS. tit. 14, § 15384(a) (Westlaw 2012); see also CAL. PUB. RES. CODE § 21168.5 (Westlaw 2012).

¹⁶² Order Granting Petition for Writ of Mandate Under Cal. Env'tl. Quality Act at 11-12.2, *Coal. to Support Plastic Bag Recycling v. City of Oakland*, *supra* note 141.

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increase in paper bag use, the impacts of increased paper bag use, and a comparison of paper to plastic. To Oakland's credit, using CEQA to defeat plastic bag ordinances was a novel idea at the time.

The superior court decision, though limited to the narrow issue of Oakland's administrative record and not binding on other superior courts, ultimately led to future lawsuits by SPBC and thwarted the movement to ban plastic bags in California.

iii. Town of Fairfax

On August 1, 2007, the Fairfax Town Council adopted its plastic bag ordinance.¹⁶³ Soon thereafter, CSPBR threatened a lawsuit premised upon requiring the city to complete an EIR under CEQA (at an estimated cost of \$100,000).¹⁶⁴ Councilmember Lew Tremaine, who sponsored the Fairfax ban, called the suit an abuse of the CEQA process and has opted to make the Town's ban voluntary to avoid a suit.¹⁶⁵ Ultimately, on November 4, 2008, Fairfax enacted a mandatory ban by voter initiative, which is exempt from CEQA.¹⁶⁶

iv. City of Malibu

On May 27, 2008, the City of Malibu adopted its plastic bag ordinance.¹⁶⁷ The ordinance banned all plastic carryout bags and compostable plastic carryout bags at all retail establishments and restaurants.¹⁶⁸ The ordinance was adopted pursuant to a Negative Declaration but did not waive its categorical exemption argument.¹⁶⁹ This was undoubtedly because Oakland's ordinance had been repealed the month before.¹⁷⁰ Malibu's ordinance was not challenged under CEQA.

The ordinance text included CEQA findings that the ordinance

¹⁶³ FAIRFAX, CAL., CITY CODE § 8.18 (2007), available at www.cawrecycles.org/files/Fairfax%20Ordinance-Mun%20Code.pdf.

¹⁶⁴ Press Release, Flexible Plastic Association, *supra* note 108; see also Romer, *supra* note 20, at 460-61.

¹⁶⁵ Press Release, Flexible Plastic Association, *supra* note 108.

¹⁶⁶ See FAIRFAX, CAL., CITY CODE § 8.18. A project under CEQA expressly does not include "[t]he submittal of proposals to a vote of the people of the state or of a particular community." CEQA Guidelines, CAL. CODE REGS. tit. 14, § 15378 (b)(3) (Westlaw 2012).

¹⁶⁷ MALIBU, CAL., MUNICIPAL CODE ch. 9.28 (2008), available at qcode.us/codes/malibu/view.php?topic=9-9_28&showAll=1&frames=on.

¹⁶⁸ *Id.*

¹⁶⁹ Malibu, Cal., Ordinance 323, § 5, available at www.malibucity.org/download/index.cfm/fuseaction/download/cid/12230/.

¹⁷⁰ See Order Granting Petition for Writ of Mandate Under Cal. Env'tl. Quality Act, Coal. to Support Plastic Bag Recycling v. City of Oakland, *supra* note 141.

qualified for a Class 8 categorical exemption, as well as the following statement:

Without waiving the right to rely on any applicable categorical or statutory exemption and in the interest of providing meaningful information to the City Council and to foster the most informed decision making process practicable, the Planning Division has nevertheless conducted an initial study of the proposed ordinance. The initial study confirmed that the action does not have the potential to result in a significant impact on the environment. Consequently, a negative declaration was prepared and hereby adopted.¹⁷¹

v. *City of Manhattan Beach*

On July 15, 2008, the City of Manhattan Beach adopted its plastic bag ordinance¹⁷² pursuant to a Negative Declaration.¹⁷³ Prior to adoption of the ordinance, SPBC filed official objections,¹⁷⁴ which included quotations from the *Oakland* case, as well as a statement that “[t]he issue of the applicability of CEQA to the banning of plastic bags has already been litigated,” which erroneously implied that *Oakland*’s narrow ruling was binding on Manhattan Beach.¹⁷⁵

On August 12, 2008, SPBC filed a verified mandate petition in the Los Angeles County Superior Court demanding that Manhattan Beach prepare an EIR before taking any action that would limit or ban plastic bag use or distribution.¹⁷⁶ SPBC claimed to be an unincorporated association with members including plastic bag manufacturers and distributors directly and indirectly affected and prejudiced by the Ordinance.¹⁷⁷ The outcome of the *Manhattan Beach* case is discussed in

¹⁷¹ Malibu, Cal., Ordinance 323, § 5 available at www.malibucity.org/download/index.cfm/fuseaction/download/cid/12230/.

¹⁷² Manhattan Beach, Cal., Ordinance 2115 (2008), available at plasticbaglaws.org/wordpress/wp-content/uploads/2010/05/leg_manhattan_beach_ordinance-text-unsigned.pdf.

¹⁷³ *Id.* at § 1(H).

¹⁷⁴ See Formal Objections to Proposed Negative Declarations and Claims of Exemption Regarding Proposed Ordinance 2115, from Stephen Joseph, Save the Plastic Bag Coalition to the City of Manhattan Beach (June 18, 2008), available at www.savetheplasticbag.com/UploadedFiles/STPB%20objections%20to%20MB%20ordinance.pdf.

¹⁷⁵ *Id.* at 6.

¹⁷⁶ See Verified Petition for Writ of Mandate, *Save the Plastic Bag Coal. v. City of Manhattan Beach*, No. BS116362 (Super. Ct. of L.A. Cnty. Aug. 12, 2008), available at plasticbaglaws.org/wordpress/wp-content/uploads/2010/04/lit_Manhattan-Beach_CEQA-Petition.pdf; see also *infra* Part VI on the *Manhattan Beach* decision.

¹⁷⁷ SPBC’s membership included Elkay Plastics Co., Inc., Crown Poly, Inc., and Grand

the next section.

vi. City of Palo Alto

On March 20, 2009, the City of Palo Alto adopted its plastic bag ordinance.¹⁷⁸ The ordinance was adopted pursuant to a Mitigated Negative Declaration, to which SPBC officially objected.¹⁷⁹ Soon thereafter, SPBC filed a lawsuit against the City of Palo Alto and the City Council, claiming that the city must prepare an EIR before taking any action that would limit or ban plastic bag use or distribution.¹⁸⁰ SPBC claimed to have standing as a non-profit environmental campaign organization whose:

[s]ole and exclusive purposes and missions as an organization are to (i) identify and expose myths, misinformation and exaggerations that are disseminated about the environmental impact of plastic bags; and (ii) take steps to publish the truth about the environmental impacts of banning or imposing fees on plastic bags, including the environmental impacts of paper and reusable bags that are alternatives to plastic bags.¹⁸¹

Ultimately the City of Palo Alto settled with SPBC by agreeing not to expand the list of stores affected by the ordinance until the city has completed a final EIR.¹⁸²

Packaging, Inc. dba Command Packaging. Verified Petition for Writ of Mandate at 2:5-6, Save the Plastic Bag Coal. v. City of Manhattan Beach, *supra* note 176.

¹⁷⁸ PALO ALTO, CAL., MUNICIPAL CODE ch. 5.35 (2009), available at [www.amlegal.com/nxt/gateway.dll/California/paloalto_ca/paloaltomunicipalcode?f=templates\\$fn=default.htm\\$3.0\\$vid=amlegal:paloalto_ca](http://www.amlegal.com/nxt/gateway.dll/California/paloalto_ca/paloaltomunicipalcode?f=templates$fn=default.htm$3.0$vid=amlegal:paloalto_ca).

¹⁷⁹ See Objections to Proposed Mitigated Negative Declaration and Notice of Intent to File Lawsuit, from Stephen Joseph, Save the Plastic Bag Coalition to the City of Palo Alto (Feb. 13, 2009), available at plasticbaglaws.org/wordpress/wp-content/uploads/2010/05/lit_Palo-Alto_letter-from-SPBC-Proposed-Ban-2009-02-13.pdf.

¹⁸⁰ Verified Petition for Writ of Mandate, Save the Plastic Bag Coalition v. City of Palo Alto, *supra* note 143.

¹⁸¹ *Id.* at 3:15-17.

¹⁸² Settlement Agreement and Mutual Releases Agreement between Coalition to Support Plastic Bag Recycling and the City of Palo Alto (July, 2009), available at plasticbaglaws.org/wordpress/wp-content/uploads/2010/05/lit_Palo-Alto_settlement-agreement-with-SPBC.pdf.

vii. *Unincorporated Los Angeles County*¹⁸³

On November 16, 2010, Los Angeles County adopted its plastic bag ordinance for unincorporated areas of the County.¹⁸⁴ Los Angeles County was the first municipality in California to adopt a plastic bag ordinance pursuant to an EIR. Los Angeles County was also the first municipality to opt for a “second generation” plastic bag ordinance that included a ban on plastic bags in addition to a ten-cent charge on paper bags.¹⁸⁵ Every ordinance adopted after Los Angeles County’s ordinance has included a charge on paper bags.¹⁸⁶ Los Angeles County was not sued based on a CEQA claim, but it was sued on a Proposition 26 claim, as discussed above.¹⁸⁷

viii. *City of San Jose*

On December 14, 2010, the City of San Jose adopted its plastic bag ordinance, also pursuant to its own EIR.¹⁸⁸ The official cost of San Jose’s EIR was \$140,000, and it took fifteen months to complete.¹⁸⁹ San Jose’s ordinance included a ten-cent charge on paper bags that increases to twenty-five cents after one year of implementation.¹⁹⁰ The City of San Jose was not sued.

¹⁸³ In 2008, before a final ordinance had even been drafted, SPBC sued Los Angeles County. The court denied SPBC’s Petition, finding that the issue was not sufficiently ripe. *Decision on Petition for Injunctive and Declaratory Relief: Denied, Save the Plastic Bag Coalition v. County of Los Angeles*, BS115845 (Super. Ct. of L.A. Cnty. May 3, 2010), available at plasticbaglaws.org/wordpress/wp-content/uploads/2010/05/lit_LA-STPB-v-LA-County-final-ruling.pdf.

¹⁸⁴ LOS ANGELES COUNTY CODE ch. 12.85 (2011), available at search.municode.com/html/16274/index.htm (follow “Title 12. Environmental Protection” link).

¹⁸⁵ *See id.*

¹⁸⁶ *See, e.g.*, San Jose, Cal., Ordinance 28877 (Jan. 11, 2010), available at plasticbaglaws.org/wordpress/wp-content/uploads/2010/05/leg_CA_San-Jose_final-ordinance.pdf; MARIN COUNTY, CAL., CODE, ch. 5.46 (2011), available at library.municode.com/index.aspx?clientID=16476&stateID=5&statename=California.

¹⁸⁷ For discussion of Proposition 26, *see supra* Part III.C.iii.a.

¹⁸⁸ San Jose, Cal., Ordinance 28877 (Jan. 11, 2010), available at plasticbaglaws.org/wordpress/wp-content/uploads/2010/05/leg_CA_San-Jose_final-ordinance.pdf.

¹⁸⁹ E-mail from Emy Mendoza, San Jose Environmental Services Department, to Jennie Romer (July 13, 2011) (on file with author).

¹⁹⁰ SAN JOSE, CAL., MUNICIPAL CODE ch. 9, pt. 13, § 9.10.2020(B), (C) (2011), available at [sanjose.amlegal.com/nxt/gateway.dll/California/sanjose_ca/sanjosemunicipalcode?f=templates\\$fn=default.htm\\$3.0\\$vid=amlegal:sanjose_ca](http://sanjose.amlegal.com/nxt/gateway.dll/California/sanjose_ca/sanjosemunicipalcode?f=templates$fn=default.htm$3.0$vid=amlegal:sanjose_ca).

ix. Unincorporated Marin County

On January 25, 2011, Marin County adopted its plastic bag ordinance for unincorporated areas of the County.¹⁹¹ Marin County made the bold choice of going forward under a categorical exemption.¹⁹² No other California municipality had gone forward under a categorical exemption since Oakland. A major part of the County's reasoning in using a categorical exemption was that the inclusion of a five-cent charge on paper bags eliminated the "paper could be worse than plastic" argument that contributed to the Oakland ordinance's downfall.¹⁹³ After several years of study and fierce opposition from plastic bag industry groups, Marin passed its ordinance, which applies to supermarkets, large pharmacies, and any store with a liquor license.¹⁹⁴

SPBC sued, arguing that the County was required to prepare an EIR before adopting the ordinance and that the ordinance was preempted by A.B. 2449.¹⁹⁵ Marin County prevailed on both issues at the superior-court level,¹⁹⁶ and the case is expected to be appealed.¹⁹⁷ SPBC's arguments against a categorical exemption are discussed in detail below.¹⁹⁸ With regard to A.B. 2449, SPBC argued that the Governor's signing statement

¹⁹¹ MARIN COUNTY CAL., CODE, ch. 5.46 (2011), available at library.municode.com/index.aspx?clientID=16476&stateID=5&statername=California. Then Marin County Supervisor Charles McGlashan, the sponsor of the ordinance, died of a heart attack less than a month after the ordinance passed. The Supervisor's passion for the issue will not be forgotten. He saw the plastics industry's arguments and hundreds of pages of last-minute objections what they were—"bunk." See *Supervisor Charles McGlashan Dies of Heart Attack at 49, Marin County Loses a Great Environmental Leader*, PLASTICBAGLAWS.ORG (Mar. 29, 2011), plasticbaglaws.org/supervisor-charles-mcglashan-dies-of-heart-attack-at-49-marin-county-loses-a-great-environmental-leader/.

¹⁹² See Shanna Foley, *Marin County and Santa Monica Ban Plastic Bags, Other California Regions Consider Similar Measures*, PLASTICBAGLAWS.ORG (Feb. 3, 2011), plasticbaglaws.org/marin-county-and-santa-monica-ban-plastic-bags-other-california-regions-consider-similar-measures/.

¹⁹³ See Order Granting Petition for Writ of Mandate Under Cal. Env'tl. Quality Act, Coal. to Support Plastic Bag Recycling v. City of Oakland, *supra* note 141.

¹⁹⁴ MARIN COUNTY, CAL., CODE § 5.46.010(f).

¹⁹⁵ Petitioner's Opening Brief in Support of Petition for Writ of Mandate Under Cal. Env'tl. Quality Act & Declaratory Judgment, Save the Plastic Bag Coal. v. Cnty. of Marin, *supra* note 8.

¹⁹⁶ See Order on Submitted Matter, Save the Plastic Bag Coal. v. Cnty. of Marin, No. 1100996 (Super. Ct. Marin Cnty. Sept. 14, 2011), available at plasticbaglaws.org/wordpress/wp-content/uploads/2011/03/CA_Marin_OrderonSubmittedMatter.pdf; see also *Marin County Wins Plastic Bag Ordinance Lawsuit*, PLASTICBAGLAWS.ORG (Sept. 26, 2011), plasticbaglaws.org/marin-county-wins-plastic-bag-ordinance-lawsuit-final-hearing-scheduled-for-tuesday-sept-27th-at-9am/.

¹⁹⁷ Post-script: Save the Plastic Bag Coalition filed a Notice of Appeal on Dec. 1, 2011. See Appellant's Opening Brief, Save the Plastic Bag Coal. v. Cnty. of Marin, California Court of Appeal, No. A133868 (Feb. 9, 2012), available at plasticbaglaws.org/wordpress/wp-content/uploads/2011/03/lit_CA_Marin_appeal_STPB-opening-brief.pdf.

¹⁹⁸ See *infra* Part V.B.

precluded local jurisdictions from implementing any local regulation of plastic bags¹⁹⁹ rather than just those preempted by the text of A.B. 2449.²⁰⁰ The court stated that “Petitioner’s opening brief contains no citation to legal authority discussing the issue of preemption, and petitioner is deemed to have waived this argument. Nevertheless, the court finds that At-Store Recycling Program [A.B. 2449] does not prevent communities from banning plastic bags.”²⁰¹

x. *City of Santa Monica*

On January 25, 2011, the City of Santa Monica adopted its plastic bag ordinance.²⁰² The ordinance applies to all retail establishments including restaurants, with an exception for prepared take-away foods, and it includes a ten-cent charge for paper carryout bags.²⁰³ In response to SPBC’s objections to the proposed ordinance, Santa Monica prepared a full EIR.²⁰⁴ Santa Monica was not sued.

xi. *City of Calabasas*

On February 9, 2011, the City of Calabasas adopted its plastic bag ordinance, which includes a ten-cent charge on paper bags.²⁰⁵ Calabasas modeled its ordinance on Los Angeles County’s ordinance, meaning that every substantive component of the Los Angeles County ordinance was

¹⁹⁹ A.B. 2449, § 1, 2005-2006, Reg. Sess. (Cal. 2006), codified as CAL. PUB. RES. CODE § 42254 (Westlaw 2012); Petitioner’s Opening Brief in Support of Petition for Writ of Mandate Under Cal. Env’tl. Quality Act & Declaratory Judgment, *Save the Plastic Bag Coal. v. Cnty. of Marin*, *supra* note 8 (“The ordinance is preempted by AB 2449”); *see also* A.B. 2449 discussed in detail in Part III.A.ii, *supra*.

²⁰⁰ A.B. 2449 preempts local municipalities from “impos[ing] a plastic carryout bag fee” or “requiring auditing and reporting requirement” upon a store that is in compliance with the program. A.B. 2449, codified as CAL. PUB. RES. CODE § 42254(b)(2), (3) (Westlaw 2012).

²⁰¹ Order on Submitted Matter at 3, *Save the Plastic Bag Coal. v. Cnty. of Marin*, *supra* note 196.

²⁰² SANTA MONICA, CAL., MUNICIPAL CODE ch. 5.45 (2011), *available at* qcode.us/codes/santamonica/.

²⁰³ SANTA MONICA, CAL., MUNICIPAL CODE ch. 5.45, §§ 5.45.010(h), 5.45.040(a)(1).

²⁰⁴ *Compare* Letter from Stephen L. Joseph, Counsel for Save the Plastic Bag, to the City of Santa Monica (Jan. 12, 2009), *available at* www.savetheplasticbag.com/UploadedFiles/STPB%20CEQA%20objections%20to%20Santa%20Monica%20plastic%20bag%20ban%20ordinance.pdf, *with* CITY OF SANTA MONICA, SANTA MONICA SINGLE-USE CARRYOUT BAG ORDINANCE: FINAL ENVIRONMENTAL IMPACT REPORT (2011), *available at* [www.smgov.net/uploadedFiles/Departments/OSE/Business/Santa_Monica_Single-use_Carryout_Bag_Ordinance_FEIR\[1\].pdf](http://www.smgov.net/uploadedFiles/Departments/OSE/Business/Santa_Monica_Single-use_Carryout_Bag_Ordinance_FEIR[1].pdf).

²⁰⁵ CALABASAS, CAL., MUN. CODE ch. 8.17 (2011), *available at* library.municode.com/index.aspx?clientID=16235&stateID=5&statename=California (click on “title 8” then click on “Chapter 8.17”).

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kept in place, and the city adopted the ordinance pursuant to Los Angeles County's EIR.²⁰⁶ Calabasas did not prepare any additional CEQA documents other than the small section on CEQA in Section 5 of its ordinance.²⁰⁷ Calabasas was not sued.

xii. Unincorporated Santa Clara County

On April 16, 2011, Santa Clara County adopted its plastic bag ordinance for unincorporated areas of the County.²⁰⁸ Santa Clara's ordinance includes a fifteen-cent charge for paper bags and was adopted pursuant to a revised Negative Declaration²⁰⁹ that had been revised based on modifications to the ordinance regarding the "green" paper bag definition in response to objections by SPBC.²¹⁰ Santa Clara was not sued.

xiii. City of Long Beach

On May 17, 2011, the City of Long Beach adopted its plastic bag ordinance.²¹¹ Long Beach's ordinance is virtually the same as Los Angeles County's ordinance and includes a ban on plastic bags and a ten-cent charge on paper bags.²¹² Long Beach prepared an addendum to Los Angeles County's EIR pursuant to Section 15164 of the CEQA Guidelines, which is appropriate in instances when "only minor technical changes or additions are necessary."²¹³ The bulk of the addendum

²⁰⁶ See Calabasas, Cal., Ordinance 2011-282, § 1 (Feb. 9, 2011), available at plasticbaglaws.org/wordpress/wp-content/uploads/2010/05/CA_Calabasas_ordinance.pdf ("WHEREAS, the City intends this Ordinance No. 2011-282 to fall within the scope of the County's EIR and has therefore modeled this ordinance No. 2011-282 on the County's ordinance. . .").

²⁰⁷ See Calabasas, Cal., Ordinance 2011-282, § 1 (Feb. 9, 2011), available at plasticbaglaws.org/wordpress/wp-content/uploads/2010/05/CA_Calabasas_ordinance.pdf.

²⁰⁸ SANTA CLARA, CAL., COUNTY CODE tit. B, div. B11, ch. XVII (2011), available at library.municode.com/index.aspx?clientID=13790&stateID=5&statename=California (follow "Division B11" link, then follow "chapter XVII" link).

²⁰⁹ *Id.* at § B11-510; Notice of Intent to Adopt a Negative Declaration (Revised), County of Santa Clara, Department of Planning and Development, County Planning Office (Mar. 4, 2011), available at plasticbaglaws.org/wordpress/wp-content/uploads/2010/05/leg_CA_Santa-Clara_Neg-Dec_NOI_March-2011.pdf.

²¹⁰ SANTA CLARA, CAL., COUNTY CODE § B11-510.

²¹¹ Long Beach, Cal., Ordinance ORD-11-009 (May 24, 2011), available at www.litterfreelb.org/tote_bags/pdf/ordinance.pdf.

²¹² CITY OF LONG BEACH, CARRYOUT BAG ORDINANCE: ADDENDUM TO THE ORDINANCES TO BAN PLASTIC CARRYOUT BAGS IN LOS ANGELES COUNTY FINAL EIR, 1-3 (2011), available at www.longbeach.gov/civica/filebank/blobload.asp?BlobID=30754.

²¹³ *Id.* at 1; see CEQA Guidelines, CAL. CODE REGS. tit. 14, § 15164 (Westlaw 2012).

focused on the ordinance's potential effects on air and water quality.²¹⁴

SPBC sued Long Beach, arguing that the addendum's changes to the County EIR's greenhouse gas (GHG) threshold of significance merits a Writ.²¹⁵ SPBC also argues that state law AB2449 preempts local ordinances banning plastic bags.²¹⁶ Comparing Long Beach's approach with that of Calabasas, it appears that Long Beach may have been better off going forward without preparing an addendum, because Calabasas did not prepare additional CEQA documents and was not sued, while Long Beach prepared an addendum and was sued. In addition, SPBC and Long Beach eventually reached a settlement under which Long Beach agreed to adopt a resolution retracting and cancelling any part of the addendum that was inconsistent with the Los Angeles County EIR, in exchange for SPBC dismissing the lawsuit.²¹⁷

xiv. Unincorporated Santa Cruz County

On September 13, 2011, Santa Cruz County adopted its ordinance, which includes a ban on plastic bags and a ten-cent charge on recycled paper bags, which increases to twenty-five cents after the first year.²¹⁸ Santa Cruz was the first municipality to adopt a second generation ordinance that included restaurants.²¹⁹ Santa Cruz's ordinance was adopted pursuant to a Negative Declaration.²²⁰

Not surprisingly, SPBC sued Santa Cruz County, but this time it was not about CEQA.²²¹ SPBC's complaint alleged that Santa Cruz's

²¹⁴ CITY OF LONG BEACH, *supra* note 212, at 3.

²¹⁵ Verified Petition for Writ of Mandate Under the Cal. Env'tl. Quality Act and Based on State Law Preemption at 11-12, *Save the Plastic Bag Coal. v. City of Long Beach*, No. BS132500 (Super. Ct. L.A. Cnty. June 9, 2011), *available at* plasticbaglaws.org/wordpress/wp-content/uploads/2011/07/lit_Long-Beach_petition-for-writ-of-mandate1.pdf.

²¹⁶ *Id.* at 12-15.

²¹⁷ A Resolution of the City Council of the City of Long Beach Adopting the Statement of Overriding Considerations for the Los Angeles County Final Environmental Impact Report (FEIR) Relating to the Adoption of Ordinance No. ORD-11-0009 Banning Plastic Carryout Bags in the City of Long Beach, Resolution No. RES-11-0116 (Oct. 11, 2011), *available at* plasticbaglaws.org/wordpress/wp-content/uploads/2011/07/lit_CA_Long-Beach_settlement-resolution.pdf.

²¹⁸ Santa Cruz Cnty., Cal., Ordinance Relating to the Reduction of Single-Use Plastic and Paper Carryout Bags (Sept. 13, 2011).

²¹⁹ The only prior ordinances that included restaurants within the scope of covered businesses were the City of Malibu and the Town of Fairfax, which were both first-generation ordinances.

²²⁰ Planning Dep't, Cnty. of Santa Cruz, Notice of Intent to Adopt a Mitigated Negative Declaration re: Single-use Bag Reduction Ordinance, *available at* plasticbaglaws.org/wordpress/wp-content/uploads/2010/05/Leg_CA_Santa-Cruz_Mit-Neg-Dec.pdf.

²²¹ See Complaint for Writ of Mandate, Injunctive Relief, and Declaratory Relief at 13-19, ¶¶ 69-73, *Save the Plastic Bag Coal. v. Cnty. of Santa Cruz*, No. CV172379 (Santa Cruz Cnty. Super.

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ordinance is preempted by the California Health and Safety Code.²²² According to the complaint, the Code preempts Santa Cruz's ordinance by virtue of its statement that:

[I]t is the intent of the Legislature to occupy the whole field of health and sanitation standards for retail food facilities, and the standards set forth in this part and regulations adopted pursuant to this part shall be exclusive of all local health and sanitation standards relating to retail food facilities.²²³

SPBC contends that this section means that only the state legislature “may enact a law regarding whether restaurants can take actions that affect whether the way food is served is ‘sanitary’ or ‘safe’ or ‘healthy.’”²²⁴ Similarly, this claim seems to be part of SPBC's strategy to portray plastic bags as safer for transporting hot foods, and thus provide “public health and safety benefits.”²²⁵

SPBC also alleges that the ordinance is also preempted by A.B. 2449,²²⁶ an argument that failed in the Marin County CEQA challenge.²²⁷ SPBC also appears to be testing out several new theories alleging that Santa Cruz's ordinance violates the Fourteenth Amendment and the Dormant Commerce Clause of the United States Constitution.²²⁸ Some commentators have interpreted the lack of a CEQA claim in the Santa Cruz suit as acceptance of the sufficiency of Santa Cruz's Negative Declaration and noted that use of these new meritless arguments “reeks of desperation.”²²⁹

Ct. Oct. 17, 2011), available at plasticbaglaws.org/wordpress/wp-content/uploads/2011/10/lit_CA_Santa-Cruz_Complaint.pdf (stating five causes of action: (1) state law preemption—Health and Safety Code § 113705, (2) state law preemption—A.B. 2449, (3) Fourteenth Amendment violation—void for vagueness, (4) Fourteenth Amendment violation—ordinance exceeds police powers, (5) Commerce Clause violation).

²²² *Id.* at 13.

²²³ CAL. HEALTH & SAFETY CODE § 113705 (Westlaw 2012).

²²⁴ Complaint for Writ of Mandate, Injunctive Relief, and Declaratory Relief at 14, *Save the Plastic Bag Coal. v. Cnty. of Santa Cruz*, *supra* note 221.

²²⁵ Mike Verespej, *Are Plastic Bags Safer Than Paper for Moving Hot Foods?* WASTE & RECYCLING NEWS (Oct. 20, 2011), www.wasterecyclingnews.com/email.html?id=1319117690.

²²⁶ See *supra* Part III.A.ii. for more on A.B. 2449; see also Complaint for Writ of Mandate, Injunctive Relief, and Declaratory Relief at 15-16, *Save the Plastic Bag Coal. v. Cnty. of Santa Cruz*, *supra* note 221.

²²⁷ Order on Submitted Matter at 3, *Save the Plastic Bag Coal. v. Cnty. of Marin*, *supra* note 196.

²²⁸ See Complaint for Writ of Mandate, Injunctive Relief, and Declaratory Relief at 15-16, *Save the Plastic Bag Coal. v. Cnty. of Santa Cruz*, *supra* note 221.

²²⁹ *Plastic Industry Lawyer Files Another Lawsuit Against a Local Bag Ban*, CALIFORNIANS AGAINST WASTE (Oct. 19, 2011), www.cawrecycles.org/whats_new/recycling_news/

D. OTHER CALIFORNIA CITIES

The majority of cities took the “wait and see” approach and decided to conserve resources by waiting to see what the courts decided with regard to *Manhattan Beach*.²³⁰ These cities assumed that an EIR was probably not necessary, and they did not want to complete one unless and until it became clear that the law required it.²³¹ Alameda County went forward with a countywide EIR for a single-use bag reduction ordinance, but only in conjunction with environmental review of a countywide mandatory recycling ordinance.²³²

E. OTHER STATES AND COUNTRIES

At least twenty nations and forty-seven local governments have passed bans on the distribution of plastic bags,²³³ while more nations have placed charges on the distribution of bags.²³⁴ This includes countries as diverse as Italy, Botswana, Kenya, Israel, and Bangladesh.²³⁵ In the United States outside of California, numerous municipalities, including Fairbanks, Alaska,²³⁶ Telluride, Colorado, Maui, and Washington D.C., have banned or placed charges on plastic bag distribution.²³⁷

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²³⁰ See *Save the Plastic Bag Coal. v. City of Manhattan Beach*, 254 P.3d 1005 (Cal. 2011).

²³¹ See, e.g., *Proposed Plastic Bag Ban Put on Hold*, THE DAVIS ENTERPRISE, Jun. 17, 2011, available at www.davisenterprise.com/local-news/city/brown-bag-lunch-talk-to-focus-on-plastic-bags/.

²³² See STOPWASTE.ORG, DRAFT ENVTL. IMPACT REPORT: MANDATORY RECYCLING AND SINGLE USE BAG REDUCTION ORDINANCES (2011), available at www.stopwaste.org/docs/deir_bags.pdf.

²³³ ENVIRONMENT CALIFORNIA, LEADING THE WAY TOWARD A CLEAN OCEAN: COMMUNITIES AROUND THE WORLD TAKE ACTION AGAINST PLASTIC BAGS at 5 (2011), available at www.environmentcalifornia.org/uploads/86/47/8647d66214580a24c67a668581d8b4dd/Leading_the_Way_Toward_a_Clean_Ocean_final.July.2011.pdf.

²³⁴ *Id.*

²³⁵ *Id.*; see also Marrickville Council, *Plastic Bag Reduction Around the World*, available at marrickville.nsw.gov.au/marrwr/marrickville/internet/resources/documents/pdfs/bagbusters/around-the-world.pdf (last visited Dec. 12, 2011).

²³⁶ Fairbanks’s ordinance, which would have imposed a five-cent charge on plastic checkout bags, was adopted on September 10, 2009, and rescinded less than a month later. See Fairbanks North Star Borough, Alaska, Ordinance 2009-40, available at plasticbaglaws.org/wordpress/wp-content/uploads/2010/05/leg_Alaska_Fairbanks-ordinance-adopted_later-rescinded.pdf; see also *Fairbanks Assembly Repeals Tax on Plastic Shopping Bags*, ANCHORAGE DAILY NEWS, Oct. 9, 2009, available at www.adn.com/2009/10/09/967802/fairbanks-assembly-repeals-tax.html.

²³⁷ See *State & Local Laws*, PLASTICBAGLAWS.ORG, plasticbaglaws.org/legislation/state-laws/ (last visited Dec. 12, 2011) (partial list of state and local bag ordinances, click on the link for each state to view the related ordinance).

VI. THE *MANHATTAN BEACH* CALIFORNIA SUPREME COURT DECISION

A. STANDING ISSUE: DID AN ASSOCIATION OF PLASTIC BAG MANUFACTURERS HAVE STANDING TO CHALLENGE A LOCAL ORDINANCE BANNING THE USE OF PLASTIC BAGS?

CEQA allows citizens to bring suit to challenge government actions taken under CEQA.²³⁸ Not surprisingly, the vast majority of CEQA cases are brought by environmental groups or citizens concerned with the local environmental impacts of a project.²³⁹ However, industry groups with obvious financial motives have also found ways to use CEQA as a means to block or slow down government actions that would benefit the environment, a primary example being the various suits brought challenging plastic bag ordinances.

Having corporations or industry front-groups use (or abuse) a statute intended to protect the environment has raised issues of standing in court.²⁴⁰ Essentially, the question of standing in this context is whether petitioners who are not concerned with environmental issues should be able to bring suit under CEQA.²⁴¹ Other commentators have phrased the issue in similar ways: “[U]nder what circumstances do financially motivated opponents have standing to sue under CEQA,”²⁴² and, “[i]n particular, should a plaintiff’s motivations be a determinative factor in whether that plaintiff has standing?”²⁴³

²³⁸ See CAL. PUB. RES. CODE § 21168 (Westlaw 2012).

²³⁹ See Ed Casey, *The Changing Face of the California Environmental Quality Act*, L.A. DAILY J., Mar. 24, 2011, available at www.alston.com/files/Publication/26c90e19-afe2-4ecf-a8be-22ae60d841dc/Presentation/PublicationAttachment/e272c12a-28ab-4438-bab6-54bbc3b45b1d/LADJ%20Casey%20Article%203-11.pdf (“Over time, CEQA became a tool for local groups to raise a variety of environmental complaints, usually focused on more local issues such as traffic, noise and visual impacts.”).

²⁴⁰ See *Save the Plastic Bag Coal. v. City of Manhattan Beach*, 254 P.3d 1005, 1008-10 (Cal. 2011).

²⁴¹ See *id.* at 1008 (noting that case questions presented by case included “(1) What are the standing requirements for a corporate entity to challenge a determination on the preparation of an environmental impact report (EIR)?”).

²⁴² Christian L. March, *The California Supreme Court’s Recent Flood of CEQA Decisions*, L.A. LAW., 13, 17 (Jan. 2011), available at www.law.ucdavis.edu/centers/environmental/files/Flood-of-CEQA-decisions.pdf.

²⁴³ Daniel P. Selmi, *Themes in the Evolution of the State Environmental Policy Acts*, 38 URB. LAW. 949, 995 (2007).

i. Establishing Standing Under CEQA

There are two ways to establish standing under CEQA: the plaintiff must show 1) a “beneficial interest” in the subject of the litigation, or 2) that it qualifies under the “public interest” exception to the beneficial interest requirement.²⁴⁴ Beneficial interest is met by showing that the plaintiff “has some special interest to be served or some particular right to be preserved or protected through issuance of the writ.”²⁴⁵ This interest must generally be “over and above the interest held in common with the public at large.”²⁴⁶

Additional requirements to demonstrate beneficial interest include that the interest must be “direct and substantial.”²⁴⁷ California courts have stated that this standard is equivalent to the federal “injury in fact” standard, which requires a concrete and particularized, and actual or imminent violation of a legally protected interest.²⁴⁸

However, this general rule is often softened in practice via the public interest exception.²⁴⁹ In *Manhattan Beach*, the public interest exception was elaborated as follows:

[W]here the question is one of public right and the object of the mandamus is to procure the enforcement of a public duty, the [petitioner] need not show that he has any legal or special interest in the result, since it is sufficient that he is interested as a citizen in having the laws executed and the duty in question enforced.²⁵⁰

²⁴⁴ See, e.g., *Save the Plastic Bag Coal. v. City of Manhattan Beach*, 254 P.3d 1005, 1011-12 (Cal. 2011) (“As a general rule, a party must be ‘beneficially interested’ to seek a writ of mandate.”; also discussing the “public right/duty exception”); see also CAL. CIV. PROC. CODE § 1086 (Westlaw 2012).

²⁴⁵ *Waste Mgmt. of Alameda Cnty., Inc. v. Cnty. of Alameda*, 94 Cal. Rptr. 2d 740, 747 (Ct. App. 2000) (citing *Carsten v. Psychology Examining Comm. of Bd. of Med. Quality Assurance*, 614 P.2d 276, 278 (Cal. 1980), *disapproved by Save the Plastic Bag Coal. v. City of Manhattan Beach*, 254 P.3d 1005 (Cal. 2011); see also *Santiago Cnty. Water Dist. v. Cnty. of Orange*, 173 Cal. Rptr. 602, 609-10 (Ct. App. 1981); *Citizens Ass’n for Sensible Dev. v. Cnty. of Inyo*, 217 Cal. Rptr. 893, 897 (Ct. App. 1985).

²⁴⁶ *Save the Plastic Bag Coal. v. City of Manhattan Beach*, 254 P.3d 1005, 1014 (Cal. 2011) (citing *Carsten*, 614 P.2d at 278).

²⁴⁷ *Id.* (citing *Parker v. Bowron*, 254 P.2d 6, 9 (Cal. 1953)).

²⁴⁸ See *People ex rel. Dep’t of Conservation v. El Dorado Cnty.*, 116 P.3d 567, 572 (Cal. 2005) (quoting *Associated Builders & Contractors, Inc. v. S.F. Airports Comm’n*, 981 P.2d 499, 504 (Cal. 1999)).

²⁴⁹ The public interest exception is sometimes called the public right, or public duty, exception. See *Save the Plastic Bag Coal. v. City of Manhattan Beach*, 254 P.3d 1005, 1012 (Cal. 2011).

²⁵⁰ *Id.* at 1012 (quoting *Bd. of Soc. Welfare v. Cnty. of L.A.*, 162 P.2d 627, 628 (Cal. 1945) (internal quotation marks omitted)).

Thus, the public interest exception does not require any legal or special interest.²⁵¹ Instead, “in a writ of mandate against a municipal entity based on alleged violations of CEQA, a property owner, taxpayer, or elector who establishes a geographical nexus with the site of the challenged project has standing.”²⁵²

The public interest exception is intended to comport with CEQA’s purposefully broad standing requirements, and to promote public participation in agency decisionmaking and broad access to the courts, even where a petitioner is not necessarily directly harmed by the environmental impacts of the project.²⁵³

ii. Corporate Petitioners

In *Waste Management of Alameda County, Inc. v. County of Alameda*,²⁵⁴ the seminal case on CEQA standing when corporate petitioners are involved, the court found that a for-profit waste management company had no standing to seek a writ of mandate under CEQA.²⁵⁵

In *Waste Management*, the county required Waste Management of Alameda, Inc., to undergo both a facility upgrade and to prepare an EIR under CEQA before being allowed to accept certain wastes,²⁵⁶ but the county did not require its competitor to undergo the same steps.²⁵⁷ The

²⁵¹ *Citizens Ass’n for Sensible Dev. v. Cnty. of Inyo*, 217 Cal. Rptr. 893, 897 (Ct. App. 1985).

²⁵² *Id.*

²⁵³ See *Save the Plastic Bag Coal. v. City of Manhattan Beach*, 254 P.3d 1005, 1011-12 (Cal. 2011) (“This ‘public right/public duty’ exception to the requirement of beneficial interest for a writ of mandate promotes the policy of guaranteeing citizens the opportunity to ensure that no governmental body impairs or defeats the purpose of legislation establishing a public right.” (internal quotation marks omitted)).

²⁵⁴ *Waste Mgmt. of Alameda Cnty., Inc. v. Cnty. of Alameda*, 94 Cal. Rptr. 2d 740, 744 (Ct. App. 2000), *disapproved by* *Save the Plastic Bag Coal. v. City of Manhattan Beach*, 254 P.3d 1005 (Cal. 2011).

²⁵⁵ *Id.* at 744; see also *National Env’tl. Waste Corp. v. City of Riverside*, No. E030863, 2003 WL 116168 (Cal. Ct. App. Jan. 14, 2003) (unpublished). National Environmental Waste Corporation (NEWCO) filed a petition for a writ of mandate under CEQA, naming the City of Riverside and three other waste management services, Burrtec Waste Industries, Inc., Athens Services, Inc., and CR & R, Inc. NEWCO’s petition alleged that the City of Riverside solicited bids for commercial waste contracts, which constituted a project under CEQA. Riverside adopted negative declarations for the contract approvals with Burrtec, Athens, and CR&R, Inc., “even though there was substantial evidence that the approval of the contracts would have a significant effect on the environment.” *Id.* at *1. NEWCO did not claim to have beneficial interest standing, but standing under the public interest exception. The court disagreed, finding that NEWCO must demonstrate that it is interested in CEQA enforcement regardless of “its competitive or commercial interests.” The court found that “[n]othing in [NEWCO’s] allegations of the petition tend to establish that fact.” *Id.* at *3.

²⁵⁶ *Waste Mgmt. of Alameda Cnty.*, 94 Cal. Rptr. 2d at 745.

²⁵⁷ *Id.* at 745-46.

court found that Waste Management's commercial interest did not fulfill CEQA's standing requirement because Waste Management did not meet the standards for the public interest exception.²⁵⁸ The court stated that the company "has shown no demonstrable interest in or commitment to the environmental concerns which are the essence of CEQA; rather, it is pursuing its own economic and competitive interests."²⁵⁹

A different result was reached in *Burrtec Waste Industries, Inc. v. City of Colton*,²⁶⁰ which also involved a waste management company using CEQA to sue a competitor.²⁶¹ Burrtec Waste alleged that the City of Colton failed to comply with CEQA requirements regarding posting of a notice of intent to adopt a Mitigated Negative Declaration when it approved the competitor's permit.²⁶² As a result, Burrtec did not learn of the application until after it was too late to comment or appeal the decision.²⁶³ As in *Waste Management*, the defendants argued that Burrtec had no standing because it was pursuing business, not environmental, interests.²⁶⁴ The court distinguished *Waste Management's* holding because while "Waste Management's sole concern was one of commercial competitiveness," Burrtec was attempting to address whether proper notice was given.²⁶⁵

The court held that CEQA's notice provisions are "not confined to any commercial interest of the Petitioner," and thus there was no commercial interest alleged within Burrtec's cause of action.²⁶⁶ The court quoted with approval the superior court's holding that Burrtec's claim concerning a lack of notice "is certainly not confined to the Petitioner's interest, and I think it is a real public interest, as Waste Management pointed out, as necessary in order to establish a citizen's standing to bring these actions."²⁶⁷

The issue of establishing standing for petitioners who do not have strictly environmental concerns has appeared in a variety of other cases leading up to *Manhattan Beach*. For example, CEQA has been used by labor groups to oppose proposed Wal-Mart developments and by

²⁵⁸ *Id.* at 751.

²⁵⁹ *Id.*

²⁶⁰ *Burrtec Waste Indus., Inc. v. City of Colton*, 119 Cal. Rptr. 2d 410, 412 (Ct. App.2002) (finding waste company had standing to sue under CEQA).

²⁶¹ *Id.*

²⁶² *Id.*; see also CAL. PUB. RES. CODE §§ 21092, 21092.3 (Westlaw 2012) (providing public notice and posting requirements for environmental impact reports and negative declarations).

²⁶³ *Burrtec Waste Indus.*, 119 Cal. Rptr. 2d at 411.

²⁶⁴ *Id.* at 413.

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ *Id.*

property owners opposing development projects near their land.²⁶⁸

iii. Standing for Save the Plastic Bag Coalition

The issue of standing was one of two major issues in *Save the Plastic Bag Coalition v. Manhattan Beach*.²⁶⁹ In this case, the Save the Plastic Bag Coalition, “a coalition of plastic bag manufacturers and distributors,”²⁷⁰ petitioned for review under CEQA in order to bar an ordinance placing restrictions on the use of plastic bags in Manhattan Beach.²⁷¹ SPBC sought to force Manhattan Beach to prepare an EIR, claiming that the ordinance would result in significant environmental impacts.²⁷²

SPBC claimed that “public rights were at stake, and that its ‘objective in bringing this action [was] that of an interested citizen seeking to procure enforcement of . . . public duties.’”²⁷³ Namely, SPBC alleged that the ordinance would result in an increase in the usage of paper bags, which would have significant environmental impacts through the additional energy used to manufacture paper bags, as well as the “environmental misinformation”²⁷⁴ SPBC claimed was fueling plastic bag ordinances.²⁷⁵

Manhattan Beach argued that SPBC had no standing to bring suit under CEQA because it was not a citizen and was barred under the holding of *Waste Management* because it was seeking to advance its commercial and competitive interests of its members, not actual environmental concerns.²⁷⁶

At the lower court level, SPBC was found to have standing because, unlike in *Waste Management*, the petitioners were not a “for-profit

²⁶⁸ See Selmi, *supra* note 243, at 994-95. State environmental protection acts have “attracted some plaintiffs whose motivations have little or nothing to do with environmental protection. They include the traditional ‘NIMBY’ plaintiffs, as neighbors will often employ any tool to stop a project. They also include, more recently, labor unions utilizing SEPA’s to stop projects they consider anti-union, such as Wal-Marts or public projects not using union labor. At the other end of the spectrum, businesses can attempt to employ SEPA’s as a means of delaying their competitors’ projects.” *Id.*

²⁶⁹ *Save the Plastic Bag Coal. v. City of Manhattan Beach*, 254 P.3d 1005, 1008 (Cal. 2011).

²⁷⁰ *Id.*

²⁷¹ *Id.* at 1011.

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ In various court documents filed by SPBC, SPBC states that it was formed “for the sole and exclusive purpose of responding to the myths, misinformation, and exaggerations about the environmental impact of plastic bags.” See, e.g., Verified Petition for Writ of Mandate at ¶ 30, *Save the Plastic Bag Coal. v. City of Palo Alto*, *supra* note 143.

²⁷⁵ *Save the Plastic Bag Coal. v. City of Manhattan Beach*, 254 P.3d 1005, 1008 (Cal. 2011).

²⁷⁶ *Id.* at 1011.

corporation that is seeking a commercial advantage over a specific competitor,” but instead had a “genuine environmental issue: whether the banning of plastic bags, and the consequent increase in the use of paper bags, will increase, rather than decrease, injury to the environment.”²⁷⁷ The court of appeal affirmed.²⁷⁸

The California Supreme Court agreed, finding that although “plaintiff is an association representing corporate entities,” its “commercial interests were not an impediment to its standing here.”²⁷⁹ Additionally, the court found that the SPBC did not need to resort to the public interest exception, but instead “plainly possesses the direct, substantial sort of beneficial interest required” under CEQA.²⁸⁰ The ordinance’s ban on plastic bags would have a severe and immediate effect on their business. Clearly, they have a “particular right to be preserved or protected over and above the interest held in common with the public at large.”²⁸¹

The court rejected the notion that the petitioners must be affected by an environmental impact specifically, and instead found it sufficient to have “business interests whose operations are directly affected by a government project.”²⁸² As to Manhattan Beach’s claim that SPBC did not have standing because it was not a citizen, the court held that the term citizen under CEQA “is descriptive, not prescriptive. It reflects an understanding that the action is undertaken to further the public interest and is not limited to the plaintiff’s private concerns. Entities that are not technically ‘citizens’ regularly bring citizen suits.”²⁸³

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ *Id.* at 1013.

²⁸⁰ *Id.* at 1014. At oral argument, Stephen Joseph, counsel for Save the Plastic Bag Coalition, insisted upon standing as an environmental organization formed solely to protect the environment against harms caused by misinformation about plastic bags. See Jennie Romer, *Initial Impressions from the Save the Plastic Bag Coalition v. City of Manhattan Beach Supreme Court Oral Argument*, PLASTICBAGLAWS.ORG (May 5, 2011), plasticbaglaws.org/initial-impressions-from-the-save-the-plastic-bag-coalition-v-city-of-manhattan-beach-supreme-court-oral-argument/. Perhaps for this reason SPBC has been careful to point out that the group does not accept money from other plastics industry groups (like the ACC), but the court would not accept this standing argument. See SAVE THE PLASTIC BAG COALITION, savetheplasticbag.com/ (last visited Dec. 12, 2011) (“Please note that we are not and have never been connected with or funded by the American Chemistry Council (ACC), even indirectly.”).

²⁸¹ *Save the Plastic Bag Coal. v. City of Manhattan Beach*, 254 P.3d 1005, 1011 (Cal. 2011) (quoting *Carsten v. Psychology Examining Comm. of Bd. of Med. Quality Assurance*, 614 P.2d 276, 278 (Cal. 1980)).

²⁸² *Id.* at 1015 (citing as examples *W. States Petroleum Ass’n v. Superior Court*, 888 P.2d 1268, 1269-70 (Cal. 1995); *Dunn-Edwards Corp. v. Bay Area Air Quality Mgmt. Dist.*, 11 Cal. Rptr. 2d 850, 852, 854 (Ct. App. 1992)).

²⁸³ *Save the Plastic Bag Coal. v. City of Manhattan Beach*, 254 P.3d 1005, 1013 (Cal. 2011).

Finally, the *Manhattan Beach* decision overruled *Waste Management* to the extent that *Waste Management* held that “corporations are subject to heightened scrutiny when they file citizen suits.”²⁸⁴ Considering *Waste Management* and *Manhattan Beach* together, it would appear that corporations would be barred from CEQA litigation only under the limited circumstances presented in *Waste Management*, where a corporation sued a competitor. *Manhattan Beach*, on the other hand, expands a corporation’s ability to use CEQA, allowing a corporation to bring suit under CEQA as long as a CEQA-applicable project impacts its own economic interests.

B. MERITS OF CEQA CLAIM: DID MANHATTAN BEACH’S FAILURE TO PREPARE AN ENVIRONMENTAL IMPACT REPORT VIOLATE CEQA?

The substantive question presented in the *Manhattan Beach* case was whether the city was required to “prepare an EIR on the effects of an ordinance banning the use of plastic bags by local businesses?”²⁸⁵ Manhattan Beach adopted its plastic bag ordinance pursuant to a Negative Declaration.²⁸⁶ The lower court held that Manhattan Beach had to prepare an EIR to support its proposed bag ordinance, finding that SPBC had presented substantial evidence to support a fair argument that Manhattan Beach’s ordinance might significantly affect the environment, primarily due to environmental impacts from paper bags.²⁸⁷

The Supreme Court disagreed, finding that while some increase in the use of paper bags is foreseeable, “no evidence suggests that paper bag use by Manhattan Beach consumers in the wake of a plastic bag ban would contribute to [negative environmental impacts] in any significant way.”²⁸⁸ As to the issue of significant impacts, the court stated that a city has some discretion as to what constitutes “significant” and that CEQA does not demand an exhaustive comparative analysis of relative

²⁸⁴ *Id.* at 1014.

²⁸⁵ *Id.* at 1008.

²⁸⁶ A Negative Declaration is defined as “a written statement briefly describing the reasons that a proposed project will not have a significant effect on the environment and does not require the preparation of an environmental impact report.” CAL. PUB. RES. CODE § 21064 (Westlaw 2012). For a detailed discussion of negative declarations, see *supra* Part IV.A.iii.

²⁸⁷ See Order Granting Petition for Writ of Mandate Under Cal. Envtl. Quality Act at 2-3, *Save the Plastic Bag Coal. v. City of Manhattan Beach*, No. BS116362, (Super. Ct. Cnty. of L.A. Feb. 20, 2009), available at plasticbaglaws.org/wordpress/wp-content/uploads/2010/04/lit_Manhattan-Beach_superior-court-ruling.pdf; see also *Save the Plastic Bag Coal. v. City of Manhattan Beach*, 105 Cal. Rptr. 3d 41, 58 (Ct. App. 2010), *rev’d*, 254 P.3d 1005 (Cal. 2011).

²⁸⁸ *Save the Plastic Bag Coal. v. City of Manhattan Beach*, 254 P.3d 1005, 1018 (Cal. 2011).

environmental detriments for every alternative course of action.²⁸⁹ Therefore, the court ruled that the city did not need to prepare an EIR²⁹⁰ and that a Negative Declaration was sufficient under CEQA since “substantial evidence” and “common sense” supported it.²⁹¹

The court found that the case exemplified potential issues with relying on “generic” life cycle studies.²⁹² Essentially, the court found that while SPBC may have been able to provide some evidence of environmental impacts associated with paper bag production, such evidence would not support a finding of significance, when “increased use of the product is an indirect and uncertain consequence, and especially when the scale of the project is such that the increase is plainly insignificant.”²⁹³ The court went on to state that common sense “is an important consideration at all levels of CEQA review. Here, common sense leads the court to the conclusion that environmental impacts discernible from the ‘life cycle’ of plastic and paper bags are not significantly implicated by a plastic bag ban in Manhattan Beach.”²⁹⁴

i. Adoption of “Second Generation” Ordinances May Permit Categorical Exemptions Under CEQA

All of the California courts that have considered whether categorical exemptions²⁹⁵ apply to plastic bag ordinances have found that categorical

²⁸⁹ *Id.* at 1017.

²⁹⁰ *Id.* at 1008.

²⁹¹ *Id.*

²⁹² *Id.* at 1018.

²⁹³ *Id.*

²⁹⁴ *Save the Plastic Bag Coal. v. City of Manhattan Beach*, 254 P.3d 1005, 1018 (Cal. 2011) (citations omitted).

²⁹⁵ The applicable categorical exemptions are sections 15307 and 15308 of CEQA. *See* CEQA Guidelines, CAL. CODE REGS. tit. 14 §§ 15307, 15308 (Westlaw 2012) (commonly referred to as Class 7 & 8). Categorical exemptions are classes of projects that are exempt from the provisions of CEQA because they were determined to not have a significant effect on the environment. *See* CAL. CODE REGS. tit. 14, § 15300 (Westlaw 2012). Class 7 and 8 categorical exemptions are relevant to single-use bag ordinances because these classes apply to projects that are intended to benefit the environment, will have a beneficial impact on the environment, and have no reasonable likelihood of significant adverse impacts. *See* CAL. CODE REGS. tit. 14, §§ 15307, 15308 (Westlaw 2012). Thus far, the only court rulings regarding the applicability of CEQA categorical exemptions to plastic bag ordinances have been the *City of Oakland* and *Marin County* cases. *See* Order Granting Petition for Writ of Mandate Under Cal. Env'tl. Quality Act, Coal. to Support Plastic Bag Recycling v. City of Oakland, *supra* note 141; Order on Submitted Matter, *Save the Plastic Bag Coal. v. Cnty. of Marin*, *supra* note 196. The only other court ruling regarding the applicability of CEQA to plastic bag ordinances was the *Manhattan Beach* case, which concerned the applicability of a Negative Declaration. *See* *Save the Plastic Bag Coal. v. City of Manhattan Beach*, 254 P.3d 1005, 1018 n.8 (Cal. 2011).

exemptions apply.²⁹⁶ The Alameda County Superior Court found that Oakland's ordinance fell within the Class 7 and 8 categorical exemptions, but that the unusual circumstances exception applied.²⁹⁷ The Marin County Superior Court found that the Marin County Board of Supervisors acted reasonably in relying upon Class 7 and 8 categorical exemptions. In addition, that court found that there was substantial evidence to support the legislative action, in part because the ordinance's charge on paper bags acted as a sufficient disincentive against the use of single-use paper bags.²⁹⁸ Exemptions were not examined in the *Manhattan Beach* case, because Manhattan Beach did not make an argument that any exceptions applied.²⁹⁹

As the Supreme Court noted in *Manhattan Beach*, the city initially suggested that the proposed ordinance would be exempt under what is sometimes called the "commonsense" exemption, but once STPB raised objections to the ordinance, the city abandoned that position and proceeded with an initial study and Negative Declaration.³⁰⁰ Since the city did not preserve the categorical exemption argument, the court did not consider it.³⁰¹ The court's decision to take time in explaining why it could not rule on the applicability of the "commonsense" exemption³⁰² (similar to a categorical exemption) is an indication that California cities

²⁹⁶ Oakland also relied on the "common sense exception," CAL. CODE REGS. tit. 14, § 15061(b)(3) (Westlaw 2012), which requires that there be "no possibility" of a significant effect on the environment, but the court found that the exemption did not apply. Marin County did not rely on the common sense exemption.

²⁹⁷ See 14 CAL. CODE REGS. tit. 14, § 15300.2(c) ("A categorical exemption shall not be used for an activity where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances."); see also Order Granting Petition for Writ of Mandate Under Cal. Envtl. Quality Act at 10-11, *Coal. to Support Plastic Bag Recycling v. City of Oakland*, *supra* note 141 ("A shift in consumer use from one environmentally damaging product to another constitutes an 'unusual circumstance' of an activity that would otherwise be exempt from review under CEQA as an activity undertaken to protect the environment.").

²⁹⁸ See Order on Submitted Matter at 2-3, *Save the Plastic Bag Coal. v. Cnty. of Marin*, *supra* note 196 ("It does not do away with the problem of single-use paper bags, although eliminating the plastic and placing a charge on the use of single-use paper bags has been shown to reduce the reliance on single-use paper bags. It is an urgent and correct first step.").

²⁹⁹ *Save the Plastic Bag Coal. v. City of Manhattan Beach*, 254 P.3d 1005, 1018 n. 8 (Cal. 2011) ("[O]nce plaintiff raised objections to the ordinance, the city abandoned that idea [common sense exemption] and proceeded instead to conduct an initial study and issue a negative declaration.").

³⁰⁰ *Id.*

³⁰¹ *Id.*

³⁰² In addition to statutory and categorical exemptions, CEQA guidelines have a catch-all category called the "common sense" exemption. Under the "common sense" exemption, CEQA does not apply to projects where the lead agency determines "with certainty that there is no possibility that the activity in question may have a significant effect on the environment." CAL. CODE REGS. tit. 14, § 15061(b)(3) (Westlaw 2012).

should be careful to preserve their right to rely on exemptions so that future rulings may address this argument. If Manhattan Beach had preserved this argument, the Supreme Court's decision may have provided cities with more clarity regarding exemptions to CEQA.

a. The “Unusual Circumstances” Exception to Categorical Exemptions Does Not Apply to Second Generation Ordinances

The “unusual circumstances” exception applies to “an activity where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances.”³⁰³ In the *Oakland* case, the court found the unusual circumstances exception applied because Oakland's (first generation) plastic bag ban might cause a “shift in consumer use from one environmentally damaging product to another.”³⁰⁴

Second generation plastic bag ordinances eliminate the unusual circumstances exception at issue in the *City of Oakland* case because paper bag charges in second generation ordinances create a sufficient incentive for customers to change behavior,³⁰⁵ a conclusion supported by the following examples:

Marin County Superior Court found that the unusual circumstance exception did not apply because the ordinance's five-cent charge on paper bags acted as a sufficient disincentive against the use of paper bags.³⁰⁶

Ireland's implementation of a fifteen-euro-cent charge on plastic bags in 2002 (now twenty-two euro cents) has led to an over-90% reduction in plastic bag consumption, and disposable plastic bags have largely been replaced by reusable shopping bags.³⁰⁷

³⁰³ CEQA Guidelines, CAL. CODE REGS. tit. 14, § 15300.2(c) (Westlaw 2012).

³⁰⁴ Order Granting Petition for Writ of Mandate Under Cal. Env'tl. Quality Act at 11, *Coal. to Support Plastic Bag Recycling v. City of Oakland*, *supra* note 141.

³⁰⁵ See CEQA Guidelines, CAL. CODE REGS. tit. 14, § 15300.2(c) (Westlaw 2012).

³⁰⁶ See Order on Submitted Matter at 2-3, *Save the Plastic Bag Coal. v. Cnty. of Marin*, *supra* note 196 (“It does not do away with the problem of single-use paper bags, although eliminating the plastic and placing a charge on the use of single-use paper bags has been shown to reduce the reliance on single-use paper bags. It is an urgent and correct first step.”).

³⁰⁷ *Plastic Bags, Alternatives to Disposable Plastic Bags*, IRISH DEP'T OF THE ENV'T, HERITAGE, & LOCAL GOV'T, www.environ.ie/en/Environment/Waste/PlasticBags/#Current%20Levy (last visited Dec. 12, 2011) (“[The fifteen-euro-cent charge] had an immediate effect on consumer behaviour with a decrease in plastic bag usage from an estimated 328 bags per capita to 21 bags per capita overnight [a decrease of 94%]. . . . The consumer has changed to using these alternatives. In the grocery sector, disposable plastic bags have largely been replaced by reusable shopping bags.”); see also Convery et al., *supra* note 30, at 7.

China introduced a nationwide regulation requiring all retailers to charge for plastic shopping bags on June 1, 2008.³⁰⁸ Chinese consumers in two surveyed cities reduced overall plastic bag consumption by 49%.³⁰⁹ The study also found that “the plastic bag regulation also shifted various other aspects of bag use behavior toward more efficient use, more reuse of plastic bags, and more use of substitutes.”³¹⁰

Washington D.C.’s five-cent charge applies to all single-use bags at checkout.³¹¹ Since implementation in January 2010, bag use decreased by 80%,³¹² a success showing that even a small five-cent charge can lead to a huge change in consumer behavior.³¹³

Thus, the uncertainty in *City of Oakland* regarding whether the unusual circumstances exception applies can likely be avoided by using a second generation ordinance and including information on the administrative record that shows the efficacy of such ordinances, especially if current and local information is included.

b. The “Cumulative Impacts” Exception to Categorical Exemptions Probably Does Not Apply to Second Generation Ordinances

The cumulative impacts exception applies “when the cumulative impact of successive projects of the same type in the same place, over time is significant.”³¹⁴ In the *Manhattan Beach* decision, the California Supreme Court noted that Manhattan Beach was “small enough that the cumulative effects of its ordinance would be negligible.”³¹⁵ However, the court was somewhat ambiguous when addressing the threshold for

³⁰⁸ HAORAN HE, DEPARTMENT OF ECONOMICS, SCHOOL OF BUSINESS, ECONOMICS AND LAW, UNIVERSITY OF GOTHENBURG, THE EFFECTS OF AN ENVIRONMENTAL POLICY ON CONSUMERS—LESSONS FROM THE CHINESE PLASTIC BAG REGULATION, ENVIRONMENTAL AND BEHAVIORAL ECONOMICS—APPLICATIONS TO CHINA 1 (2010), available at gupea.ub.gu.se/bitstream/2077/23829/2/gupea_2077_23829_2.pdf.

³⁰⁹ *Id.*

³¹⁰ *Id.* at 19.

³¹¹ David Nakamura, *District Businesses Not Harmed by Bag Tax*, THE WASHINGTON POST, Feb. 24, 2011, available at www.washingtonpost.com/wp-dyn/content/article/2011/02/23/AR2011022306669.html.

³¹² *Id.*

³¹³ See Press Release, Alice Ferguson Foundation, *supra* note 56.

³¹⁴ CAL. CODE REGS. tit. 14, § 153002(b) (Westlaw 2012) (cumulative-impacts exception).

³¹⁵ See *Save the Plastic Bag Coal. v. City of Manhattan Beach*, 254 P.3d 1005, 1018 (Cal. 2011).

considering cumulative impacts.³¹⁶ The court stated it would be “pointless to require the city to prepare an EIR on the additional impacts of paper bag use by its fewer than 40,000 residents” but that “the movement to ban plastic bags is a broad one, active at levels of government where an appropriately comprehensive environmental review will be required.”³¹⁷ However, the court’s reasoning was based on the specifics of Manhattan Beach’s first generation ordinance, which did not include a charge for paper bags—and even then the potential for cumulative impacts were negligible.³¹⁸ Since second generation ordinances focus more on an overall reduction in all bags and are much less likely to spur a switch to paper bags, the cumulative impact exception is likely inapplicable.

c. A City Proceeding Under a Categorical Exemption Should Be Careful to Create a State-of-the-Art Ordinance

The exact wording of the ordinance is crucial when faced with CEQA lawsuits, so it is important for cities to learn from the mistakes of other jurisdictions and use the best definitions possible.

1. *Use San Francisco’s Expanded Ordinance as a Starting Point*

Los Angeles County was the first municipality to adopt a second generation plastic bag ordinance,³¹⁹ which was adopted pursuant to an EIR.³²⁰ The structure of the ordinance is clear and it provides a good starting point for further refining ordinance language with the suggestions that follow. San Francisco’s Expanded Ordinance adds slight improvements to Los Angeles County’s ordinance, including applying the bag charge to reusable bags, and including all retailers and restaurants under the ordinance.³²¹

2. *Reusable Bags: Develop a Strong Definition and Require a*

³¹⁶ *See id.*

³¹⁷ *Id.* at 1018 n.10.

³¹⁸ *See id.* at 1018.

³¹⁹ *See* LOS ANGELES COUNTY CODE ch. 12.85 (2011), *available at* search.municode.com/html/16274/index.htm (follow “Title 12. Environmental Protection” link).

³²⁰ *See*, SAPPHOS ENVIRONMENTAL, INC., LOS ANGELES COUNTY DRAFT ENVIRONMENTAL IMPACT REPORT (2010), *available at* dpw.lacounty.gov/epd/aboutthebag/ordinance_govt.cfm (scroll down to CEQA documents).

³²¹ S.F., Cal., Expanded Plastic Bag Reduction Ordinance, *available at* plasticbaglaws.org/wordpress/wp-content/uploads/2010/05/leg_CA_SF-revised-2011-11-14.pdf.

Minimum Charge

An important issue for many of these plastic bag ordinances has been the definition of a reusable bag.³²² California's first ordinances, including San Francisco and Malibu, essentially defaulted to the A.B. 2449 definition of reusable bag:

“Reusable bag” means either of the following: (1) A bag made of cloth or other machine washable fabric that has handles. (2) A durable plastic bag with handles that is at least 2.25 mils thick and is specifically designed and manufactured for multiple reuse.³²³

San Francisco's original ban was based on the A.B. 2449 definition that defines reusable bags by the thickness of their plastic (2.25 mils).³²⁴ This has inspired at least one plastic bag manufacturer to make slightly thicker plastic bags that fit within the definition of “reusable bags” at a price point where they can be given away to customers just like ordinary plastic bags.³²⁵ These bags are less flimsy and thus arguably less likely to be blown around as litter, but they are thicker and therefore require more plastic.³²⁶ The biggest problem with these bags is that they are made to be given away for free, and therefore have very little likelihood of changing consumer behavior.³²⁷

With its revised ordinance, San Francisco plans to deal with these bags by making the ten-cent paper bag charge also apply to reusable bags given out to customers.³²⁸ Therefore, even if similar bags are allowed

³²² See *The Big Question: What Does “Reusable Bag” Mean?*, PLASTICBAGLAWS.ORG (Nov. 14, 2010), available at plasticbaglaws.org/what-does-reusable-bag-mean/.

³²³ A.B. 2449, § 1, 2005-2006 Reg. Sess. (Cal. 2006), codified as CAL. PUB. RES. CODE § 42250(d) (Westlaw 2012).

³²⁴ S.F., CAL., ENV'T CODE § 1702(k) (2007), available at [www.amlegal.com/nxt/gateway.dll/California/environment/chapter17plasticbagreductionordinance?fn=default.htm\\$3.0\\$vid=amlegal:sanfrancisco_ca](http://www.amlegal.com/nxt/gateway.dll/California/environment/chapter17plasticbagreductionordinance?fn=default.htm3.0vid=amlegal:sanfrancisco_ca).

³²⁵ See *Paper Bag Rehab / T-Shirt Recovery*, ROPLAST INDUSTRIES INC., www.roplast.com/Grocery/Paper_Bag_Rehab.html (last visited Dec. 12, 2011) (“At 2.25 mil, [this plastic bag] is considered ‘reusable’ by California law AB 2449 and San Francisco’s Bag Reduction Ordinance. Give your customers a real treat. Give them a reusable bag!”).

³²⁶ See David Gorn, *San Francisco Plastic Bag Ban Interests Other Cities*, NATIONAL PUBLIC RADIO (Mar. 27, 2008), available at www.npr.org/templates/story/story.php?storyId=89135360.

³²⁷ Interview with Jack Macy, Commercial Zero Waste Coordinator, S.F. Dep’t of the Env’t, in San Francisco, Cal. (Nov. 7, 2011); see *San Francisco Looks to Expand Bag Ordinance*, PLASTICBAGLAWS.ORG (Nov. 17, 2011), plasticbaglaws.org/san-francisco-looks-to-expand-bag-ordinance/.

³²⁸ See S.F., Cal., Expanded Plastic Bag Reduction Ordinance, available at plasticbaglaws.org/wordpress/wp-content/uploads/2010/05/leg_CA_SF-revised-2011-11-14.pdf; see also *San Francisco Looks to Expand Bag Ordinance*, PLASTICBAGLAWS.ORG (Nov. 17, 2011),

under the reusable bag definition, at least the charge on such bags is likely to affect consumer behavior. If San Francisco's ordinance is adopted as written, San Francisco will be the first California municipality to adopt an ordinance placing a minimum charge on a reusable bag.³²⁹

Other municipalities, including Los Angeles County, are focusing on durability standards for reusable bags.³³⁰ Reusable bags must be used many times in order to be more environmentally benign than plastic bags, so durability standards are important.³³¹ One point of contention has been whether to require that reusable bags be machine-washable both to ensure greater durability of materials and address public health concerns,³³² but thus far the only California municipality that has succeeded in adopting an ordinance that includes a machine-washability requirement for reusable bags is the Town of Fairfax, which passed its ordinance via voter initiative.³³³

3. *Compostable Plastic Bags: How to Define and Whether to Allow*

San Francisco's plastic bag ban specifically allows for compostable plastic bags.³³⁴ However, compostable plastic bags are of limited use in communities without curbside residential composting programs and have therefore not been allowed in many ordinances. For example, AB 1998 did not allow for the distribution of compostable plastic bags.³³⁵ The

available at plasticbaglaws.org/san-francisco-looks-to-expand-bag-ordinance/.

³²⁹ See S.F., Cal., Expanded Plastic Bag Reduction Ordinance, available at plasticbaglaws.org/wordpress/wp-content/uploads/2010/05/leg_CA_SF-revised-2011-11-14.pdf; see also *San Francisco Looks to Expand Bag Ordinance*, PLASTICBAGLAWS.ORG (Nov. 17, 2011), available at plasticbaglaws.org/san-francisco-looks-to-expand-bag-ordinance/.

³³⁰ See L.A. COUNTY CODE ch. 12.85.010(I), available at search.municode.com/html/16274/index.htm (follow "Title 12. Environmental Protection" link).

³³¹ The Los Angeles County EIR determined that each polypropylene and cotton reusable bag distributed must be used at least 104 times to result in global warming impacts that are significantly lower than the impacts from paper and plastic carryout bags. LOS ANGELES COUNTY EIR, vol. III, tbl.R.3.3.5.5A: Relative Impacts of Various Types of Bags. SAPPHOS ENVIRONMENTAL, INC., LOS ANGELES COUNTY FINAL ENVIRONMENTAL IMPACT REPORT, vol. III, at 12-20 (2010), available at dpw.lacounty.gov/epd/aboutthebag/ordinance_govt.cfm (scroll down to CEQA documents).

³³² See *The Big Question: What Does "Reusable Bag" Mean?*, PLASTICBAGLAWS.ORG (Nov. 14, 2010), available at plasticbaglaws.org/what-does-reusable-bag-mean/.

³³³ FAIRFAX, CAL., CITY CODE § 8.18.030(j) (2007), available at www.cawrecycles.org/files/Fairfax%20Ordinance-Mun%20Code.pdf ("Reusable Bag" means a bag with handles that is specifically designed and manufactured for multiple reuse is either made from cloth or other machine washable fabric.).

³³⁴ S.F. ENV'T CODE § 1703 (2007), available at [www.amlegal.com/nxt/gateway.dll/California/environment/chapter17plasticbagreductionordinance?f=templates\\$fn=default.htm\\$3.0\\$vi d=amlegal:sanfrancisco_ca](http://www.amlegal.com/nxt/gateway.dll/California/environment/chapter17plasticbagreductionordinance?f=templates$fn=default.htm$3.0$vi d=amlegal:sanfrancisco_ca).

³³⁵ A.B. 1998, § 1(d), 2009-2010 Reg. Sess. (Cal. 2010), available at www.leginfo.ca.gov/pub/09-10/bill/asm/ab_1951-2000/ab_1998_bill_20100528_amended_

reasoning behind omitting compostable bags is in part that “plastics made from bio-based sources that are marked as ‘compostable’ or ‘biodegradable’ have not been shown to degrade in aquatic environments and require conditions only available in composting facilities to rapidly break down into constituents that assimilate back into the environment.”³³⁶ “[C]omposting facilities are not typically available to local jurisdictions and compostable plastic in communities without commercial composting would be disposed of as waste.”³³⁷ When municipalities allow compostable plastic bags, they should be careful to specify the ASTM 6400³³⁸ standard for compostability and not allow biodegradable bags.³³⁹ Also, only jurisdictions where the majority of residential households have access to curbside collection of foodwaste for composting should consider allowing compostable plastic bags, because compostable plastic bags need to be processed in special facilities.³⁴⁰

asm_v96.html.

³³⁶ *Id.*

³³⁷ A.B. 1998, §1(j), 2009-2010 Reg. Sess. (Cal. 2010) (as introduced Feb. 17, 2010), available at www.leginfo.ca.gov/pub/09-10/bill/asm/ab_1951-2000/ab_1998_bill_20100217_introduced.pdf.

³³⁸ ASTM INTERNATIONAL, ASTM D6400 - STANDARD SPECIFICATION FOR COMPOSTABLE PLASTICS, available at www.astm.org/Standards/D6400.htm (“This specification covers plastics and products made from plastics that are designed to be composted in municipal and industrial aerobic composting facilities.”).

³³⁹ The term “biodegradable” is often misleading, which prompted a bill recently signed into law in California prohibiting the sale of plastic products labeled as “biodegradable.” S.B. 567, 2010-2011 Reg. Sess. (Cal. 2011), available at www.leginfo.ca.gov/pub/11-12/bill/sen/sb_0551-0600/sb_567_bill_20111008_chaptered.html (“Use of the term ‘degradable,’ ‘biodegradable,’ ‘decomposable,’ or other like terms on plastic products is inherently misleading unless the claim includes a thorough disclaimer providing necessary qualifying details, including, but not limited to, the environments and timeframes in which the claimed action will take place.”).

³⁴⁰ A.B. 1998, 2009-2010 Reg. Sess. (Cal. 2010), (as amended Aug. 27, 2010), available at www.leginfo.ca.gov/pub/09-10/bill/asm/ab_1951-2000/ab_1998_bill_20100827_amended_sen_v94.pdf (proposing new CAL. PUB. RES. CODE § 42281(g)(1)).

- ii. *While CEQA Requirements for Plastic Bag Ordinances Depend on Specific Ordinance Language and the Jurisdictional Characteristics, EIRs and Negative Declarations Are Probably Not Required*
- a. *Negative Declarations Can Be a Conservative Route for Most Cities Adopting Second Generation Ordinances and for Small Cities Adopting First Generation Ordinances*

After the *Manhattan Beach* decision, it seems clear that cities comparable in size and composition to Manhattan Beach may avoid costly EIRs by enacting a plastic bag ordinance pursuant to Negative Declarations similar to the scope of the Negative Declaration used by Manhattan Beach.³⁴¹ Therefore, if city officials want to take a conservative approach, preparation of a Negative Declaration appears to be sufficient for cities of a similar size and make-up as Manhattan Beach that prepare a comparable initial study. The court in *Manhattan Beach* took note that “analysis would be different for a ban on plastic bags by a larger governmental body, which might precipitate a significant increase in paper bag consumption.”³⁴² However, if a city adopts a second generation ban that includes a charge on paper and reusable bags, the argument that paper bag use will increase significantly—which might have had some plausibility in the absence of a charge on paper bags—is much less compelling.

Additionally, Manhattan Beach’s initial study recognized that a switch from plastic to paper bags would have some negative environmental consequences, but on balance, the harms would not outweigh the benefits, for the following reasons:

1. Plastic bags would not be replaced by paper bags on a one-to-one ratio, since paper has a higher capacity, and at least some plastic bags would be replaced by reusable bag;³⁴³
2. The ordinance would require paper bags to have 40% recycled content;³⁴⁴

³⁴¹ See *Save the Plastic Bag Coal. v. City of Manhattan Beach*, 254 P.3d 1005 (Cal. 2011).

³⁴² *Id.* at 1017.

³⁴³ CITY OF MANHATTAN BEACH, INITIAL STUDY/ENVIRONMENTAL CHECKLIST FOR THE MANHATTAN BEACH MUNICIPAL CODE AMENDMENT TO PROHIBIT SINGLE-USE PLASTIC CARRY-OUT BAGS AT COMMERCIAL ESTABLISHMENTS 10 (2008), available at plasticbaglaws.org/wordpress/wp-content/uploads/2010/04/lit_Manhattan-Beach_CMB-Initial-Study.pdf.

³⁴⁴ *Id.* at 9.

3. Any increase in the total use of paper bags resulting from the proposed ban (and even considering it as a cumulative increase) would be relatively small with a minimal or nonexistent increase in truck traffic;³⁴⁵
4. Substitution of paper bags for plastic would not significantly impact landfill capacity since a larger portion of paper bags are recycled and Manhattan Beach is a small proportion of regional landfill users;³⁴⁶ and
5. Switching from plastic to paper would have no negative impact on plants or wildlife and would result in decreased plastic bag litter.³⁴⁷

An initial study does not have to be long; in fact, Manhattan Beach's initial study was only twenty-two pages,³⁴⁸ but the Negative Declaration should carefully address all of the issues that could be impacted by the ordinance and, at a minimum, emulate Manhattan Beach's specificity. Also, in the time since Manhattan Beach's initial study, several other cities have prepared EIRs and Negative Declarations.³⁴⁹ In preparing an initial study, a city would be smart to cull the pertinent information from these documents and identify what additional information specific to the jurisdiction and to the terms of the ordinance should also be included. For example, more recent CEQA studies include statistics and local polls regarding how much a charge on paper bag would reduce paper bag use.³⁵⁰

Another reason why California municipalities should feel more confident moving forward with plastic bag ordinances pursuant to Negative Declarations is that two California Counties, Santa Clara and Santa Cruz, recently adopted ordinances pursuant to Negative Declarations—and were not sued under CEQA. Santa Cruz County was sued by SPBC, but not on CEQA claims. Santa Clara County was not

³⁴⁵ *Id.* at 20.

³⁴⁶ *Id.* at 21.

³⁴⁷ *Id.* at 22.

³⁴⁸ *See id.*

³⁴⁹ *See supra* Part IV.C.

³⁵⁰ CITY OF SAN JOSE, DRAFT ENVIRONMENTAL IMPACT REPORT 28 (2010). *available at* plasticbaglaws.org/wordpress/wp-content/uploads/2010/05/leg_CA_San-Jose_draft-EIR.pdf (“A survey of residents of San Jose done in spring/summer 2010 did indeed verify that a higher fee on single-use paper bags would increase customers’ use of reusable bags. But the survey also identified a very high level of initial participation even with a \$.10 fee. Of those responding to the survey, 81 percent indicated they would bring reusable bags for shopping if plastic bags were banned and recycled content paper bags cost \$.10. With a \$.25 fee on paper bags, 90 percent of the survey respondents would bring reusable bags. This supports the City’s assumptions that the environmentally aware citizens of San Jose will respond positively to the purpose of the ordinance.”).

sued regarding its single-use bag ordinance, which was adopted pursuant to a Mitigated Negative Declaration.³⁵¹

b. Environmental Impact Reports Are Probably Not Necessary for Second Generation Ordinances

To date, three plastic bag ordinances in California have been adopted pursuant to EIRs.³⁵² These EIRs were all prepared before the *Manhattan Beach* decision was issued, when the landscape was much less clear regarding what was required under CEQA for plastic bag ordinances. Two significant things have happened since that time. First, the Supreme Court found that a Negative Declaration was sufficient for the circumstances in *Manhattan Beach*, and thus an EIR was not required for that ordinance.³⁵³ Second, the structure of plastic bag ordinances in California has been modified to include a charge for paper bags to incentivize an overall reduction in single-use bag consumption and eliminate the argument that the ordinance will result in increased paper bag consumption.³⁵⁴ To date, all California courts that have addressed the sufficiency of CEQA review with respect to second generation ordinances have found that Negative Declarations or categorical exemptions are sufficient.³⁵⁵ Thus, EIRs are probably not necessary for second generation ordinances.

VII. CONCURRENT LEGISLATIVE AND LITIGATION DEVELOPMENTS

A. STATEWIDE LEGISLATION IN CALIFORNIA

i. *Assembly Bill 68*

On December 12, 2008, Assembly Member Brownley introduced

³⁵¹ See COUNTY PLANNING OFFICE, DEPARTMENT OF PLANNING AND DEVELOPMENT, COUNTY OF SANTA CLARA, NOTICE OF INTENT TO ADOPT A NEGATIVE DECLARATION (REVISED) (Mar. 4, 2011), available at plasticbaglaws.org/wordpress/wp-content/uploads/2010/05/leg_CA_Santa-Clara_Neg-Dec_NOI_March-2011.pdf.

³⁵² The California jurisdictions that adopted plastic bag ordinances pursuant to EIRs were Los Angeles County, City of San Jose and City of Santa Monica. See *supra* Part IV.C.

³⁵³ *Save the Plastic Bag Coal. v. City of Manhattan Beach*, 254 P.3d 1005, 1008 (Cal. 2011).

³⁵⁴ See Letter from Frances Lam, Chairman, Rise Above Plastics Campaign, Surfrider Foundation, South Orange County Chapter, to City of Dana Point Mayor and City Council (Dec. 2, 2011), available at assets.matchbin.com/sites/997/assets/AJ9W_SurfriderLetterToDanaPointCouncil.pdf.

³⁵⁵ See *supra* Part V.B.i.

A.B. 68.³⁵⁶ A.B. 68 would have prohibited a store³⁵⁷ from providing a carryout bag (paper, plastic, or compostable plastic) to a customer unless the store charged a fee of not less than twenty-five cents per bag at the point of sale, and the majority of fees collected would have been remitted to the Bag Pollution Fund to fund programs to control pollution from single-use plastic bags and reusable bag giveaway programs.³⁵⁸

The bill would have prevented cities and counties from charging additional fees on carryout bags at stores in compliance, but it would not have preempted a city or county from prohibiting the use or distribution of carryout bags—which would have allowed cities to continue to enact plastic bag bans.³⁵⁹ A.B. 68 passed the Assembly Committee on Natural Resources by a 6-3 vote but did not make it any further.³⁶⁰

ii. *Senate Bill 531*

On February 27, 2009, California Senator DeSaulnier introduced California Senate Bill (S.B.) 531,³⁶¹ the Single-Use Carryout Bag Responsibility Fee, which would have charged a minuscule \$0.001 fee per bag to *suppliers* of plastic bags.³⁶² As originally drafted, S.B. 531 would not have provided any direct incentive for consumers to use reusable bags as an alternative to paper or plastic.³⁶³ Rather than focusing on reduction of overall use of plastic bags, S.B. 531 focused on “requiring manufacturers or suppliers of those products to pay an appropriate share of litter abatement and clean-up costs.”³⁶⁴ Most importantly, the law sought to preempt any city or county plastic bag ordinances.³⁶⁵

³⁵⁶ A.B. 68, 2009-2010, Reg. Sess. (Cal. 2010), available at www.leginfo.ca.gov/pub/09-10/bill/asm/ab_0051-0100/ab_68_bill_20100113_amended_asm_v96.pdf; see also HEAL THE BAY, AB 68 (BROWNLEY): SACK THE BAG, available at sites.healthebay.org/assets/pdfdocs/actionalerts/2009_01_06_AB68/FactSheet_AB%2068_2009.pdf (last visited Dec. 12, 2011).

³⁵⁷ A.B. 68, § 2 (proposing new CAL. PUB. RES. CODE § 42280(i), which would have defined “store” as a retail establishment that is a supermarket, or a pharmacy or convenience food store with over 10,000 square feet of retail space).

³⁵⁸ *Id.* (proposing new CAL. PUB. RES. CODE §§ 42281(a), 42285(b)).

³⁵⁹ See *id.* (proposing new CAL. PUB. RES. CODE § 42286(c)).

³⁶⁰ See Unofficial Ballot, Natural Resources Assembly Committee, A.B. 68 (Apr. 13, 2009), available at www.leginfo.ca.gov/pub/09-10/bill/asm/ab_0051-0100/ab_68_vote_20090413_000001_asm_comm.html.

³⁶¹ S.B. 531, 2009-2010 Reg. Sess. (Cal. 2009) (as introduced), available at www.leginfo.ca.gov/pub/09-10/bill/sen/sb_0501-0550/sb_531_bill_20090227_introduced.pdf.

³⁶² *Id.* at § 2 (proposing new CAL. PUB. RES. CODE § 42261(a), (b)).

³⁶³ See Letter from Kirsten James and Sonia Diaz to Senator Mark DeSaulnier, *supra* note 36.

³⁶⁴ S.B. 531, § 1(b) (as introduced).

³⁶⁵ S.B. 531, § 2 (as introduced) (proposing new CAL. PUB. RES. CODE § 42269.3(b)).

The group behind the sponsor of S.B. 531,³⁶⁶ Californians for Extended Producer Responsibility (CEPR),³⁶⁷ were no strangers to representing plastic bag industry interests.³⁶⁸ Stephen Joseph, counsel for SPBC, was counsel for CEPR.³⁶⁹ Several opponents, including Heal the Bay, the California Integrated Waste Management Board, the Stop Hidden Taxes Coalition, and the City of Manhattan Beach, took issue with the introduced version of S.B. 531 because of local preemption, lack of transparency of a supplier-based fee, the nominal fee amount, and the focus on recycling and voluntary “best practices” efforts that were duplicative of A.B. 2449.³⁷⁰

The opponents to S.B. 531 managed to take the teeth—i.e., local preemption—out of the bill. The amended version of S.B. 531 passed the Senate but ultimately died in the Assembly.³⁷¹

containing following preemption language: “A city, county, or other public agency shall not adopt or enforce an ordinance, resolution, regulation, or rule prohibiting the use, import, sale, or distribution of carryout bags or imposing a fee on carryout bags or requiring any specifications for carryout bags unless that ordinance, resolution, regulation, or rule was adopted prior to January 1, 2009.”)

³⁶⁶ SENATE COMM. ON ENVTL. QUALITY, BILL ANALYSIS, S.B. 531, 2009-2010, Reg. Sess. (Apr. 27, 2009), available at www.leginfo.ca.gov/pub/09-10/bill/sen/sb_0501-0550/sb_531_cfa_20090424_181145_sen_comm.html (“SB 531 is sponsored by Source: Californians for Extended Product Responsibility.”); see also cached web page from Californians for Extended Producer Responsibility (on file with author) (“SB 531: California Senate bill SB 531 is the legislative vehicle for CEPR’s Carryout Bag EPR Program.”).

³⁶⁷ See cached web page from Californians for Extended Producer Responsibility (on file with author). “CEPR formerly used the name Californians for Extended Product Responsibility. ‘Product’ was changed to ‘Producer’ in July 2009.” *Id.*

³⁶⁸ See cached web page from Californians for Extended Producer Responsibility (on file with author) (Formed in 2009, CEPR “is a coalition of Californian plastic bag manufacturers who have decided to take an independent approach to addressing the issues of the proliferation of carryout bags and carryout bag litter. [CEPR] believe[s] that environmental groups need to come to terms with political realities and consumer preferences. Plastic and paper bag companies need to come to terms with the fact that we are moving into an age of Extended Producer Responsibility. It is time for the stakeholders to collaborate on developing a legislative package. Other organizations: CEPR is not affiliated with the American Chemistry Council (ACC) or Progressive Bag Affiliates (PBA). None of CEPR’s members are members of the ACC or PBA.”).

³⁶⁹ Jim Downing, *Folsom Walmart to Start Reusable Bag Trial*, THE SACRAMENTO BEE, Oct. 20, 2009, available at www.charity-charities.org/news.php?artid=142602 (“The tax would raise about \$100 million a year, according to Stephen Joseph, attorney for Californians for Extended Producer Responsibility, a bag manufacturers group.”).

³⁷⁰ SENATE COMM. ON ENVTL. QUALITY, BILL ANALYSIS 3 (“Opposition: Based on introduced version: American Forest & Paper Association, Clean Water Action, Environment California, Heal the Bay, Los Angeles County, Manhattan Beach, Save the Bay, Stop Hidden Taxes Coalition, Surfrider Foundation, 58 individuals”).

³⁷¹ See Unofficial Ballot, Senate Floor, A.B. 531 (June 1, 2009), available at www.leginfo.ca.gov/pub/09-10/bill/sen/sb_0501-0550/sb_531_vote_20090601_0338PM_sen_floor.html.

iii. Assembly Bill 1998

On February 17, 2010, Assembly Member Brownley introduced A.B. 1998.³⁷² A.B. 1998 would have prohibited stores from providing single-use plastic carryout bags and required that paper carryout bags be provided subject to a green bag fee.³⁷³ A.B. 1998 faced fierce opposition largely funded by the American Chemistry Council (ACC), which spent “millions in lobbying fees, radio ads and even a prime-time television ad attacking the measure.”³⁷⁴

Much of the opposition’s rhetoric around the bill claimed that the measure would kill jobs and create a tax on “working class families who can least afford it.”³⁷⁵ This rhetoric appears to have been at least somewhat effective. Despite amendments to the bill that would have required stores to give bags to low-income customers for free, some senators cited the “financial burden” the measure would place on customers.³⁷⁶ A.B. 1998 made it through the State Assembly and passed the Senate Environmental Quality and Appropriations Committees, only to be struck down by a 14-21 vote on the Senate floor.³⁷⁷

iv. Assembly Bill 298

In 2011, Assembly Member Brownley introduced A.B. 298, which would have required that reusable bags sold or distributed meet certain criteria.³⁷⁸ A.B. 298 would have imposed many of the same requirements

³⁷² A.B. 1998, 2009-2010 Reg. Sess. (Cal. 2010), available at www.leginfo.ca.gov/pub/09-10/bill/asm/ab_1951-2000/ab_1998_bill_20100827_amended_sen_v94.pdf; see also *The Fate of AB 1998 and Our Next Steps*, HEAL THE BAY, http://sites.healthebay.org/news/2010/09_01_AB1998/ (last updated Sept. 2, 2010).

³⁷³ A.B. 1998, at (1).

³⁷⁴ Robin Hindery, *California Plastic Bag Ban Rejected By State Lawmakers*, HUFFINGTON POST, Sept. 1, 2010, www.huffingtonpost.com/2010/09/01/california-plastic-bag-ba_0_n_701952.html. Interestingly, some from the plastics industry also supported AB 1998; the President of Roplast Industries stated that “AB 1998 was not perfect, but it would have settled the issue and we could all have moved forward. As it is, the uncertainty remains and we are having to deal with a new initiative to ban thin bags each month—or is it each week?” Kitt Doucette, *The Plastic Bag Wars*, ROLLING STONE, July 25, 2011, www.rollingstone.com/politics/news/the-plastic-bag-wars-20110725.

³⁷⁵ See, e.g., *Opposition to “Bag Ban Bill” (AB 1998) Increasing*, AM. CHEMISTRY COUNCIL (Aug. 2, 2010), available at www.americanchemistry.com/Media/PressReleasesTranscripts/ACC-news-releases/Opposition-to-Bag-Ban-Bill-AB-1998-Increasing.html.

³⁷⁶ See, e.g., Enjoli Francis, *California Strikes Down Proposal to Ban Plastic Bags*, ABC NEWS, Sept. 1, 2010, abcnews.go.com/US/california-votes-plastic-bag-ban/story?id=11526792.

³⁷⁷ See A.B. 1998 Current Bill Status, available at www.leginfo.ca.gov/pub/09-10/bill/asm/ab_1951-2000/ab_1998_bill_20101004_status.html (last visited Dec. 12, 2011).

³⁷⁸ A.B. 298, § 2, 2011-2012 Reg. Sess. (Cal. 2011), available at www.leginfo.ca.gov/pub/11-

as the reusable bag definition in Los Angeles County's ordinance with regard to durability and public health, including a requirement that reusable bags be "made from a material that can be cleaned and disinfected" and "not contain lead, cadmium, or any other heavy metal in toxic amounts."³⁷⁹ The bill passed on the Assembly floor but died in the Senate Environmental Quality Committee.³⁸⁰

v. *Senate Bill 915*

In 2011, Assembly Member Calderon introduced S.B. 915, which would have required that plastic bag use be reduced "by an unspecified percent by an unspecified year" and set mandatory levels of recycled content.³⁸¹ As originally introduced, the bill would also have preempted all local plastic bag ordinances, requiring the "suspension of] local plastic bag ordinance[s]," and the "prohibit[ion of] local governments from enacting plastic bag bans or fees on plastic bags."³⁸² However, the amended version of the bill lacks the preemption language, and the bill was pulled by the author.³⁸³ Not surprisingly, S.B. 915 was supported by Hilex Poly.³⁸⁴

B. HILEX POLY V. CHICOBAG: A CLASSIC SLAPP

SLAPPs are Strategic Lawsuits Against Public Participation, which are filed against people or organizations because they have exercised their First Amendment right to speak out regarding matters of public concern.³⁸⁵ Plaintiffs in SLAPP suits generally file civil claims such as

12/bill/asm/ab_0251-0300/ab_298_bill_20110209_introduced.pdf (proposing to add CAL. PUB. RES. CODE § 42253.5).

³⁷⁹ *Id.*

³⁸⁰ See A.B. 298 Current Bill Status, available at www.leginfo.ca.gov/pub/11-12/bill/asm/ab_0251-0300/ab_298_bill_20110512_status.html (last visited Dec. 12, 2011).

³⁸¹ S.B. 915, 2011-2012 Reg. Sess. (Cal. 2011) (as introduced), available at plasticbaglaws.org/wordpress/wp-content/uploads/2011/02/CA_sb_915_bill_20110218_introduced.pdf.

³⁸² *Id.* at § 1(b), (e), (f).

³⁸³ See S.B. 915, 2011-2012 Reg. Sess. (Cal. 2011) (as amended Mar. 25, 2011), available at www.leginfo.ca.gov/pub/11-12/bill/sen/sb_0901-0950/sb_915_bill_20110325_amended_sen_v98.pdf; Bill Status—S.B. 915, available at www.leginfo.ca.gov/pub/11-12/bill/sen/sb_0901-0950/sb_915_bill_20110503_status.html.

³⁸⁴ See SENATE COMMITTEE ON ENVIRONMENTAL QUALITY, BILL ANALYSIS, S.B. 915 (May 2, 2011), available at www.leginfo.ca.gov/pub/11-12/bill/sen/sb_0901-0950/sb_915_cfa_20110429_160754_sen_comm.html (noting support from Hilex Poly).

³⁸⁵ See *The Anti-SLAPP Resource Center—What Are SLAPPs? FIRST AMENDMENT PROJECT*, www.thefirstamendment.org/antislappresourcecenter.html#What%20are%20slapps (scroll down to "What are SLAPP's?") (last visited Dec. 12, 2011).

defamation, conspiracy, or interference with contractual rights.³⁸⁶ Many SLAPPs are legally unsuccessful but can serve the purpose of intimidating or bankrupting those that speak out in the public interest.³⁸⁷ Chief among the concerns around SLAPP suits are their potential to chill speech, discouraging important commentary on issues of public concern.³⁸⁸

In January 2011, ChicoBag, a manufacturer of reusable shopping bags,³⁸⁹ was sued by three single-use plastic bag manufacturing companies who alleged that ChicoBag was “engaged in a continuous and systematic campaign of false advertising and unfair competition.”³⁹⁰ Plaintiffs in the case alleged that ChicoBag sold its product based on claims that single-use plastic bag use has harmful environmental impacts and that reusable bags were the superior alternative.³⁹¹ Specifically, plaintiffs alleged that ChicoBag violated several South Carolina statutes (the venue where the case was filed) regarding trade practices, false advertising, and “unfair competition in interstate commerce.”³⁹²

In the SLAPP context, venue can be everything. Some jurisdictions, including California, have anti-SLAPP statutes that create a presumption in favor of dismissal; it then becomes the plaintiff’s burden to demonstrate why its suit has legitimate grounds.³⁹³ If the case is found to be a SLAPP, it is dismissed and the plaintiff must pay the defendant’s attorney’s fees.³⁹⁴ South Carolina on the other hand, where the ChicoBag case was filed, does not have an anti-SLAPP statute.³⁹⁵

Commentators took note of the “David and Goliath” fight between the companies: plaintiffs are the three leading single-use plastic bag

³⁸⁶ *See id.*

³⁸⁷ *See id.*

³⁸⁸ *See* CAL. CIV. PROC. CODE § 425.16(a) (Westlaw 2012) (“The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process.”).

³⁸⁹ *See* CHICOBAG COMPANY, www.chicobag.com (last visited Dec. 12, 2011).

³⁹⁰ *See* Complaint, *Hilex Poly Co. v. ChicoEco, Inc.* 3:11-cv-00116-JFA (S.C. Dist. Ct. Jan. 14, 2011), available at plasticbaglaws.org/wordpress/wp-content/uploads/2011/06/Complaint.pdf.

³⁹¹ *See id.* at 3-4.

³⁹² *Id.* at 2.

³⁹³ *See* CAL. CIV. PROC. CODE § 425.16(b)(1). For other examples of anti-SLAPP statutes, *see* WASH. REV. CODE §§ 4.24.500–520 (Westlaw 2012); N.Y. C.P.L.R. 3211(g), 3212(h) (MCKINNEY 2011); N. Y. CIV. RIGHTS LAW §§ 70-a, 76-a (MCKINNEY 2011).

³⁹⁴ CAL. CIV. PROC. CODE § 425.16(c)(2).

³⁹⁵ Paul Rauber, *Big Plastic v. the Bag Monster*, SIERRA (June 13, 2011), available at sierraclub.typepad.com/sierradaily/2011/06/big-plastic-vs-the-bag-monster.html.

manufacturers,³⁹⁶ and ChicoBag is a small company less than ten years old. As with many SLAPP suits, prolonged litigation could have put ChicoBag out of business.³⁹⁷ For single-use plastic bag manufacturers, facing a growing tide of criticism and rejection of single-use bags, fighting criticism of their product seems to be one tactic the plastic bag industry is using to remain relevant. As one headline in Rolling Stone declared, “The world consumes 1 million plastic shopping bags every minute—and the industry is fighting hard to keep it that way.”³⁹⁸

However, commentators also noted that this strategy may only serve to “[draw] even more attention to the excessive waste caused by single-use plastic bags.”³⁹⁹ In fact, this seems to be exactly what occurred. First, when ChicoBag challenged the plaintiffs “to back up their allegations and asked for the true recycling rate for plastic bags,” two of the plaintiffs dropped out of the suit.⁴⁰⁰ The lawsuit was then resolved in a settlement requiring *both parties* to provide “citations and dates for all facts and statistics on any web page or advertising.”⁴⁰¹ ChicoBag had already updated its website information to include source citations, so as a result of the settlement, ChicoBag was not required to make significant changes to its website.⁴⁰² Interestingly, the settlement required Hilex Poly (the remaining plaintiff) to take measures to reduce plastic bag litter, including putting statements on its product to “Tie Bag in Knot Before Disposal” in an effort to cut down on windblown litter, and including statements on its website discussing ways to prevent windblown litter.⁴⁰³ Additionally, according to the President of ChicoBag, the settlement provides that Hilex Poly “can no longer inflate plastic bag recycling numbers by including non-bag wrap and plastic film. Furthermore, Hilex Poly agreed to acknowledge that plastic bags can become windblown litter despite proper disposal and to better educate the public.”⁴⁰⁴

³⁹⁶ Felicity Barringer, *In a War of Worlds, Makers of Plastic Bags Go to Court*, N.Y. TIMES, June 12, 2011, at A28, www.nytimes.com/2011/06/12/science/earth/12garbage.html?_r=2&partner=rss&emc=rss.

³⁹⁷ See Doucette, *supra* note 374 (noting the company has “few resources to devote to a prolonged legal battle”).

³⁹⁸ *See id.*

³⁹⁹ Doucette, *supra* note 374 (“Although the lawsuit could put Keller out of business—he has few resources to devote to a prolonged legal battle—it has also backfired on the industry, drawing even more attention to the excessive waste caused by plastic bags.”).

⁴⁰⁰ Press Release, ChicoBag Co., Bag Wars, Plastic Bag Giants Superbag and Advance Poly Split from Hilex Poly, Drop Out of Lawsuit Against ChicoBag (Sept. 13, 2011), *available at* www.chicobag.com/settlement-press-release.

⁴⁰¹ *Id.*

⁴⁰² *See id.*

⁴⁰³ *Id.*

⁴⁰⁴ *Id.*

C. STATEWIDE COALITION OF ENVIRONMENTAL GROUPS PUSHES PLASTIC BAG ORDINANCES FORWARD IN CALIFORNIA

In the face of fierce resistance to these ordinances by the plastics industry, environmental groups have built a successful coalition to keep the fight against single-use bags moving forward.⁴⁰⁵ This coalition formed in large part around the A.B. 1998 legislative campaign for a statewide plastic bag ban in 2010.⁴⁰⁶ A.B. 1998 proponents were for the most part non-profit environmental groups focused on water law, policy, and science (Heal the Bay, Save the Bay, Surfrider, Environment California, San Diego Coastkeeper, Algalita Marine Research Foundation, 5 Gyres, The Plastic Pollution Coalition), major environmental organizations (Natural Resources Defense Center, Sierra Club, Clean Water Action), waste advocacy groups (Californians Against Waste), and numerous local environmental groups and individuals.⁴⁰⁷ After A.B. 1998 was defeated by a slim margin, these groups continued the campaign on a local level, primarily through the Clean Seas Coalition (CSC).⁴⁰⁸ CSC is a “growing coalition of environmentalists, scientists, California lawmakers, students, and community leaders pushing California to strengthen laws reducing trash in California’s seas and on beaches.”⁴⁰⁹ CSC acts as an informal clearinghouse for information relating to marine plastic pollution, including coordinating the distribution of information regarding plastic bag ordinance structure, outreach materials, and strategy.⁴¹⁰ The successful collaboration among these groups is in large part responsible for the continued success and momentum at the local level in California.⁴¹¹

VIII. CONCLUSION

The plastics industry is aware that its business model is at a tipping point, and the industry will continue to strenuously fight against

⁴⁰⁵ See FREINKEL, *supra* note 4, at 149.

⁴⁰⁶ See FREINKEL, *supra* note 4, at 149.

⁴⁰⁷ Telephone Interview by Jennie R. Romer with Leslie Mintz Tamminen, Director of Ocean Programs, Seventh Generation Advisors, in Santa Monica, Cal. (Sept. 22, 2011).

⁴⁰⁸ *Id.*

⁴⁰⁹ *About*, CLEAN SEAS COALITION, www.cleanscoalition.org/index.php?option=com_content&view=article&id=46&Itemid=53 (last visited Dec. 12, 2011).

⁴¹⁰ *See id.*

⁴¹¹ Telephone Interview by Jennie R. Romer with Leslie Mintz Tamminen, Director of Ocean Programs, Seventh Generation Advisors, in Santa Monica, Cal. (Sept. 22, 2011); *see also Plastic Bag Ban Gains Momentum in California*, NEW HAVEN TIMES, Nov. 17, 2010, available at nhregister.com/articles/2010/11/17/news/aa12plastic111710.txt?viewmode=fullstory.

measures to limit plastic use.⁴¹² However, exposing the plastics industry groups' various efforts to cast themselves as environmentalists, being familiar with the industry's tactics, and knowing the basics of the litigation history can empower cities to move forward more confidently. With this information, California cities have the tools and can move forward with plastic bag ordinances and ensure that the tipping point is surpassed.

The *Manhattan Beach* decision provides some guidance, but it does not provide a definitive rule as to what type of document a California city desiring to adopt a single-use bag ordinance would need to prepare.⁴¹³ However, based on the whole of the *Manhattan Beach* decision, as well as guidance offered by other CEQA decisions, cities may be able to proceed under categorical exemptions, or under Negative Declarations if they feel the need to be more conservative.⁴¹⁴ California cities should strive to make their ordinances as effective as possible by adopting state-of-the-art ordinances, including using a second-generation ordinance structure, as discussed above. Cities can also improve the likelihood of success of their ordinances by conducting rigorous business outreach and public education.

Jurisdictions outside of California should not limit themselves to the ordinance structures used in California. California's local plastic bag bans are the product of state-level statutory constraints resulting from CEQA, A.B. 2449 and Proposition 26, which make second generation plastic bag bans a legislative necessity in California.⁴¹⁵ Many jurisdictions outside of California are following California cities' lead and adopting plastic bag bans—and by doing so are unwittingly accepting the constraints imposed by California's plastics industry lobbyists. Jurisdictions outside of California should embrace the full palette of policy options available, including an across the board charge that applies to all single-use bags and generates funding for programs focusing on environmental education and clean-up, like the Washington D.C. model.⁴¹⁶

⁴¹² FREINKEL, *supra* note 4, at 157.

⁴¹³ See *Save the Plastic Bag Coal. v. City of Manhattan Beach*, 254 P.3d 1005 (Cal. 2011).

⁴¹⁴ See *supra* Part V.B.

⁴¹⁵ See *supra* Part III.A.ii.b.2.

⁴¹⁶ Wash., D.C., Ordinance §§ 4(B)(i), 6 (2001 & Supp. 2009), available at plasticbaglaws.org/wordpress/wp-content/uploads/2010/02/leg_Washington-DC.pdf.