





August 5, 2014

Chair Felicia Marcus and Board Members  
c/o Jeanine Townsend, Clerk to the Board  
State Water Resources Control Board  
1001 I Street, 24<sup>th</sup> Floor  
Sacramento, CA 95814

Sent via electronic mail to: [commentletters@waterboards.ca.gov](mailto:commentletters@waterboards.ca.gov)

**RE: Comment Letter – Trash Amendments**

Dear Chair Marcus and Board Members:

On behalf of California Coastkeeper Alliance, Heal the Bay, 7th Generation Advisors, Clean Water Action, Algalita, Natural Resources Defense Council, The Surfrider Foundation, Sierra Club California, Team Marine, Turtle Island Restoration Network, Environment California, WeTap, Planning and Conservation League, Endangered Habitats League, Coastal Environmental Rights Foundation, Azul, California Sportfishing Protection Alliance, The Lake Merritt Institute, The Center for Oceanic Awareness, Research, and Education, WILDCOAST, Friends of Harbors, Beaches and Parks, Klamath-Siskiyou Wildlife Center, Russian River Watershed Protection Committee, Plastic Pollution Coalition, Earth Law Center, CLEAN South Bay, Coast Action Group, Californians Against Waste, Center for Biological Diversity, 5 Gyres, Coast Action Group, and Golden Gate Audubon Society, we appreciate the opportunity to provide comments on the State Water Resources Control Board’s (“State Board”) June 2014 draft Trash Amendments (“Amendments”). Generally, we support the Amendments and commend the State Water Board for its leadership on the issue.

In 1972, Congress enacted the federal Clean Water Act (CWA) with the goal to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”<sup>1</sup> The CWA directs states, with oversight by the U.S. Environmental Protection Agency (U.S. EPA), to adopt water quality standards to protect the public health and welfare, enhance the quality of water, and serve the purposes of the CWA. Ultimately, states must provide comprehensive protection of their waters through the application of water quality standards.<sup>2</sup>

We commend the State Board for addressing the growing threat trash pollution poses to the chemical, physical, and biological integrity of our waters. Trash impairs the health of both humans and aquatic life. Trash transports other pollutants (bacteria, toxins, invasive species) and can become sources of disease (including mosquito borne diseases).<sup>3</sup> Scientific research demonstrates that trash in the oceans is increasing at an alarming rate: plastic debris in an area north of Hawaii known as the Northwest Pacific

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<sup>1</sup> 33 US Code§ 1251(a).

<sup>2</sup> State Water Resources Control Board, Substitute Environmental Document: Draft Amendments to Statewide Water Quality Control Plans to Control Trash 3 (June 2014).

<sup>3</sup> See, e.g., California Coastal Commission and Algalita Marine Research Foundation, “Plastic Debris, Rivers to Sea: A Bibliography of Research Related to Debris and Trash in Urban Runoff” (2006) (“BMP Manual”) <http://www.plasticdebris.org/bibliography.html>. See also Moore, S. L. et al., “Composition and Distribution of Beach Debris in Orange County, California,” *Marine Pollution Bulletin*, Vol. 42, No. 3, pp. 241-45 (2001); Moore, Charles, “Synthetic Polymers in the Marine Environment: A Rapidly-Increasing, Long-Term Threat” *Environmental Research*, Vol. 108, pp. 131-139 (2008).

Gyre has increased 5-fold in the last 10 years.<sup>4</sup> Researchers estimate that 80 percent of marine debris comes from land-based sources, particularly trash and plastic litter in urban runoff, and the generation of trash and waste is increasing.<sup>5</sup> According to California's 2008-2010 Section 303(d) list of impaired waters, there are 73 listings due to trash in California waters. California must act decisively and swiftly to reduce the amount of trash that is discharged into our waterways. The public agrees and has shown remarkable concern about trash pollution by submitting more than **1,541 letters** in support of a strong trash policy (*see* Attachment 1). Specifically, these letters express strong support for the Trash Amendments and request the State Board hold each municipality equally responsible for trash reductions.

The undersigned groups submit the following comments on behalf of all our hundreds of thousands of public members. The State Board's efforts to reduce trash impairments are laudable, but substantial changes need to be made to the Amendments in order to attain true trash reductions. As described in detail below, we ask the State Board to make the following revisions to the Amendments and the Substitute Environmental Document (SED):

- Include more information on the impacts of trash;
- Revise the Water Quality Objective to be clear and enforceable;
- Provide clear monitoring guidance for Track 2 Permittees;
- Require Track 2 Permittees to install full-capture devices to the maximum extent feasible;
- Be explicit that the discharge of pre-production plastics are prohibited;
- Hold municipalities responsible for identifying trash hot spots and requiring a minimum number of non-point source discharges to be addressed;
- Ensure priority land use areas are defined precisely, free from loopholes, and include schools;
- Limit the scope of the Los Angeles Region trash TMDLs re-opener;
- Mandate interim milestones of at least 10 percent annually;
- Require permittees to begin implementing the Amendments within 18 months of adoption;
- Retain source control incentives;
- Address microplastics in the Storm Water Strategy Initiative.

#### **A. THE TRASH AMENDMENTS ARE A STRONG STEP FORWARD TOWARDS REDUCING TRASH POLLUTION IN CALIFORNIA'S WATERS.**

##### *1. Trash is Prevalent in All Waters of the State.*

The majority of trash in our waterways comes from land—and is plastic. The U.S. Department of Commerce estimates that 80 percent of marine debris comes from land-based sources.<sup>6,7</sup> Sixty to Eighty percent of all marine debris is plastic.<sup>8</sup> Single-serving goods and packaging are the largest percentage of land-based marine debris by product type.<sup>9</sup> Plastic can take hundreds of years or more to break down, and some types never truly biodegrade.<sup>10</sup> In the environment, plastic eventually breaks down into smaller and smaller particles that attract toxic chemicals.<sup>11</sup>

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<sup>4</sup> California Ocean Protection Council, "Resolution on Reducing and Preventing Marine Debris," Adopted February 8, 2007 available at <http://www.opc.ca.gov/2007/02/resolution-of-the-california-ocean-protection-council-on-reducing-and-preventing-marine-debris/>; *See also* California Ocean Protection Council, "An Implementation Strategy for the California Ocean Protection Council Resolution to Reduce and Prevent Ocean Litter," Adopted November 20, 2008.

<sup>5</sup> Ocean Protection Council, Website: Preventing Ocean Litter, available at <http://www.opc.ca.gov/2010/01/preventing-ocean-litter-2/>.

<sup>6</sup> *Supra* note 4.

<sup>7</sup> MICHELLE ALLSOPP ET AL., GREENPEACE INT'L, PLASTIC DEBRIS IN THE WORLD'S OCEANS 6 (2006), available at [http://www.unep.org/regionalseas/marinelitter/publications/docs/plastic\\_ocean\\_report.pdf](http://www.unep.org/regionalseas/marinelitter/publications/docs/plastic_ocean_report.pdf).

<sup>8</sup> *Id.* at 9.

<sup>9</sup> Marine Debris Action Coordination Team, West Coast Governor's Agreement on Ocean Health, "Work Plan" (May 2010), pp. 11-12, available at [http://westcoastoseas.gov/Docs/Marine\\_Debris\\_Final\\_Work\\_Plan.pdf](http://westcoastoseas.gov/Docs/Marine_Debris_Final_Work_Plan.pdf).

<sup>10</sup> MIRIAM GORDON, CAL. COASTAL COMM'N, ELIMINATING LAND BASED DISCHARGES OF MARINE DEBRIS IN CALIFORNIA: A PLAN OF ACTION FROM THE PLASTIC DEBRIS PROJECT 18 (2006) at 2.

<sup>11</sup> *See* Matthew Cole et al., Microplastics as Contaminants in the Marine Environment: A Review, 62 MARINE POLLUTION BULL. 2588, 2589 (2011) at 2589, 2595; Richard C. Thompson et al., Lost at Sea: Where Is All the Plastic?, 304 SCIENCE 838,

Foam plastics are particularly prevalent in the marine environment. In an average 72 hour period, 2.3 billion plastic fragments and 30 metric tons of plastic debris are found to flow through the Los Angeles and San Gabriel Rivers. Of this trash, researchers found that 71 percent of the quantity of plastic debris was foam.<sup>12</sup>

## 2. *Trash is Environmentally Harmful.*

Plastic particles are ingested by wildlife on land and in the ocean—contaminating our food chain.<sup>13</sup> Plastic lasts hundreds of years in the environment without biodegrading.<sup>14</sup> Plastics can contain potentially harmful constituents such as phthalates, bisphenol A, styrene, vinyl chloride and flame retardants.<sup>15</sup> Research is being conducted to determine whether these constituents leach out of plastic products, presenting a threat to the health of humans and wildlife.<sup>16</sup> Trash has reportedly harmed over 663 marine species through ingestion and entanglement, some of which are threatened or endangered species under California or federal law.<sup>17 18</sup>

Light and aerodynamic, plastic bags can become airborne even when properly disposed of; bags photodegrade and disintegrate into particles, littering the urban landscape and posing a serious threat to the riparian and marine environments and wildlife. Even when no longer obvious to the naked eye, plastic degrades into tiny particles that adsorb toxins and contaminate our food chain as well as water and soil.<sup>19</sup> Plastic bags especially hurt sea turtles because bags floating in water look like jellyfish, a primary food for turtles, and researchers have commonly found plastic bags in the digestive tracts of dead turtles.<sup>20</sup>

Expanded polystyrene foam (EPS), (commonly known as Styrofoam®) is pervasive in the marine environment.<sup>21</sup> When littered, wind blows it from streets to storm drains leading to the inland and ocean waters. Foam easily breaks into small pieces that are mistaken by marine wildlife for food.<sup>22</sup>

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838 (2004) at 838.

<sup>12</sup> C.J. Moore et al., Quantity and type of plastic debris flowing from two urban rivers to coastal waters and beaches of Southern California, *JOURNAL OF INTEGRATED COASTAL ZONE MANAGEMENT* 11(1):65-73 (2011)

<sup>13</sup> EPA-909-R-11-006, Marine Debris in the North Pacific: A Summary of Existing Information and Identification of Data Gaps, EPA 8 (Nov. 2011), available at <http://www.epa.gov/region9/marine-debris/pdf/MarineDebris-NPacFinalAprvd.pdf>; see also Yukie Mato et al., Plastic Resin Pellets as a Transport Medium for Toxic Chemicals in the Marine Environment, 35 *ENVTL. SCI. & TECH.* 318, 318 (2001); Lorena M. Rios et al., Quantification of Persistent Organic Pollutants Adsorbed on Plastic Debris from the Northern Pacific Gyre's "Eastern Garbage Patch," 12 *J. ENVTL. MONITORING* 2226, 2232-33 (2010); Emma L. Teuten et al., Potential for Plastics to Transport Hydrophobic Contaminants, 41 *ENVTL. SCI. & TECH.* 7759, 7762-63 (2007); Emma L. Teuten et al., Transport and Release of Chemicals from Plastics to the Environment and to Wildlife, 364 *PHIL. TRANSACTIONS ROYAL SOC'Y B.* 2027, 2040 42 (2009); Charlotte Stevenson, Plastic Debris in the California Marine Ecosystem: A Summary of Current Research, Solution Efforts and Data Gaps, UNIV. S. CAL. SEA GRANT 22-24 (Sept. 2011), available at <http://www.usc.edu/org/seagrant/research/PlasticReport/PlasticReport.pdf>.

<sup>14</sup> *Supra* note 4.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> CBD Technical Series No. 67, Impacts of Marine Debris on Biodiversity: Current Status and Potential Solutions, SECRETARIAT OF THE CONVENTION ON BIOLOGICAL DIVERSITY 9 (2012), available at <http://www.cbd.int/doc/publications/cbd-ts-67-en.pdf>.

<sup>18</sup> *Supra* note 4.

<sup>19</sup> See Matthew Cole et al., Microplastics as Contaminants in the Marine Environment: A Review, 62 *MARINE POLLUTION BULL.* 2588, 2589 (2011); Richard C. Thompson et al., Lost at Sea: Where Is All the Plastic?, 304 *SCIENCE* 838, 838 (2004).

<sup>20</sup> See N. Mrosovsky et al., Leatherback Turtles: The Menace of Plastic, 58 *MARINE POLLUTION BULL.* 287, 287-88 (2009) (noting that 37.2 percent of Leatherback turtle necropsies from 1968 to 2009 showed plastic in their stomachs, and plastic bags were the most commonly found item).

<sup>21</sup> MIRIAM GORDON, CAL. COASTAL COMM'N, ELIMINATING LAND BASED DISCHARGES OF MARINE DEBRIS IN CALIFORNIA: A PLAN OF ACTION FROM THE PLASTIC DEBRIS PROJECT 18 (2006) at 2 and 15, available at [www.plasticdebris.org](http://www.plasticdebris.org).

<sup>22</sup> J.G.B. Derraik, "The pollution of the marine environment by plastic debris: a review" *Marine Pollution Bulletin* 44 (2002): 843; Gregory, M.R., Ryan, P.G. "Pelagic plastics and other seaborn persistent synthetic debris: a review of Southern Hemisphere perspectives" in Coe, J.M. Rogers, D.B. (Eds.), *MarineDebris—Sources, Impacts and Solutions*, (1997) Springer-Verlag, New York, pp. 4 9-66.

It is particularly important to eliminate foam trash at the source because typical trash capture and collection methods are incapable of providing an adequate solution for foam litter. As an example, street sweepers do not often collect foam from streets before wind carries it into the local storm drain or away from the street. Additionally, full capture devices are designed to capture trash that is greater than 5mm in size and are not useful control measures for foam pieces that break into micro-plastic pollution less than 5mm in size.

3. *Plastic Bags, Foam Containers, Take-out Food and Beverage Packaging, and Cigarette Filters are Significant Products Found in Storm Drain Trash.*

Plastic bags and foam are both prevalent types of plastic pollution. According to the Ocean Conservancy's 2013 International Coastal Cleanup Day data, the fourth most abundant item found was plastic bags.<sup>23</sup> The California Integrated Waste Management Board estimates that plastic bags comprise 0.4 percent of California's total waste stream by weight,<sup>24</sup> but contribute significantly to litter, especially within catch basins (openings in street curbs into which stormwater flows).<sup>25</sup> As another example, Los Angeles County found that plastic bags constituted 25 percent of the weight and 19 percent of the volume of trash collected during the June 10, 2004, "City of Los Angeles Catch Basin Cleaning."<sup>26</sup> In addition, single-use plastic grocery bags comprised 8 percent of storm drain trash collected by the Santa Clara Valley Urban Runoff Pollution Prevention Program in its 2009-2012 regional trash study.<sup>27</sup>

Recent studies have found that take-out food and beverage packaging are significant components of litter that flows into storm drains. For example, Clean Water Fund and five municipalities studied trash on streets in the San Francisco Bay Area and found that 67 percent was comprised of take-out food packaging, 81 percent of the trash originated with businesses that serve take-out food and beverages.<sup>28</sup> Storm drain sampling provides similar results; roughly 60 to 70 percent of the trash (by volume) identified in recent storm drain sampling was comprised of plastic bags and polystyrene foam foodware.<sup>29</sup>

Cigarette litter is prevalent worldwide. For decades, International Coastal Cleanup Day results consistently rank cigarette litter as the most prevalent form of beach litter worldwide, based on volunteer data collection. A more comprehensive and scientifically conducted assessment of beach litter conducted by the Southern California Coastal Water Research Project found 20 times more cigarettes than the Coastal Cleanup Day data for the same year (2007).<sup>30</sup>

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<sup>23</sup> INT'L COASTAL CLEANUP, OCEAN CONSERVANCY, WORKING FOR CLEAN BEACHES AND CLEAN WATER: 2013 REPORT, at 14 (2013), available at <http://www.oceanconservancy.org/ourwork/international-coastal-cleanup/2013-trash-free-seas-report.pdf>; See also INT'L COASTAL CLEANUP, OCEAN CONSERVANCY, TRACKING TRASH 25 YEARS OF ACTION FOR THE OCEAN: 2011 REPORT, at 5 (2011), available at [http://act.oceanconservancy.org/pdf/Marine\\_Debris\\_2011\\_Report\\_OC.pdf](http://act.oceanconservancy.org/pdf/Marine_Debris_2011_Report_OC.pdf) (indicating that nearly eight million bags were collected during Coastal Cleanup Days from 1986 to 2011).

<sup>24</sup> Cascadia Consulting Grp., Inc., Statewide Waste Characterization Study, CAL. RECYCLE 6 tbl.ES-3 (Dec. 2004), available at <http://www.calrecycle.ca.gov/Publications/Documents/LocalAsst/34004005.pdf>.

<sup>25</sup> MIRIAM GORDON, CAL. COASTAL COMM'N, ELIMINATING LAND BASED DISCHARGES OF MARINE DEBRIS IN CALIFORNIA: A PLAN OF ACTION FROM THE PLASTIC DEBRIS PROJECT 18 (2006) (finding plastic film and bags constitute 43 percent of trash found in catch basins).

<sup>26</sup> L.A. Cnty. Bd. of Supervisors, An Overview of Carryout Bags in Los Angeles County, L.A. DEP'T OF PUB. WORKS 24-25 (Aug. 2007), available at [http://ladpw.org/epd/pdf/PlasticBag\\_Report.pdf](http://ladpw.org/epd/pdf/PlasticBag_Report.pdf).

<sup>27</sup> Santa Clara Valley Urban Runoff Pollution Prevention Program, Fact Sheet: Reducing Impacts in Santa Clara Valley Creeks and San Francisco Bay (February 2013), available at [http://www.scvurppp-w2k.com/pdfs/1213/Trash\\_Factsheet\\_2012-Final\\_Feb.pdf](http://www.scvurppp-w2k.com/pdfs/1213/Trash_Factsheet_2012-Final_Feb.pdf).

<sup>28</sup> See Clean Water Action, Taking Out the Trash (December 2011), available at <http://www.cleanwateraction.org/files/smeyer@cleanwater.org/FINAL%20TOTT%20Report.pdf>.

<sup>29</sup> Supra note 27.

<sup>30</sup> Novatny, Thomas E., Cigarettes Butts and the Case for an Environmental Policy on Hazardous Cigarette Waste, Int J Environ Res Public Health May 2009; 6(5): 1691-1705; available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2697937/#b16-ijerph-06-01691>.

#### 4. Trash is Costly to California's Economy.

The costs associated with trash pickup from city streets and waterways are substantial; carefully designed and comprehensive Trash Amendments could help reduce these impacts. As revealed in a report produced on behalf of the Natural Resources Defense Council by Kier Associates, 95 California cities, towns, and taxpayers (communities ranging in size from just over 700 residents to over 4 million) are shouldering nearly \$500 million per year in costs to stop trash from becoming pollution.<sup>31</sup> While cities have an important role to play here, plastic producers should also be held responsible for their contribution to the plastic pollution problem.<sup>32</sup>

Plastic and other debris litter our beaches, and represents a threat to California's \$46 billion ocean-dependent, tourism-oriented economy and in certain circumstances may pose a public health threat.<sup>33</sup> Trash also negatively impacts tourism at California beaches, whose market and non-market values exceed \$5 billion annually.<sup>34</sup> Conversely, studies have correlated a drop in crime with cleanup of neighborhood trash and blight.<sup>35</sup> Trash-free communities have been shown in a number of studies to be demonstrably safer than polluted communities, reducing other costs to residents.

Thus, there can be no question that trash is an economic, public health, and environmental threat to California—a strong trash policy is desperately needed.

#### **B. THE TRASH AMENDMENTS' WATER QUALITY OBJECTIVE SHOULD BE CLEAR AND ENFORCEABLE.**

##### *1. The Most Protective Existing Standard for Trash Should Be the Starting Point for Action Statewide.*

The most stringent and common water quality objective throughout the basin plans states that waterways shall not contain trash, which should be the starting point for any statewide water quality objective. The Porter-Cologne Act defines "water quality objectives" as the allowable "limits or levels of water quality constituents or characteristics which are established for the reasonable protection of beneficial uses of water or the prevention of nuisance within a specific area."<sup>36</sup> Thus, water quality objectives are intended to protect the public health and welfare, and to maintain or enhance water quality in relation to the existing or potential beneficial uses of the water.<sup>37</sup>

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<sup>31</sup> Kier Assocs., *Waste in Our Water: The Annual Cost to California Communities of Reducing Litter that Pollutes Our Waterways*, NATURAL RES. DEF. COUNCIL 1-2, app. B tbl.14 (Aug. 2013), available at [http://docs.nrdc.org/oceans/files/occe\\_13082701a.pdf](http://docs.nrdc.org/oceans/files/occe_13082701a.pdf) (finding that the top communities are L.A. at \$36.4 million, San Diego at \$14.1 million, Long Beach at \$13.0 million, San Jose at \$8.9 million, Oakland at \$8.4 million, and Sacramento at \$2.9 million). For this study, information about litter capable of becoming aquatic debris "was solicited from 221 communities randomly selected from a list of all California communities. . . . Cost data came from a variety of sources including MS4 [Municipal Separate Storm Sewer] permits; annual budgets and reports; and phone interviews and e-mail correspondence with city hall staff, public works field managers, and knowledgeable nongovernmental organizations." *Id.* Of the 250-plus cities, towns, and municipal agencies contacted, "95 (representing about 20 percent of all California communities and one-third of the state's total population) responded with data relating to some, if not all, of the six cost categories." *Id.*

<sup>32</sup> For example, the total maximum daily load (TMDL) for trash in the Los Angeles River and Ballona Creek—both of which discharge untreated stormwater directly onto local beaches and into the Pacific Ocean—requires a 10% annual reduction in trash entering the waterways, down to a target of zero trash by 2014. Cal. Reg'l Water Quality Control Bd., L.A. Region, *Trash Total Maximum Daily Loads for the Los Angeles River Watershed*, EPA 27-29 (July 27, 2007), available at <http://www.epa.gov/waters/tmdl/docs/34863-RevisedStaffReport2v2.pdf>. Significant federal penalties could accrue for noncompliance.

<sup>33</sup> *Supra* note 4.

<sup>34</sup> Kildow, J. and Colgan, C.S., National Ocean Economics Program, "California's Ocean Economy. A Report to the Resources Agency, State of California" (2005).

<sup>35</sup> *See, e.g.*, Suffolk University, "Research Boosts Broken Windows Theory" (Jan. 13, 2009), available at <http://www.suffolk.edu/34417.html> (documenting a 20% drop in calls to police in formerly trash-strewn area as compared with control); full study found at: Braga, Anthony A. and Brenda J. Bond, "Policing Crime and Disorder Hot Spots: A Randomized Controlled Trial," *Criminology*. Vol. 46, No. 3 (August 2008).

<sup>36</sup> California Water Code § 13050(h).

<sup>37</sup> [http://www.waterboards.ca.gov/lahontan/water\\_issues/programs/basin\\_plan/docs/ch3\\_wqobjectives.pdf](http://www.waterboards.ca.gov/lahontan/water_issues/programs/basin_plan/docs/ch3_wqobjectives.pdf)

Water quality objectives must be set at a level that is technically and scientifically sufficient to protect beneficial uses.<sup>38</sup> There is no acceptable level of trash that may be present in our state's waters without impairing a number of beneficial uses, including recreation, habitat, and municipal and domestic water supply uses. Current efforts in the state to address trash in our waterways support this conclusion.

It is instructive that the analysis surrounding the Los Angeles River Watershed TMDL found that beneficial uses would not be supported in the presence of any amount of trash. As was found by the Los Angeles Regional Water Board, "since littering is unlawful, a target of zero trash" is the "only defensible position."<sup>39</sup> Regional Water Board staff "found no study to document that there is an acceptable level of trash that will cause no harm to aquatic life."<sup>40</sup> The Los Angeles Regional Water Board's rationale that "even a single piece of trash can be detrimental, and no level of trash is acceptable"<sup>41</sup> can and should be applied to waters across the state.

The Trash Amendments' SED acknowledges that a "numeric objective of 'zero trash' could be an efficient regulatory tool because the measurement of compliance is clearly defined."<sup>42</sup> However, the State Board goes on to claim that on "a feasible level, a single piece of trash found in a water body may or may not constitute impairment, and it may or may not be aesthetically unpleasing."<sup>43</sup> We disagree with the State Board's conclusion, and recommend a zero water quality objective be re-evaluated.

2. *The Trash Amendments' Water Quality Objective Should Be Consistent with Existing Basin Plans' Water Quality Objectives.*

The draft Amendments propose the following narrative water quality objective: "no trash shall accumulate in state waters (or in areas adjacent to state waters) in amounts that would either adversely affect beneficial uses, or cause nuisance." The State Board contends it derived this water quality objective "[t]o provide consistency statewide" with existing water quality objectives. As the SED explains, each regional water board has adopted narrative objective(s) for pollutants in its basin plan. These narrative objectives refer to trash-related pollutants and prohibit the presence of floatable, solid, suspended, and settleable materials in amounts that adversely affect beneficial uses.<sup>44</sup> According to the SED, there are "currently 33 existing narrative objectives in the eleven different water quality control plans that apply to the discharge of trash to state waters."<sup>45</sup>

We agree with the State Board that the Amendments' water quality objectives should be consistent with existing basin plans' water quality objectives. But as drafted, the Amendments' water quality objective is not consistent with existing basin plans. According to the State Board's SED, Table 15, there is not one water quality objective in California using the terms "shall accumulate". Instead, almost every existing water quality objective uses the terms "shall not contain."

For purposes of consistency, we recommend the State Board revise the Amendments' water quality objective to state that "waterways shall not contain trash..." Or, if the Board wishes to keep the existing sentence structure, we recommend: "no trash shall be present..."

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<sup>38</sup> *Mississippi Comm'n on Natural Resources v. Costle*, 625 F.2d 1269, 1277 (5th Cir. 1980); *see also* 65 Fed. Reg. 31682, 31708 (May 18, 2000).

<sup>39</sup> *City of Arcadia et al. v. Los Angeles RWQCB et al.*, 135 Cal.App.4th 1392, 1410 (Jan. 26, 2006).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 1406.

<sup>42</sup> *Supra* note 2, at 67.

<sup>43</sup> *Id.*

<sup>44</sup> *Supra* note 2, at 7.

<sup>45</sup> *Supra* note 2, at 65.

### 3. *The Water Quality Objective Should Be Clear and Easily Enforceable.*

We note that, *at a minimum*, the most stringent existing narrative standard for trash should be the starting point for action statewide, and no action should be taken that could detract from efforts already in effect under narrative criteria in this state to reduce trash (such as the Los Angeles River Watershed Trash TMDL).

The term “accumulate” is vague, and a vague water quality objective is difficult to enforce. The dictionary defines “accumulate” as: “to increase gradually as time passes.”<sup>46</sup> Given the temporal component of the definition, the definition leaves more questions than answers. How much increase in trash needs to occur before it is considered a violation of the water quality objective? How much time needs to pass before a violation occurs? Or more importantly, how does trash accumulate in the receiving water itself?

In contrast to the term “accumulate,” the terms “contain” or “present” are clear and precise. The dictionary defines “present” as: “to exist now”<sup>47</sup>, and “contain” as: “to have”.<sup>48</sup> These are clear and easily enforceable terms. Additionally, the SED does not find that the accumulation of trash adversely affects beneficial uses, but rather the “*presence* of trash in waterways adversely affects beneficial uses, including but not limited to threats to aquatic life, wildlife, and public health.”<sup>49</sup>

In order for the Amendments’ water quality objective to be clear and enforceable, we request the following revision to Chapter II.C.5.:

*Trash\* shall not ~~accumulate~~ be present in ocean waters, along shorelines or adjacent areas in amounts that adversely affect beneficial uses or cause nuisance.*

### **C. THE STATE WATER BOARD SHOULD PROVIDE CLEAR MONITORING CRITERIA FOR TRACK 2 PERMITTEES TO ENSURE COMPLIANCE.**

The State Water Board needs to provide a performance standard for Track 2 Permittees to achieve, explicit language in the Amendments requiring monitoring to be conducted for Track 2, and minimum monitoring criteria for Track 2 Permittees to follow.

The Amendments require Track 2 Permittees to achieve “the same performance results as compliance under Track 1 would achieve...” To prove they are achieving the same performance results, Track 2 Permittees will be required to conduct monitoring to demonstrate they are reducing trash equivalent to that of Track 1 Permittees, but the Amendments lack specificity as to what shall be required for receiving water monitoring for Track 2. Instead, the Amendments only provide minimum monitoring and reporting requirements.

#### *1. Provide a Track 1 Performance Standard for Track 2 Permittees to Achieve.*

The CWA requires all NPDES permits to contain monitoring provisions that allow for a determination of whether a discharger is in compliance with its permit.<sup>50</sup> The Amendments require Track 2 Permittees to demonstrate equivalent trash reductions as Track 1. Chapter III.L.6. states that “Track 2 Permittees shall develop and implement monitoring plans that demonstrate the mandated performance results...and compliance with the performance standard.” Yet, neither the Amendments nor the SED provide a performance standard for Track 2 Permittees to achieve. How are Track 2 Permittees expected to

<sup>46</sup> See Merriam-Webster’s Dictionary, available at <http://www.merriam-webster.com/dictionary/accumulate>.

<sup>47</sup> See Oxford Dictionary, available at [http://www.oxforddictionaries.com/us/definition/american\\_english/present](http://www.oxforddictionaries.com/us/definition/american_english/present)

<sup>48</sup> See Oxford Dictionary, available at [http://www.oxforddictionaries.com/us/definition/american\\_english/contain](http://www.oxforddictionaries.com/us/definition/american_english/contain).

<sup>49</sup> Supra note 2, at 1.

<sup>50</sup> See 33 U.S.C. §§ 1318(a)(A), 1342(a)(2), and 1342(b)(1); 40 C.F.R. §§ 122.44(i)(1), 122.41(j)(1), and 122.48(b); see also Cal. Water Code § 13383.5).

demonstrate compliance with an unknown performance standard? Since there is much less certainty in trash reduction volumes with implementation actions other than full capture devices, an established performance standard is critical.

We request the State Board provide an explicit performance standard in both the Amendments and the SED to help Track 2 Permittees demonstrate compliance.

Alternatively, the State Board may consider requiring Track 2 Permittees to conduct a baseline analysis of all trash discharged within priority use areas, and then demonstrate a 100 percent reduction of that baseline assessment. If this is the State Board's intent, we strongly encourage the Board to provide sufficient monitoring guidance to ensure the baseline study and the annual monitoring is conducted appropriately.

2. *Explicitly State that Receiving Water Monitoring and Trash Baseline Monitoring are required for Track 2 Permittees.*

The Trash Amendments must provide certainty that Track 2 BMPs are achieving the desired performance. As currently drafted, the Amendments do not specifically state that receiving water monitoring is required for Permittees electing Track 2. Instead, the Amendments require Track 2 Permittees to assess their compliance through "monitoring reports," which may or may not include actual receiving water monitoring. The Amendments state that the monitoring reports shall address and answer the following questions:

- (1) What type of and how many treatment controls\*, institutional controls\*, and/or multi-benefit projects\* have been used, and in what locations?
- (2) How many full capture systems\* have been installed (if any), and in what locations have they been installed, and what is the individual and cumulative area served by them?
- (3) What is the effectiveness of the total combination of treatment controls\*, institutional controls\*, and multi-benefit projects\* employed by the MS4\* permittee?
- (4) Has the amount of Trash\* discharged from the MS4\* decreased from the previous year? If so, by how much? If not, explain why.
- (5) Has the amount of Trash\* in the MS4's\* receiving water(s) decreased from the previous year? If so, by how much? If not, explain why.

We agree these questions are appropriate to determine compliance, but it must be clear that these questions need to be answered specifically with receiving water monitoring.

Unlike the Amendments, the Staff Report is clearer that monitoring is required to answer the Amendments' reporting questions. The SED states definitively that Track 2 Permittees "would develop and implement annual monitoring that demonstrate the mandated performance results, effectiveness of the selected combination of treatment and institutional controls, and compliance with the equivalency to Track 1."<sup>51</sup> This is the type of explicit language that should be in the Amendments themselves.

As recently explained by the 9th Circuit Court of Appeals:

[T]he Clean Water Act requires every NPDES permittee to monitor its discharges into the navigable waters of the United States in a manner sufficient to determine whether it is in compliance with the relevant NPDES permit. 33 U.S.C. § 1342(a)(2); 40 C.F.R. § 122.44(i)(1) ("[E]ach NPDES permit shall include conditions meeting the following . . . monitoring requirements . . . to assure compliance with permit limitations."). That is, an NPDES permit is unlawful if a permittee is not required to effectively monitor its permit

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<sup>51</sup> Supra note 2, at 16.

compliance.<sup>52</sup>

The monitoring component of Track 2 is a critical piece to ensure that the Trash Amendments meet the goal of no trash present in our waterways. Without an explicit requirement for receiving water monitoring, the State Board is providing a compliance path that is not easily enforced. Moreover, it is important that all permittees understand their options under the Amendments. If the Amendments are not clear that Track 2 Permittees must perform receiving water monitoring, then it will lead to poor implementation.

The Trash Amendments do not specifically require baseline monitoring. The SED clearly states that Track 2 Permittees are required to develop a baseline analysis of existing trash levels:

“MS4 permittees complying under Track 2 would develop and implement annual monitoring plans to demonstrate implementation, performance results, and effectiveness of the institutional controls. This requires that permittees collect monitoring data about existing trash levels prior to implementation of institutional controls to *set a baseline* for comparison to trash levels after implementation of controls.”<sup>53</sup>

However, the Amendments – which outline the minimum monitoring requirements – do not mention the requirement for Track 2 Permittees to develop a baseline analysis of existing trash levels. A baseline analysis is an indispensable element of any monitoring plan intended to demonstrate a percent reduction in trash; and therefore, should be an explicit minimum monitoring requirement with in the Amendments.

We recommend the State Board revise the Trash Amendments to *be explicit that Track 2 Permittees are required to conduct a baseline assessment and annual receiving water monitoring to demonstrate equivalent trash reductions as Track 1.*

### *3. Provide Minimum Baseline and Compliance Monitoring Criteria.*

The Amendments provide too much discretion to permittees to develop a monitoring methodology, which will lead to ineffective and inconsistent compliance monitoring. The SED states that the “monitoring objectives are intended to provide flexibility to the permit writers to select the most relevant monitoring techniques and expectations for their respective permits.”<sup>54</sup> While we generally agree that some flexibility is warranted given variations for permittee compliance, we do not agree that Track 2 permittees should be given full discretion with conducting baseline and annual monitoring programs.

Minimum baseline monitoring criteria is a critical first step to assure Track 2 permittees are reducing trash discharges. Without an accurate baseline, permittees will be unable to determine whether they are actually reducing trash discharges as required by the Amendments. Region 2’s MRP is a good example – and a cautionary tale – of what can happen if monitoring criteria is not provided as guidance. The lack of guidance led to a deficient baseline study by Region 2 municipalities, and the study was rejected by the Regional Board for not appropriately assessing the accurate amount of trash being discharged.

Instead, we recommend the State Board look at the monitoring being conducted in the Los Angeles region. The City of Los Angeles submitted a study entitled: “Qualification Study of Institutional Measures for Trash TMDL Compliance, 2012-2013” to the Regional Board to quantitatively assess their trash reductions. The State Board should *review and consider the Los Angeles study and the Monitoring and Reporting Program for the Ventura River Estuary Trash TMDL.*

In order to provide suitable monitoring guidance for Track 2 Permittees to demonstrate compliance, we

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<sup>52</sup> *NRDC v. County of L.A.*, 2013 U.S. App. LEXIS 16416, 36 (9th Cir. 2013).

<sup>53</sup> *Supra* note 2, at 81.

<sup>54</sup> *Supra* note 2, at 16.

offer the following revisions to Chapter III.L.6.b.:

*MS4\* permittees that elect to comply with Chapter III.J.2.b.2. (Track 2) shall develop and implement monitoring plans that demonstrate the mandated ~~performance results, effectiveness of the full capture systems\*, other treatment controls\*, institutional controls\*, and/or multi-benefit projects\*~~, and compliance with the performance standard of (xx??). Monitoring reports shall be provided to the applicable permitting authority\* on an annual basis, and shall include a baseline monitoring report, minimum receiving water monitoring criteria as set forth in the Staff Report, GIS-mapped locations and drainage area served for each of the full capture systems\*, other treatment controls\*, institutional controls\*, and/or multi-benefit projects installed or utilized by the MS4\* permittee.*

**D. THE STATE BOARD SHOULD REQUIRE TRACK 2 PERMITTEES TO INSTALL FULL-CAPTURE DEVICES TO THE MAXIMUM EXTENT FEASIBLE.<sup>55</sup>**

Implementation of trash TMDLs in Region 4 has demonstrated that full capture devices are an effective way to reduce large volumes of trash from entering a receiving water. The City of Los Angeles reported that in 2013, over one million gallons of trash were captured prior to entering the Los Angeles River. In the Ballona Creek watershed during the same year, nearly 500,000 gallons were diverted from the stormdrain system. Thus, the State Board should maintain within the Trash Amendments that full-capture devices are a “preferred alternative” for controlling trash from being discharged into California’s waterways and require this preferred alternative be implemented to the maximum extent feasible. Full capture devices have proven feasible in many locations once thought challenging and we believe full-capture devices should be prioritized under Track 2’s trash reduction program.

Track 2 is less enforceable compared to Track 1. In an increasing number of areas, trash pollution has accumulated in waters to the point that 303(d) listings are required. If the State Board insists on a Track 2 approach to achieve a narrative water quality objective, then it is even more important that the implementing provisions are clear and unambiguous. The Cal EPA Enforcement Initiative succinctly found that:

“Currently, one of the greatest difficulties faced by enforcement staff is complicated, ambiguous and/or poorly written permits or multiple, conflicting and confusing regulatory requirements that are unenforceable. Permit requirements must be unambiguous. They should be written in such a way that they are clear, easy to understand, and determining compliance is simple. Similarly, the enforcement consequences for violation should be clear.”<sup>56</sup>

A lack of clarity and objectivity in stormwater permits impacts enforcement, which necessarily becomes extremely staff-intensive. Prioritizing full-capture devices in Track 2 will provide permittees a straightforward and clear path to compliance—leading to greater trash reductions.

In order to require Track 2 Permittees to install full-capture devices to the maximum extent feasible, we offer the following revisions to Chapter III.L.2.a.2:

*Track 2: Install, operate, and maintain ~~any combination of~~ full capture systems\* to the maximum extent feasible. For storm drains demonstrated to be infeasible for full capture*

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<sup>55</sup> Note: if the State Board creates a sufficient performance standard for Track 2 and a sufficient receiving water monitoring requirement to demonstrate compliance with this performance standard, we remove our request for installing full capture to the maximum extent feasible.

<sup>56</sup> Memorandum from Terry Tamminen, Secretary, Cal/EPA to BDOs, p. 8 (November 30, 2004) (“CalEPA Enforcement Initiative”).

*system installation, include any combination of other treatment controls\*, institutional controls\*, and/or multi-benefit projects\* within either the jurisdiction of the MS4\* permittee or within the jurisdiction of the MS4\* permittee and contiguous MS4s\* permittees, so long as such combination achieves the same performance results as compliance under Track 1 would achieve for all storm drains that captures runoff from one or more of the priority land uses\* within such jurisdiction(s).*

**E. BE EXPLICIT THAT PRE-PRODUCTION PLASTIC DISCHARGES ARE OUTRIGHT PROHIBITED.**

It is critical that the prohibition of discharge of preproduction plastics remain absolute and unwavering in order to address the problem of preproduction plastics in receiving waters, and in order to comply with existing state law. In Chapter III.I.6.d, the Amendments contain a prohibition of discharge for preproduction plastics, but this prohibition conflicts with Chapter III.L.2.c. These two sections must be reconciled and it must be clarified that the prohibition of pre-production plastic discharges is absolute, and cannot be undermined by any other section of the Amendments.

Sixty to 80 percent of all marine debris and 90 percent of floating debris is plastic.<sup>57</sup> The problem of plastic marine debris is increasing in California and the North Pacific Gyre, where densities of micro-plastics have tripled during the last decade.<sup>58</sup> Thermoplastic resin pellets (commonly called “nurdles”), plastic powders, and production scrap, all of which are mistaken as food by marine life, are a significant source of beach pollution. One survey conducted in the summer of 1998 estimated that over 100 million nurdles were polluting Orange County beaches alone – this represented over 98 percent of all of the pollution collected in terms of abundance and 17 percent in terms of weight.<sup>59</sup>

Assembly Bill 258 (Krekorian) was signed into law in 2007 to address California’s growing problem with preproduction plastics. AB 258 requires the State and Regional Water Boards to implement a program for the prevention of preproduction plastics discharges from point and nonpoint sources. The law includes waste discharge, monitoring, and reporting requirements that, at a minimum, target plastic manufacturing, handling, and transportation facilities, and the implementation of specified minimum best management practices for the control of discharges of preproduction plastic.

The Amendments’ prohibition of discharge, Chapter III.I.6., states that the “discharge of trash to surface waters of the State, or the deposition of Trash where it may be discharged into surface waters of the State is prohibited. The prohibition, sub-section d, goes on to state:

“This prohibition of discharge applies to the discharge of preproduction plastic\* by manufacturers of preproduction plastics\*, transporters of preproduction plastics\*, and manufacturers that use preproduction plastics\* in the manufacture of other products to surface waters of the State, or the deposition of preproduction plastic\* where it may be discharged into surface waters of the State.”

We applaud the State Board for Chapter III.I.6.d., but we are concerned that the Amendments may nonetheless provide a loophole for industrial permittees to escape the outright prohibition of preproduction plastics. Chapter III.I.6.d is in conflict with Chapter III.L.2.c of the Amendments. Chapter III.L.2.c of the Amendments’ state that “[i]f the discharger can satisfactorily demonstrate to the permitting authority its inability to comply with the outright prohibition of the discharge of Trash” then an Executive Officer can exempt the permittee from the prohibition and require Track 1 or Track 2.

As the SED outlines, preproduction plastics often fall well below the existing 5mm screening requirement

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<sup>57</sup> Supra note 4; See also California Ocean Protection Council, “An Implementation Strategy for the California Ocean Protection Council Resolution to Reduce and Prevent Ocean Litter,” Adopted November 20, 2008.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

of full capture devices. Allowing a permittee to be exempt from the outright prohibition of preproduction plastics and instead be required to install full-capture devices would do nothing to stop preproduction plastics from being discharged into waters of the state. Likewise, a Track 2 approach would have limited success at stopping any significant portion of preproduction plastic discharges. Thus, the State Board should *be explicit that Chapter III.L.2.c. does not apply to the prohibition of preproduction plastics.*

In order to clearly state that Executive Officers do not have the discretion to terminate the prohibition on pre-production plastic discharges, we offer the following revisions to Chapter III.L.2.c.:

*...Termination of permit coverage the outright prohibition under Chapter III.1.6.a. for industrial and construction storm water\* dischargers shall be conditioned upon the proper operation and maintenance of all controls (e.g., full capture systems\*, other treatment controls\*, institutional controls\*, and/or multi-benefit projects\*) used at their facility(ies). Regardless of termination under Chapter III.1.6.a., all industrial storm water dischargers shall meet the outright prohibition for pre-production plastics under Chapter III.1.6.d.*

**F. MUNICIPALITIES SHOULD BE HELD RESPONSIBLE FOR IDENTIFYING TRASH HOT SPOTS AND BE REQUIRED TO ADDRESS A MINIMUM NUMBER OF UN-PERMITTED NON-POINT SOURCES AND CERTAIN CATEGORIES OF NON-POINT SOURCES.**

Permittees should address a minimum number of un-permitted non-point sources. Trash generated from non-point sources has significant impact. As a result, recent trash TMDLs adopted in Region 4 and requirements in Region 2 all include load allocations for non-point sources. Thus the State Board should require Regional Boards to address a minimum number of non-point sources within its region. Instead, the Amendments give complete discretion to the permitting authority to determine specific land uses or locations that generate substantial amounts of trash.<sup>60</sup> Given limited resources, it is highly unlikely that Regional Boards will require additional measures beyond the existing Amendments' requirements.

*1. Municipalities Should Conduct a Trash "Hot Spot" Survey to Determine Significant Sources of Non-Point Sources of Trash.*

As currently drafted, a Regional Board would be responsible for determining specific locations where substantial amounts of trash are being generated. Or the Regional Board could ignore non-point sources altogether. Regional Boards do not have the resources to conduct a comprehensive determination, and if they did, those resources should be better spent on other programs—such as enforcement.

Instead of placing the burden on Regional Boards to determine non-point sources that are generating a substantial amount of trash, the State Board should *require municipalities to conduct a hot spot survey every permit term to identify non-point sources of trash that contribute significant volumes of trash. Each survey should rank its non-point sources from the most egregious location to the lowest.*

This type of hot spot survey is required in the Region 2 MRP where permittees are required to identify hot spots that discharge a substantial amount of trash. The MRP states that "Trash Hot Spots in receiving waters shall be cleaned annually to achieve the multiple benefits of beginning abatement of these impacts as mitigation and to learn more about the sources and patterns of trash loading."<sup>61</sup>

We applaud Region 2 and Region 4's efforts to identify and address non-point sources of trash, and recommend the State Board look at these non-point source programs as a starting place for putting specific non-point source requirements into the Amendments.

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<sup>60</sup> Supra note 2, at 15.

<sup>61</sup> San Francisco Regional Water Board, Municipal Regional Stormwater NPDES Permit, 89 (October 2009).

2. *Address a Minimum Number of Non-Point Source Hot Spots through Waste Discharge Requirements.*

In addition to requiring municipalities to identify non-point sources of trash through trash hot spot surveys, the Water Boards should determine a minimum level of non-point sources to be addressed. Again, we suggest the State Board look at the MRP's non-point source program as a starting place. The MRP sets a minimum number of non-point sources to be addressed by permittees through a population analysis:

“Population-based Permittees shall identify high trash-impacted locations on State waters totaling at least one Trash Hot Spot per 30,000 population, or one per 100 acres of Retail/Wholesale Commercial Land Area, within their jurisdictions based on Association of Bay Area Governments (ABAG) 2005 data, whichever is greater.”<sup>62</sup>

By requiring this type of analysis, the State Board will set a clear and unambiguous methodology for calculating the minimum number of non-point sources to be addressed in each region. The MRP's calculation led to minimum of 349 non-point sources to be addressed in the Bay Area. Those 349 minimum non-points were then broken down into minimum requirements for each municipality. With each municipality responsible for addressing a certain quantity of trash hot spots, the municipality was then given the discretion to determine what non-point sources were priorities and needed to first be addressed. We recommend the State Board require the permitting authority conduct a similar population analysis as Region 2's MRP in order to set a minimum number of non-point source discharges to be addressed.

3. *The Permitting Authority Should Retain Discretion Over Specific WDR-Criteria, but the Amendments Should Provide Minimum Criteria.*

Addressing non-point source discharges for trash can be a very site-specific determination. As such, permitting authorities should retain the discretion to develop appropriate WDRs to address non-point sources of trash. However, the State Board should provide a minimum level of criteria to be required in each trash hot spot. Again, Region 2's non-point source program is a good starting point regarding what the Amendments should require as minimum criteria for non-point sources. The MRP states that “Permittees shall cleanup selected Trash Hot Spots to a level of ‘no visual impact’ at least one time per year for the term of the permit. Trash Hot Spots shall be at least 100 yards of creek length or 200 yards of shoreline length.”<sup>63</sup> This type of minimum criteria is critical to ensure the responsible party is properly addressing the non-point source discharge.

Second, it is important for the responsible party to quantify the amount of trash being discharged and its sources. The Region 2 non-point source program states that:

The Permittees shall quantify the volume of material removed from each Trash Hot Spot cleanup, and identify the dominant types of trash (e.g., glass, plastics, paper) removed and their sources to the extent possible. Documentation shall include the trash condition before and after cleanup of the entire hot spot using photo documentation with a minimum of one photo per 50 feet of hot spot length. Trash Hot Spots may also be assessed using either the Rapid Trash Assessment (RTA v.8) or the SCVURPPP Urban RTA variation of that method.

Minimum requirements are critical to obtaining the necessary information for both the permittee and the permitting authority to determine whether additional measures are required to address trash hot spots. As required in Region 2, we request the hot spot survey include a source identification component to

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<sup>62</sup> *Id* at 85.

<sup>63</sup> *Id.*

assess the sources of trash pollution. This source identification evaluation should be conducted in conjunction with the survey for non-point sources in order to better assess the most appropriate types of BMPs and source controls to be implemented.

4. *Homeless Encampments and High-Use Beaches Should Be Addressed Explicitly.*

In addition to a minimum amount of non-point sources to be addressed, a permitting authority should be explicitly required to issue WDRs to address homeless encampments and high-use beaches.

Throughout the state, due to the unfortunate lack of attention to these areas, homeless encampments constitute a significant source of non-source point trash pollution. This year, the State Department of Fish and Wildlife filed an environmental complaint against the City of San Jose, claiming violations of water quality laws for failing to clean up homeless encampments.<sup>64</sup> The State has already determined that trash, human waste and other refuse from homeless encampments constitutes a nuisance.<sup>65</sup> Given the Amendments' water quality objective of "no trash that causes a nuisance," it is necessary for the State Board to explicitly require homeless encampments to be addressed through non-point source WDRs.

High-use beaches are another non-point source that contributes significant volumes of trash discharges to waters of the state, despite the efforts of many signatory organizations on this letter to conduct regular volunteer beach clean ups. In 2013, California Coastal Cleanup Day volunteers (including several State Board members) picked up almost 750,000 pounds of trash along the California coastline.<sup>66</sup> There is no dispute that high-use beaches are a significant source of non-source trash pollution. However, not every beach constitutes a significant source of trash pollution. Therefore, we suggest only high-use beaches – as defined by AB 411 – be explicitly addressed as a non-point source of trash.

In order to address non-point sources of trash, we recommend the following revisions be made to both Chapter III.I.2.d. and Chapter III.I.3.:

**Chapter III.I.2.d.** - A permitting authority\* ~~may~~ **shall require a minimum amount of ~~determine that~~ specific land uses or locations (e.g., parks, stadia, schools, campuses, or roads leading to landfills) to be deemed trash hot spots and determined as trash hotspots generate substantial amounts of Trash\*. In the event that the permitting authority\* makes that determination, the permitting authority\* may** require the MS4\* to comply with Chapter III.L.2.a. or Chapter III.L.2.b. (as the case may be) with respect to such land uses or locations. In addition to the minimum amount of trash hot spots, homeless camps and high-use beaches as defined in AB411 shall be deemed "hot spots."

**Chapter III.I.3.** - A permitting authority\* ~~may~~ **shall** require dischargers, that are not subject to Chapter III.L.2. herein, to implement Trash\* controls in areas or facilities that may generate Trash\*. Dischargers subject to Chapter III.L.2. shall conduct a trash "hot spot" survey to determine a minimum number of non-point sources that generate trash, such areas or facilities may include (but are not limited to) high usage campgrounds, picnic areas, beach recreation areas, parks not subject to an MS4\* permit, or marinas. In addition to the minimum amount of trash hot spots, homeless camps and high-use beaches as defined in AB411 shall be deemed "hot spots."

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<sup>64</sup> Bruce Newman and Paul Rogers, "State files water pollution complaint against San Jose for failing to clean up homeless encampments," San Jose Mercury News (March 20, 2014); available at [http://www.mercurynews.com/bay-area-news/ci\\_25388561/state-files-water-pollution-complaint-against-san-jose](http://www.mercurynews.com/bay-area-news/ci_25388561/state-files-water-pollution-complaint-against-san-jose).

<sup>65</sup> *Id.*

<sup>66</sup> California Coastal Commission, Thousands Work to Make Trash Extinct on 29<sup>th</sup> Annual California Coastal Cleanup Day, (September 21, 2013); available at [http://www.coastal.ca.gov/publiced/ccd/2013release\\_final%20results.pdf](http://www.coastal.ca.gov/publiced/ccd/2013release_final%20results.pdf).

**G. PRIORITY LAND USE AREAS SHOULD BE DEFINED PRECISELY, FREE FROM LOOPHOLES, AND INCLUDE SCHOOLS.**

*1. Equivalent Alternative Land Uses Should Be Removed as a Priority Land Use Option.*

The Amendments limit the implementation of Track 1 or Track 2 to areas with “priority land uses.” Chapter III.L.2.a. states that “MS4 permittees with regulatory authority over priority land uses shall be required to comply with the prohibition of discharge...” The Amendments attempt to define the land uses that would be included (*e.g.*, high-density residential and industrial), but alternatively allow the permittees to make a finding of “equivalent alternate land uses” that would have a comparative trash generation rate. Appendix 1 allows “equivalent alternate land uses” to be allowed to be substituted for priority land uses for compliance with the prohibition of discharge.

Allowing permittees to comply with the prohibition of discharge through alternative land uses is inappropriate given the State Board’s findings that high-generation of trash occurs in the priority land uses. The SED acknowledges that the priority land uses are “those land uses that studies have shown generate significant sources of trash.”<sup>67</sup> Furthermore, the equivalent alternative land uses opens-up a loophole to allow permittees to avoid addressing high-generation trash spots. How will the State Board ensure that designated land use areas are defined consistently among Permittees? Will there be a public comment opportunity when a regional board is evaluating an equivalent alternative land use? This provision of the Amendments may seem trivial given its location in the Appendix, but it is a critical aspect of policy implementation.

Instead of an unclear and inconsistent review of equivalent alternative land uses, the State Board should remove the loophole allowing permittees to implement controls on equivalent alternative land uses.

*2. High-Density Residential Should Remain at 10 Units Per Acre.*

It is critical that “high-density residential” remain defined as ten units per acre. Evidence supports including low-density residential areas as a priority land use area. For example, studies in the Ballona Creek watershed determined that low-density residential areas had slightly higher trash generation rates than high-density areas, and the Los Angeles River baseline study concluded low-density only had slightly lower generation rates high-density.<sup>68</sup> Given these studies’ conclusions that low and high density zones generate similar amounts of trash, we believe the priority land-use designation for residential should be inclusive. However, we understand that different cities and counties define their residential zones differently. In light of that fact, we consider 10 units per acre an acceptable definition for high-density residential.

We strongly discourage the State Board from increasing the number of units per acre for high-density residential priority land uses, and if the number expands above 10 units per acre, we request the State Board include low-density residential areas as a priority land use.

*3. Schools Should Be Added as a Priority Land use.*

Schools are a high-generating source of trash and should be a priority land use. During Region 2’s baseline study of trash generation, studies concluded that “four land uses with the highest trash generation rates are (1) retail and wholesale, (2) high-density residential, (3) *K-12 schools*, and (4) commercial/services and industrial.”<sup>69</sup> All of these land uses are included in the Amendments as priority land uses, except schools. In the SED, there is no justification regarding why schools should not be

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<sup>67</sup> Supra note 2, at 12; City of Los Angeles 2002, County of Los Angeles Department of Public Works 2004a; 2004b, City and County of San Francisco 2007, Moore *et al.* 2011, City of Cupertino 2012, City of San Jose 2012, EOA, Inc. 2012a.

<sup>68</sup> Ballona Creek Watershed Trash Baseline Monitoring, 2002-2003 Storm Season.

<sup>69</sup> Supra note 2, at 71.

included as a priority land use similar to the other 3 high trash generation land uses found in Region 2's baseline analysis.

Given no justification for eliminating schools as a priority land use, we request the State Board include schools (K – 12) be added as a priority land use.

#### **H. THE LOS ANGELES TRASH TMDL RE-OPENER SHOULD BETTER EXPLAIN WHY THE TMDL MAY BE RECONSIDERED.**

We strongly support the “grandfathering” of the existing requirements for the 15 trash TMDLs in Region 4. The Amendments “apply to all surface waters of the State, with the exception of those waters within the jurisdiction of the Los Angeles Regional Water Quality Control Board for which trash Total Maximum Daily Loads are in effect prior to the effective date of these Trash Provisions.” Heal the Bay, Natural Resources Defense Council, and many others participated in the lengthy public processes employed by Region 4 for all of these TMDLs. There was much discussion and input provided by all stakeholders during the development of these TMDLs – the first trash TMDL came into effect in 2001. As a result, most dischargers appear to be on-track for interim and final compliance milestones.

We have seen great success in trash reductions as a result of these TMDLs. However, we are concerned that, as proposed, the Amendments require Region 4 to re-open 13 of the 15 trash TMDLs and consider modifications. Specifically, the draft Amendments state that “within one year of the effective date of these Trash Provisions, the Los Angeles Water Board shall convene a public meeting to reconsider the scope of its trash TMDLs, with the exception of those for the Los Angeles River and Ballona Creek watersheds, and to particularly consider an approach that would focus MS4 Permittee’s trash-control efforts on high-trash generation areas within their jurisdictions.” A reopener of this scope and magnitude is inappropriate and unnecessary.

First, a mandatory re-opener of 13 TMDLs within a one-year period is a herculean task, especially given the workload Region 4 has undertaken in the next year with watershed management planning. Second, a mandatory reopener is not necessary because most trash TMDLs in Region 4 are nearing their compliance deadlines. The Santa Monica Bay Debris TMDL was the last-adopted trash TMDL and has a final compliance deadline of 2020. The City of Los Angeles reports that they plan to comply with this TMDL early in 2016<sup>70</sup> in some sub-watersheds.<sup>71</sup> Third, in the highly urbanized landscape of Region 4, most areas are in fact “high-trash generation,” and therefore, properly subject to a TMDL’s requirements. If the Regional Board finds a rare exception, or identifies another short-coming, the Regional Board can always re-open the TMDL. Lastly, including a mandatory re-opener is a disincentive for compliance with trash TMDLs and other TMDLs, as the regulation will be seen as a “moving target.”

Instead, we ask that the “grandfather” clause stand for all 15 Region 4 trash TMDLs and that the re-opener become discretionary, not mandatory. At a minimum, no reopener should occur for any TMDL below 80 percent compliance with full capture devices. If the State Board is concerned that the final one or two milestones (final 0-20 percent reduction) may be difficult to achieve with full-capture devices for some Los Angeles permittees, they can employ the Track 2 approaches if these actions result in an equivalent volume reduction. We specifically request the following modification:

*Chapter III.L.1.b.2 - ~~Within one year of the effective date of these Trash Provisions\*~~, The Los Angeles Water Board shall ~~may~~ convene a public meeting to reconsider the ability to allow TMDL responsible parties, who are determined to be at least 80% in compliance through the implementation of full capture systems, to achieve full compliance through*

<sup>70</sup> “Compliance with the Debris TMDL will be met through a phased retrofit of all 218 catch basins throughout the JG7 WMParea (182 City owned and 38 County owned) by 2016, ahead of the Regional Board implementation goals for 2020 completion date.”

<sup>71</sup> Draft Watershed Management Plan at 29.

~~*focusing additional trash-control efforts on high-trash generation areas scope of its trash TMDLs, with the exception of those for the Los Angeles River and Ballona Creek watersheds, and to particularly consider an approach that would focus MS4\* permittees' trash-control efforts on high-trash generation areas within their jurisdictions.*~~

Since the Region 4 trash TMDLS are projected to meet compliance soon, through permittee investment in full-capture, it would be best to let those TMDLS conclude without initiating an alternative compliance process. We do not advocate for allowing permittees to avail themselves of the source reduction alternatives unless and until the bulk of (e.g., 80% or more) compliance has been achieved through full-capture, as we have seen in the Los Angeles area that this is the single most effective way of reducing trash. There is no justification for the State Board to re-invent the wheel and stand in the way of progress in Region 4. As importantly, there is also no evidence that reopening the TMDLS will improve water quality – the ultimate goal here – more than the existing TMDL approach will.

#### **I. INTERIM MILESTONES OF A MINIMUM OF 10 PERCENT SHOULD BE MANDATORY.**

The State Board should be explicit that each permittee is required to show a 10 percent reduction in trash discharges annually for the 10 year compliance schedule. Interim milestones are a critical component to ensure permittees meet the 10 year compliance deadline. Throughout the stakeholder process, the State Board had always considered interim milestones of 10 percent for 10 years to be the appropriate requirement:

“For MS4\* permittees complying under section 4.a.(1), compliance shall occur within ten (10) years of the effective date of the first implementing permit (whether such permit is re-opened, re-issued or newly adopted), with an average of ten percent (10%) of the full (100%) capture systems\* installed every year.”<sup>72</sup>

However, the Amendments take a departure from the State Board staff’s previous intent by only *suggesting* interim milestones of 10 percent. The Amendments state that Track 1 and 2 permittees shall achieve full compliance in ten years, “...along with achievements of interim milestones such as an average of ten percent...” The discretion to self-select interim milestones is unwarranted. Stated and clear interim milestones of 10 percent reductions over ten years creates statewide consistency and ensures everyone is reducing an acceptable portion of their trash discharges annually.

A set 10 percent reduction over 10 years has proven effective in California. One only needs to compare the Los Angeles region trash TMDLS’ implementation success versus Region 2’s MRP implementation to understand the superior value of fixed milestones of 10 percent. The municipalities in the Los Angeles region are consistently meeting or exceeding their 10 percent annual reduction targets. On the other hand, Region 2’s MRP program has largely gone unimplemented; with the majority of permittees unable to show they have met the 2014 40 percent reduction milestone. Therefore, we request the State Board be explicit that each permittee be required to show a minimum 10 percent reduction in trash discharges annually for the 10 year compliance schedule.

Additionally, the SED creates further ambiguity regarding whether interim milestones are required at all:

“Within the ten-year compliance periods discussed above, the Water Board *can set* interim compliance milestones within a specific permit. These interim milestones could be set, for example, as a percent reduction or percent installation per year.”<sup>73</sup>

The Amendments only provide discretion as to the selection of interim milestones, but is clear that some type of milestone is required under both Track 1 and Track 2. However, the SED language provides two

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<sup>72</sup> State Water Resources Control Board, Public Advisory Group Strawman Amendments, Feb 2013.

<sup>73</sup> Supra note 2, at 15.

discretionary clauses. First, the Water Board “can set interim compliance milestones”, and second, these interim milestones “could be set...as a percent reduction.” As discussed above, we believe the latter clause should include a fixed milestone of 10 percent for 10 years. However, it is even more critical that the State Board be clear within the SED that interim milestones are required—they are not discretionary.

We therefore request the following changes be made to the Amendments and the SED:

***Chapter III.L.4.a.3. and 4. (For both Tracks) - For MS4\* permittees that elect to comply with Chapter III.L.2.a.1. (Track 1), full compliance shall occur within ten (10) years of the effective date of the first implementing permit (whether such permit is re-opened, re-issued or newly adopted), along with achievements of interim milestones ~~such as an~~ average of a minimum ten percent (10%) of the full capture systems\* installed every year. In no case may the final compliance date be later than fifteen (15) years from the effective date of these Trash Provisions\*.***

***SED, Pg.15 - “Within the ten-year compliance periods discussed above, the Water Board ~~can~~ shall set interim compliance milestones within a specific permit. These interim milestones ~~could be set, for example, as~~ should be a minimum 10 percent reduction or 10 percent installation per year.”***

**J. ALL PERMITTEES SHOULD BE GIVEN EQUAL COMPLIANCE SCHEDULES REGARDLESS OF PERMIT’S RENEWAL DATES.**

Regional Boards should be required to incorporate the Amendment’s permit terms into applicable permits within the first 18 months of adoption. We applaud the State Board for incorporating a compliance schedule “backstop” into the Amendments. However, compliance schedule timeframes should be equal for all Permittees.

Both Track 1 and 2 Permittees are required to comply with the Amendments within 10 years from when the requirements are incorporated into the applicable stormwater permits. In other words, the compliance schedule does not begin to toll until a permittees’ stormwater permit is re-opened, re-issued, or adopted. We acknowledge that there is no easy solution to ensure timely incorporation of the Amendments into permits, and are concerned that unless there is a definitive “start” time for compliance, there will be serious delays in trash reductions. This concern becomes even more pronounced considering that re-adoption of stormwater permits has taken up to 15 years in the past.<sup>74</sup> To address this concern, the State Board is requiring all permittees – regardless of their permit cycle – come into compliance with the Trash Amendments no later than 15 years after adoption of the Amendments.

We support this concept, but a preferred and more equitable solution exists: Chapter 4.a.1. allows Regional Boards 18 months to either require Permittees to provide notice of what Track they will be using, or re-open a stormwater permit to implement the Amendments’ provisions. Accordingly, the Amendments should be revised to require Regional Boards to provide notice of what Track they will be using, and re-open a stormwater permit within the first 18 months of the Amendments’ adoption. There are several reasons to revise the Amendments as we suggest.

First, requiring all applicable stormwater permittees to begin implementing the Amendments after 18 months is equitable and provides statewide consistency. As currently proposed in the Amendments, the practical outcome is that certain municipalities will be given an extra four years before they would be required to comply with the Amendments. For example, San Diego just re-issued its MS4 Phase I stormwater permit and will not be incorporating the Trash Amendments for *at least* another 5 years. On the other end of the spectrum, Region 2’s MRP is due to be re-opened and will likely incorporate the Trash Amendments in the near-term, thereby starting the compliance schedule countdown immediately.

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<sup>74</sup> See State Water Resources Control Board, Statewide General Industrial Stormwater Permit (2014).

Why should one region be given at least four additional years to continue discharges of trash before complying with the Amendments?

Recently issued permits will likely have to re-open their permits regardless. Given the history of permits to take longer than the CWA-required five year re-adoption cycle, it is highly unlikely that stormwater permits recently re-issued will be adopted within the next five years. If that is the case, then those permits will be forced to be re-opened to comply with the Amendments' 15 year backstop. Again using the San Diego Phase I permit as an example, what is the likelihood that the Permit will be renewed in the next five years? Given history, it seems highly unlikely that the new San Diego's Phase I Permit will be re-issued in the next five years. Region 9 will be forced to re-open its Phase I Permit before the conclusion of its 5-year iteration cycle, in order to incorporate the Amendments' terms. If permitting agencies are already going to be required to go through the process of re-opening permits to comply with the 15-year backstop, then why not require all permits to be re-opened after the 18 months?.

*Allowing* Regional Boards the discretion to re-open permits and *requiring* the Los Angeles Regional Board to re-open its TMDL creates a double-standard. Of note, the draft Amendments currently requires Region 4 to reopen 13 TMDLs within 12 months of Amendment adoption. Although we oppose this requirement, it is not appropriate for one Regional Board to be required to re-open a TMDL and not require other Regional Boards to re-open permits to incorporate these Amendments.

Moreover, requiring all permittees to begin meeting compliance requirements within 18 months will reduce delays in implementation. Reducing the worst-case scenario of 15 years until compliance to only 11.5 years will get California quicker results without placing a burden on permittees.

Finally, incorporating the Amendments' requirements into all permits after 18 months puts the Water Boards on a stronger legal footing. As currently proposed, the Amendments may require permittees to begin planning to comply with the Trash Amendments before requirements are incorporated into permits. The Amendments allow Regional Boards to "issue an order pursuant to Water Code section 13267 or 13383 requiring..." for permittees to select which Track they will comply with and to develop an implementation plan. Rather than go through the trouble of issuing orders and complying with Section 13267 and 13383, it would be more efficient for Regional Boards to skip that intermediate step and begin incorporating the Amendments' provisions into permits.

Therefore, we request the State Board make the following revisions to Chapter III.L.4.a.1:

*Within eighteen (18) months of the effective date of these Trash Provisions\*, each permitting authority\* shall ~~either~~: (i) issue an order pursuant to Water Code section 13267 or 13383 requiring each MS4\* permittee that will be complying under Chapter III.L.2.a.1. (Track 1) or Chapter III.L.2.b.2. (Track 2) to submit written notice to the permitting authority\* stating whether such MS4\* permittee will comply with the prohibition of discharge under Track 1 or Track 2, ~~or~~ and (ii) re-open, re-issue, or adopt an implementing permit that includes requirements consistent with these Trash Provisions\*, and that requires notice from each MS4\* as to whether it has elected to comply under Track 1 or Track 2.*

#### **K. SOURCE CONTROL INCENTIVES SHOULD REMAIN IN THE AMENDMENTS.**

We support Track 2's call for source reduction as a means of controlling litter because source control ordinances in California have demonstrated that these policies can be an effective means of curbing litter, saving money, and changing consumer behavior. Plastic bag and foam bans have proliferated in recent years, as a response to a growing need for municipalities to reduce litter in order to save costs, improve the environment, and meet regulatory mandates such as TMDLs. Consequently, industry opposition has been fierce. In opposition to comments made by the American Chemistry Council, and Dart Industries during public testimony at the July 16, 2014 workshop, we believe source reduction policies are effective

and should be incentivized in the Policy.

1. *Source Reduction is an Effective Means of Decreasing Foam and Plastic Bag Pollution.*

Clearly, cities understand the need for source reduction, and they have been successful in upholding ban ordinances in court (*See* Attachment 2: Application for Leave to File *Amici Curiae* Brief in Support of Respondent County of Los Angeles, et al.; Proposed Brief of *Amici Curiae* Surfrider Foundation, Heal the Bay, The 5 Gyres Institute, Environment California Research and Policy Center, and Seventh Generation Advisors in *Schmeer et. al, v. Cnty. of Los Angeles et al.* 153 Cal. Rptr. 3d 352 (Ct. App. 2013); Jennie R. Romer, *Single-Use Plastic Bags: An Icon of Waste*, 5 SUSTAINABILITY 341 (2012); Jennie R. Romer and Shana Foley, *A Wolf In Sheep's Clothing: The Plastic Industry's "Public Interest" Role in Legislation and Litigation of Plastic Bag Laws in California* 5 GOLDEN GATE ENVTL. L.J. 377 (2012); and Jennie Reilly Romer, *The Evolution of San Francisco's Plastic Bag Ban*, 1 GOLDEN GATE ENVTL. L.J. 439 (2007)). As of the date of these comments, 113 localities have banned plastic bags, including Sacramento, Long Beach, San Francisco, and Los Angeles City and County, and 78 have enacted foam ban ordinances,<sup>75</sup> including San Francisco, San Jose, and many others.

2. *Bag and Foam Bans are Effective.*

Ireland imposed one of the first taxes on plastic bags, and it was incredibly effective. The levy there applies to every plastic bag provided at checkout.<sup>76</sup> Ireland has demonstrated a greater than 90 percent reduction in plastic bag consumption and considerable reduction in litter since the charge went into effect.<sup>77</sup> Moreover, Ireland generated an estimated €12 million in revenue in the levy's first year.<sup>78</sup> Several plastic bag ordinances have been in effect for at least a couple of years, and reports showing significant decreases in plastic bag consumption as well as litter are now available. For example, the Washington, D.C., 2009 bag tax reduced usage by approximately 50 to 70 percent, and part of the revenue helps clean up the Anacostia River.<sup>79</sup> Large stores covered by Los Angeles County's 2010 10-cent single-use bag charge reduced single-use bag usage by 95 percent and paper bag usage by 30 percent.<sup>80</sup> Los Angeles County's EIR estimated that implementation of its bag ordinance could meet the objective of "[r]educ[ing] the County's, Cities', and Flood Control District's costs for prevention, cleanup, and enforcement efforts to reduce litter in the County by \$4 million."<sup>81</sup> Since 2012, the City of San Jose has reduced plastic bag litter by 89 percent in the storm drain system, 60 percent in the creeks and rivers, and 59 percent in city streets and neighborhoods with a 10-cent-per-bag charge (in addition, the average number of single use bags used per customer decreased from 3 bags to 0.3 bags per visit).<sup>82</sup>

Foam bans are the best method for addressing foam litter. Foam bans are particularly important since small pieces of foam that can flow through the 5mm mesh in full-capture devices and street sweepers fail to capture many foam pieces before wind carries them off city streets into the storm drain or away from the street. One year after the San Francisco foam foodware prohibition, San Francisco's litter audit

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<sup>75</sup> For maps, complete listings of ordinances, and links, see Clean Water Action's website: Ban the Plastic Bag! <http://www.cleanwateraction.org/ca/rethinkdisposable/banthebag>, and <http://www.cleanwateraction.org/ca/rethinkdisposable/phaseoutfoam>.

<sup>76</sup> *See* Plastic Bags, IR. DEP'T OF THE ENV'T, CMTY. & LOCAL GOV'T, <http://www.environ.ie/en/Environment/Waste> (last visited July 31, 2014).

<sup>77</sup> *Id.*

<sup>78</sup> *See* Frank Convery *et al.*, *The Most Popular Tax in Europe? Lessons from the Irish Plastic Bags Levy*, 38 ENVTL. & RESOURCE ECON. (2007).

<sup>79</sup> *See* District Dept. of the Environment studies, surveys and other information at: <http://green.dc.gov/bags> and [http://www.epa.gov/reg3wapd/tmdl/dc\\_tmdl/AnacostiaRiver/index.html](http://www.epa.gov/reg3wapd/tmdl/dc_tmdl/AnacostiaRiver/index.html)

<sup>80</sup> About the Bag: Announcements, L.A. CNTY. DEP'T OF PUB. WORKS, <http://dpw.lacounty.gov/epd/aboutthebag> (last visited July 31, 2014).

<sup>81</sup> *See* Checkout Bag Charge: Economic Impact Report, S.F. CITY & CNTY. OFFICE OF THE CONTROLLER 6 (Nov. 30, 2011), <http://www.sfcontroller.org/Modules/ShowDocument.aspx?documentid=2721> (comparing bag charge amounts and reduction percentages).

<sup>82</sup> Memorandum from Kerrie Romanow, Dir. Env'tl. Serv., City of San Jose, to the San Jose Transp. and Env't Comm. (Nov. 21, 2012), available at [http://www.cawrecycles.org/files/SanJose\\_updatememo\\_Nov2012.pdf](http://www.cawrecycles.org/files/SanJose_updatememo_Nov2012.pdf).

showed a 36 percent decrease in foam litter.<sup>83</sup> Foam industry proponents argue that other single-use packaging just replaces these foam products as litter. While this may be true, foam breaks-down into small pieces that are difficult to capture. Replacement products, usually made from paper or heavier weight plastics, can be more easily collected by street sweepers as well as full capture devices.

### *3. Bag and Foam Bans are Part of a National and International Movement towards Trash Reduction.*

Source reduction ordinances like bag and foam bans are part of a national movement towards litter reduction and sustainability; several cities outside of California have adopted bag ban ordinances as well, ranging across the United States from Homer, Alaska, to Boulder, Colorado, from Honolulu, Maui, Kauai, and Hawaii Counties to Santa Fe, New Mexico, from Austin, Texas, to Portland, Oregon, and from Seattle, Washington, to Montgomery County, Maryland.<sup>84</sup> New York City introduced an ordinance on August 22, 2013.<sup>85</sup> At the federal level, Representative Jim Moran (D-VA8) introduced the Trash Reduction Act of 2013, which would amend the Internal Revenue Code to require retailers to pay a 5-cent excise tax on each disposable carryout bag provided to a consumer.<sup>86</sup> Bag bans are also a well-established international trend. More than thirty-seven countries or cities outside the United States have enacted bag ban legislation, including China, Italy, Mexico City, and Delhi, as well as some of the world's least-developed nations like Bangladesh and Ethiopia.<sup>87</sup> China's government estimates it has reduced overall plastic bag use by 66 percent (an estimated forty billion bags) in the first year of implementation alone.<sup>88</sup> Likewise, foam bans have been enacted in other parts of the U.S., including Seattle and Portland, and New York City enacted a ban effective 2015 if no recycling market for the city's foam foodware can be found.

### *4. Source Reduction Ordinances are Necessary because Voluntary and Mandatory Recycling have Not Been Effective.*

The “reduce-reuse-recycle” mantra makes it clear that “reduce” must come first, and that recycling is not the best choice. Plastic bags are recycled at or less than 5 percent of the time.<sup>89</sup> Plastic bag recycling is used by the plastics industry as a distraction from other issues and as a method of forestalling plastic bag source reduction. Plastic bag recycling programs have failed. For example, voluntary recycling by Los Angeles County, San Francisco, and Santa Clara County all had lackluster results that took years, wasted municipal funds, and ultimately ended in bans.<sup>90</sup> Even AB 2449, California's attempt at mandating a

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<sup>83</sup> City of San Francisco Streets Litter Re-Audit 2008. Available at: [http://sfenvironment.org/downloads/library/2008\\_litter\\_audit.pdf](http://sfenvironment.org/downloads/library/2008_litter_audit.pdf).

<sup>84</sup> See National List of Local Bag Ban Ordinances, CALIFORNIANS AGAINST WASTE, [http://www.cawrecycles.org/issues/plastic\\_campaign/plastic\\_bags/national](http://www.cawrecycles.org/issues/plastic_campaign/plastic_bags/national) (last visited July 31, 2014).

<sup>85</sup> N.Y. City Council B. No. 1135 (N.Y.C. 2013).

<sup>86</sup> Trash Reduction Act of 2013, H.R. 1686, 113th Cong. (2013). The bill had seven cosponsors as of February 22, 2014. H.R. 1686: Trash Reduction Act of 2013, GOVTRACK.US, <https://www.govtrack.us/congress/bills/113/hr1686> (last visited July 31, 2014).

<sup>87</sup> See Retail Bags Report, FLA. DEP'T OF ENVTL. PROT. (Sept. 9, 2013), <http://www.dep.state.fl.us/waste/retailbags/pages/mapsandlist.htm>; Track the Movement, CHICOBAG, <http://www.chicobag.com/track-movement> (last visited on July 31, 2104).

<sup>88</sup> Ben Block, China Reports 66-Percent Drop in Plastic Bag Use, WORLDWATCH INST., <http://www.worldwatch.org/node/6167> (last visited July 31, 2014).

<sup>89</sup> California Integrated Waste Management Board, Staff Report, Agenda Item 14, June 12, 2007, Board Meeting; *Los Angeles County Plastic Bag Study: Staff Report to the Los Angeles County Board of Supervisors* (August 2007). Available at: <http://ladpw.org/epd/pdf/PlasticBagReport.pdf> (rate is around 5%); <http://www.calrecycle/LGCentral/Basics/PlasticBag.htm> and [http://www.epa.gov/osw/characterization/municipal\\_solid\\_waste/2005\\_characterization\\_of\\_municipal\\_solid\\_waste.html](http://www.epa.gov/osw/characterization/municipal_solid_waste/2005_characterization_of_municipal_solid_waste.html) (rate is 1-5%).

<sup>90</sup> In 2008, L.A. County launched its voluntary plastic bag recycling program, and in November 2010, the County Department of Public Works reported that the voluntary recycling program “was not successful in achieving its goals” because “[o]ver a two-year period and despite State law requirements under AB 2449 . . . not more than eight (8) stores at any given time had met the minimum participation levels.” Letter from Gail Farber, Dir., L.A. Cnty. Dep't of Pub. Works, to the L.A. Cnty. Bd. of Supervisors, L.A. DEP'T OF PUB. WORKS (Nov. 16, 2010), [http://ladpw.org/epd/aboutthebag/PDF/BoardLetters/BoardLetter\\_nov2010.pdf](http://ladpw.org/epd/aboutthebag/PDF/BoardLetters/BoardLetter_nov2010.pdf). Similarly, San Francisco's voluntary program was declared a failure. See Jennie Reilly Romer, Comment, *The Evolution of San Francisco's Plastic Bag Ban*, 1 GOLDEN

voluntary recycling program, ended in failure with the state unable to say whether the law was even successful at all.<sup>91</sup> Consequently, industry attempts to substitute voluntary recycling programs or educational efforts should not deter cities from moving directly to source reduction ordinances.<sup>92</sup>

According to Los Angeles County, the overall recycling rate of expanded polystyrene foam (EPS), and particularly EPS food containers, is approximately one percent of all EPS sold in the marketplace. They attribute the low recycling rate to (1) the relatively low market value of collected EPS; (2) challenges associated with separating EPS materials from the waste stream (especially EPS food containers which are likely to have higher contamination from food); and (3) the high costs of collecting, sorting, and transporting EPS, which often requires expensive densifying machines to reduce the volume of collected EPS materials. As a result, most Mixed Refuse Facilities (MRFs) are shipping EPS containers to landfills for disposal along with other unrecyclable residual waste.<sup>93</sup> Research revealed that of the 32 communities in the Los Angeles area that have said they recycled foam waste in their curbside collection programs, 8 had discontinued the programs, 15 were sending the collected material to landfill, and only 7 communities were actually sending the material to a recycling facility.<sup>94</sup> The vast majority of foam food-service products are used in commercial districts where there is no collection of foam for recycling. EPS food-ware is typically not “clean” enough to be recycled.<sup>95</sup> Recycling of foam food ware does not make economic sense. This was the conclusion of the American Chemistry Council.<sup>96</sup> Los Angeles County drew the same conclusion.<sup>97</sup>

##### 5. *Other Industry Objections to Bag and Foam Bans Should Be Discounted.*

Plastic bags do not contain food borne illnesses, plastic bag bans do not disproportionately impact the poor and plastic bag bans do not “cost jobs.”<sup>98</sup> Moreover, misleading reports and media by industry-funded groups often purport that cities do not save money with bans. For example, the National Center for Policy Analysis’ (NCPA) latest report calls into question whether plastic bag bans save cities money.<sup>99</sup> The December 2013 report makes unsupported assumptions with budget figures. For example, the report identifies the percentage of the litter stream that is plastic bags and then creates a budget statistic manufactured from that number without accounting for the disproportionate impact of plastic bag litter (e.g., costly municipal recycling facility downtime to remove bags from clogging screens, labor for bag removal in trees and storm drains, etc.). The report also cites increases in city budgets for all solid waste

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GATE ENVTL. L.J. 439, 450-59 (2007), at 445-46. Santa Clara County scrapped its voluntary bag reduction program in favor of an ordinance after administrators saw only a 2% increase in reusable bag use.; SANTA CLARA, CAL., ORDINANCE CODE § B11-508 (2011); see also CITY OF SAN JOSE, FILE NO. PP09-193, SINGLE-USE CARRYOUT BAG ORDINANCE: DRAFT ENVIRONMENTAL IMPACT REPORT 35 (2010), available at <http://www.sanjoseca.gov/index.aspx?NID=2435> (“The City’s experience with recycling plastic bags has been that processing costs greatly exceed their value.”).

<sup>91</sup> See The Failure of Plastic Bag Recycling, CALIFORNIANS AGAINST WASTE (Feb. 6, 2012, 2:24 PM), <http://www.cawrecycles.org/node/5232>.

<sup>92</sup> See *id.*; see also Jennie R. Romer and Leslie.M. Tamminen, *Plastic Bag Reduction Ordinances: New York City’s Proposed Charge On All Carryout Bags As A Model for U.S. Cities*, 27 TULANE ENVTL. L. J. 237 (2014), Part IV.A.1.b.i (discussing how plastic bags hinder the municipal recycling process).

<sup>93</sup> County of Los Angeles Public Works, “expanded Polystyrene Food Containers in Los Angeles County- PART TWO: Feasibility of Implementing a Restriction of Expanded Polystyrene Food Containers at County Unincorporated Area Retailers,” November 2011- [http://file.lacounty.gov/bc/q4\\_2011/cms1\\_171399.pdf](http://file.lacounty.gov/bc/q4_2011/cms1_171399.pdf).

<sup>94</sup> Trash Load Reduction Plan Memorandum to San Jose Mayor and City Council (January 2012) [http://www.sanjoseca.gov/clerk/Agenda/20120124/20120124\\_0701.pdf](http://www.sanjoseca.gov/clerk/Agenda/20120124/20120124_0701.pdf)

<sup>95</sup> *Id.*

<sup>96</sup> The American Chemistry Council Website – an article by Raymond J. Erlich bearing copyright by the ACC entitled “Plastics Foodservice Packaging Group: Economic Realities of Recycling” (2007-2009) - available from Clean Water Action upon request. See also *Plastics News* “PS recycling efforts still elusive” May 26, 2009, Mike Verespej

<sup>97</sup> County of Los Angeles Public Works, “expanded Polystyrene Food Containers in Los Angeles County- PART TWO: Feasibility of Implementing a Restriction of Expanded Polystyrene Food Containers at County Unincorporated Area Retailers,” November 2011-[http://file.lacounty.gov/bc/q4\\_2011/cms1\\_171399.pdf](http://file.lacounty.gov/bc/q4_2011/cms1_171399.pdf) .

<sup>98</sup> Jennie R. Romer and Leslie. M. Tamminen, *Plastic Bag Reduction Ordinances: New York City’s Proposed Charge On All Carryout Bags as a Model for U.S. Cities*, 27 TULANE ENVTL. L. J. 237 (2014).

<sup>99</sup> See H. Sterling Burnett, Policy Rep. No. 353, Do Bans on Plastic Grocery Bags Save Cities Money?, NAT’L CTR. FOR POLICY ANALYSIS 13 (Dec. 2013), <http://www.ncpa.org/pdfs/st353.pdf> .

without specifying what components, if any, these increased budget figures are related to plastic bag cleanup. Similarly, the report cites increases in spending when the budget figures relied upon involve variables related to all solid waste, not just plastic bags. Thus, the report does not cite any coherent evidence about bag ban cost savings for cities.

In addition to their December 2013 report, the NCPA also published an August 2012 report that attempted to portray bag reduction ordinances as bad for retail businesses.<sup>100</sup> The report essentially extrapolates conjecture rather than actually completing a comprehensive survey. The report was based on a survey conducted by NCPA in December 2011 that looked at large and small stores in the unincorporated areas of Los Angeles County covered by the County's ordinance versus nearby similar stores within city jurisdictions, which were not covered by the ordinance.<sup>101</sup> The survey sought to determine the effects of the County ban, focusing on impacts to sales and employment at affected stores and shopping behaviors of customers. The study claimed to have identified a negative financial impact on stores in the unincorporated areas; however, the study's conclusions were based on survey responses from only 3 percent of stores. In contrast, a Los Angeles County staff report looked at the effect on local businesses and found that the ordinance "appears to have a minimal financial impact on local businesses."<sup>102</sup>

Regarding foam foodware bans, industry has argued that restaurants will go out of business if such bans are implemented. Among the 78 local jurisdictions that have bans in place,<sup>103</sup> none has reported such an outcome. In assessing the potential economic impact of a foam ban in San Jose, the City concluded, based on a report from Economic & Planning Systems, Inc., in *Economic Impact Analysis of EPS Foodware Costs*, that it is unlikely that the ordinance would result in substantial business failures.<sup>104</sup> Almost all the local ban ordinances contain an exemption for financial hardship, but local government reports that few restaurants ever apply for such an exemption. Among the 4,000 businesses in the City of San Francisco that must comply with the ban on foam foodware, the City has received only two requests for exemption - both were from businesses with a backlog of foam products already purchased and they were given additional time to come into compliance.

Industry has also claimed that only foam can provide the safe and effective form of food packaging that restaurants will find acceptable, and that only foam keeps "hot beverages warm and cold foods cold." In fact, several food chains have eliminated foam foodware voluntarily, including Jamba Juice, Cold Stone Creamery, and McDonalds (for clamshells, and pilot testing coffee cups). Starbucks has never used foam cups for coffee. In the jurisdictions where bans are in effect, there has been no health issue reported related to the lack of foam foodware, nor do businesses seem to have problems finding packaging to deliver their products.

The Amendments' provisions regarding source control are an important feature of the trash policy to ensure California is effectively reducing trash pollution with every effective strategy available. We request that *the Source Control Incentive and the source controls within Track 2 be retained.*

6. *Only Track 1 should be provided the Source Control Incentive of a Time-Credit Extension.*

Only Track 1 Permittees should receive a time-credit extension for implementing source control ordinances. The time-credit extension was suggested by the Public Advisory Group with the intent of

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<sup>100</sup> PAMELA VILLARREAL & BARUCH FEIGENBAUM, NAT'L CTR. FOR POLICY ANALYSIS, A SURVEY ON THE ECONOMIC EFFECTS OF LOS ANGELES COUNTY'S PLASTIC BAG BAN (2012).

<sup>101</sup> See *id.* at 3.

<sup>102</sup> Implementation of the County of Los Angeles Plastic and Paper Carryout Bag Ordinance, L.A. CNTY. DEP'T OF PUB. WORKS 1, <http://ladpw.org/epd/aboutthebag/PDF/Bag%20Ban%20Status%20Nov%202012.pdf> (last visited July 31, 2014) at 2.

<sup>103</sup> See Clean Water Action, Website: Rethink Disposable, available at <http://www.cleanwateraction.org/ca/rethinkdisposable/foambansmap>.

<sup>104</sup> Economic and Planning Systems, Inc. "Economic Impact Analysis of EPS Foodware Costs." November 2012, prepared for the City of San José.

complementing Track 1's structural BMP approach. However, the Amendments currently allow both Track 1 and 2 to receive a time-extension for passing a source-control ordinance.

Providing a time extension for Track 2 Permittees is inappropriate. Track 2 Permittees are already expected to adopt source-control ordinances in their overall trash reduction program. Giving Track 2 Permittees extra time to do something they are already expected to do will only further weaken the Track 2 approach.

To achieve the intent of Chapter III.L.5., we offer the following revision:

*The permitting authority\* may give MS4\* permittees that are complying under section Chapter III.L.2.a.1. up to a three (3) year time extension for achieving full compliance in areas where regulatory source controls\* are employed that take effect prior to or within three (3) years of the effective date of these Trash Provisions\*. Each regulatory source control\* employed by an MS4\* will be eligible for up to a one (1) year time extension.*

7. *Minimum Standards need to be established for the Source Control Incentive for a Time-Credit Extension.*

While we support Section 5's source-control incentive, we believe minimum standards need to be established in order to ensure true source control is being implemented. We do not take a time extension lightly—trash reductions need to begin immediately. But source control is such a critical component of controlling trash that we believe the one to three year credit is affordable. However, the credit is only worthwhile if real source control is being implemented. As described above, a recycling program is not source control and is not effective. By its very definition source control is stopping something at its source and offering an alternative product. Recycling does not stop a source of pollution; it only offers to refurbish that source of pollution at a later time.

There needs to be minimum standards for the permitting authority to apply before a time credit is received. Therefore, we request the State Board add minimum standards into the SED regarding what constitutes an appropriate regulatory source control.

To have an effective source control incentive, we recommend the following definition of a "regulatory source control" be added to Section 5 of the SED:

*Source reduction for trash includes methods that eliminate trash generation at the source. These include bans on trash-generating products, such as single use plastic bags or the addition of plastic microbeads in personal care products, which lead to elimination of a product that becomes trash. In addition, non-ban regulatory approaches might include mandatory discounts on re-usable alternatives to single use products, such as a discount provided to customers that bring re-usable cups or containers for take-out food. Other options can include mandatory fees on trash generating items, such as cigarettes or take-out food and beverage containers, where the fee is intended to encourage either a reduction in the use of a single use disposable product that is likely to become litter, or is intended to provide funding to support cleanup programs.*

#### **L. MICROPLASTICS SHOULD BE CONSIDERED DURING THE STATE BOARD'S STORM WATER STRATEGY INITIATIVE.**

Microplastics are a significant source of pollution. Considerable evidence exists showing that trash below 5mm is flowing through storm drains into rivers and nearby coastal waters. Algalita Marine Research Foundation's 2004 study of debris flowing through the Los Angeles and San Gabriel Rivers confirmed:

“... the abundance of plastic debris is greater than 5mm; however, our data shows that

plastic particles less than 5mm in size are far more abundant. The most common plastics found were bits of foamed polystyrene, followed by pre-production resin pellets, hard plastic fragments, thin films, line, and whole items. Our findings indicate that there is a significant amount of plastic debris, which, due to its size, is not subject to regulation under current TMDLs for trash, passing our sampling stations and discharging to the coastal ocean.”<sup>105</sup>

Particles less than 5mm in size were 16 times more abundant than those greater than 5mm, and weighed three times more than the larger particles. Recent research conducted in the Great Lakes by SUNY Fredonia and 5 Gyres also documents astounding levels of micro-plastics—43,000 microplastic particles per square kilometer.<sup>106</sup> As a result of the increasing documentation of the impacts of microplastic pollution on the marine environment and human sources of food,<sup>107</sup> California should address and stop the discharges of plastic debris less than 5mm.

We request the State Board consider addressing microplastic pollution during its Storm Water Strategy Initiative through interagency collaboration on source control.

\*\*\*

The undersigned groups generally support the Trash Amendments, and applaud the State Board’s laudable efforts to reduce trash discharges into California’s waterways. We look forward to working with you to ensure clean, abundant water for California.

Sincerely,

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<sup>105</sup> C.J.Moore *et al.*, Quantity and type of plastic debris flowing from two urban rivers to coastal waters and beaches of Southern California, *Journal of Integrated Coastal Zone Management*, 11(1): 65-73 (2011).

<sup>106</sup> M. Eriksen *et al.*, Microplastic Pollution in the surface waters of the Laurentian Great lakes, *Marine Pollution Bulletin* 77 (2013) 177-182.

<sup>107</sup> *Id.*

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Noreen Weeden  
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## ATTACHMENT 1

*Submitted in substantially similar form by more than 1,541 Californians*

Felicia Marcus, Chair and Members  
State Water Resources Control Board  
1001 I Street  
Sacramento, CA 95812-0100

Dear State Water Board Members:

Thank you for developing a Trash Policy for California that explicitly states the goal of no trash in our waterways and includes a plan for municipalities to achieve this goal. A trash policy is long overdue for California, as millions of pounds of trash are released to our streams, rivers and ocean after each storm event and severely impact wildlife. In general, I strongly support the Board's proposed Trash Policy.

The proposed Trash Policy is an important step forward to reduce the amount of trash in our waterways. However, I am concerned that the current draft of the Trash Policy may be difficult to enforce. The State Water Board should hold municipalities accountable by compelling them to calculate the current amount of trash they release into the water, and then develop a method for calculating their trash reductions annually.

In sum, I urge you to adopt a final Policy that requires a clear, straightforward path to compliance, and holds municipalities accountable for their trash pollution. Thank you for your dedication to ensure that California's waterways are safe from harmful trash pollution.

Sincerely,

1,541 Concerned California Citizens

## **ATTACHMENT 2**

No. B240592

COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT, DIVISION 3

---

LEE SCHMEER, et al.,

*Petitioners and Appellants,*

v.

COUNTY OF LOS ANGELES, et al.,

*Respondents and Appellees.*

Appeal from Judgment by the Los Angeles County Superior Court  
Hon. James C. Chalfant  
Superior Court Case No. BC470705

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**APPLICATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF IN  
SUPPORT OF RESPONDENTS COUNTY OF LOS ANGELES, ET  
AL.; PROPOSED BRIEF OF *AMICI CURIAE* SURFRIDER  
FOUNDATION, HEAL THE BAY, THE 5 GYRES INSTITUTE,  
ENVIRONMENT CALIFORNIA RESEARCH AND POLICY  
CENTER, and SEVENTH GENERATION ADVISORS.**

---

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**APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF  
AND STATEMENT OF INTERESTS OF *AMICI CURIAE***

TO THE HONORABLE JUSTICES OF THE CALIFORNIA COURT OF  
APPEAL, SECOND APPELLATE DISTRICT, DIVISION THREE:

*Amici curiae* Surfrider Foundation, Heal the Bay, the 5 Gyres Institute, Environment California Research and Policy Center, and Seventh Generation Advisors (collectively, “*amici*”) make this application to file the accompanying brief pursuant to California Rules of Court, Rule 8.200, subd. (c)(2). *Amici* believe that our brief will assist the Court by providing further documentation that the challenged County ordinance is a valid exercise of Los Angeles County’s police power, that the ordinance’s paper bag purchase requirement is not a “tax” under Proposition 26, and that the Court should uphold the ordinance given the significant adverse impacts of single-use plastic bag litter on urban and marine environments.

Surfrider Foundation (“Surfrider”) is a grassroots, non-profit environmental organization dedicated to the protection and enjoyment of the world’s oceans, waves, and beaches for all people, through a powerful activist network. Organized as a 501(c)(3) non-profit corporation, Surfrider brings this amicus brief on behalf of more than 250,000 supporters, activists, and members who live in the United States. Surfrider has over 80 local chapters nationwide, including the volunteer-based grassroots

chapters located in Los Angeles County, including the West Los Angeles/Malibu, South Bay, and Long Beach Chapters. Surfrider has a particular interest in protecting Los Angeles County beaches and waterways. Surfrider brings this action on its own institutional behalf and on behalf of its members, board, and staff, some of whom regularly enjoy and will continue to enjoy surfing, bathing, swimming, and recreating in the waters of Los Angeles County. The interests of Surfrider and its members, board, and staff in surfing, bathing, swimming, and recreating in the waters of Los Angeles County have been, and will continue to be, harmed by the prevalence of physical trash, including single-use bags, impacting these waters and the wildlife that live in Los Angeles County's waterways, wetlands, and coast. Surfrider, its members, board, and staff have worked to protect the coastal environment, including the beaches, waterways, and related wildlife habitat in Los Angeles County for twenty-eight years, and have expended significant organizational resources on advocacy and public education efforts aimed at protecting the oceans, waves, and beaches in Los Angeles County. Specifically, in support of the Los Angeles County bag ban, Surfrider Foundation submitted written commentary, participated in the public hearings, and educated the public on the matter.

Heal the Bay is a regional nonprofit organization based in Santa Monica, California with 13,000 volunteers and members. Founded in 1985, Heal the Bay is dedicated to making coastal waters and watersheds in

Southern California, including the Santa Monica Bay, safe, healthy and clean for all users. Heal the Bay uses science, education, community action and advocacy to pursue these objectives.

Heal the Bay frequently participates in proceedings related to preventing plastic pollution and improving water quality in California, and has long advocated for legislation banning single-use plastic bags, both at the state and local levels. Plastic litter, including plastic bag litter, is a source of urban and beach blight, and is a persistent threat to marine life because it may never completely biodegrade. Heal the Bay has worked with local governments, including the City of Santa Monica, City of Long Beach, and the County of Los Angeles, to develop and successfully pass ordinances banning single-use plastic bags. Specifically, Heal the Bay was a participant in the lengthy stakeholder process in developing Los Angeles County's single-use bag ordinance. Heal the Bay submitted extensive comments on Los Angeles County's environmental impact report and drafts of the single-use bag ordinance, testified at all hearings on the issue, and educated its members about the ordinance. The interests of Heal the Bay and its members have been, and will continue to be, harmed by the prevalence of physical trash, including single-use bags, impacting Los Angeles coastal waterbodies.

The 5 Gyres Institute is a non-profit organization that researches the impacts of plastic pollution in the global ocean, then returns to land to

mitigate the loss of plastic to the sea through education, policy, and product change. By chasing the problem of plastic pollution from environmental impacts to consumer and producer behavior, the 5 Gyres Institute believes it can help save the seas. In recent years, the 5 Gyres Institute has traveled more than 40,000 miles through all of the five subtropical ocean gyres and the Great Lakes. The 5 Gyres Institute is focused on solutions that address individual products, their production and use, and the policies that manage their full life-cycle. The 5 Gyres Institute provides unbiased, research-based testimony on what it finds around the world and its local work in California watersheds.

Environment California Research and Policy Center (“Environment California”) is a statewide, citizen-based environmental advocacy organization with approximately 53,000 members and 183,000 email supporters in California. Organized as a 501(c)(3) non-profit corporation, Environment California has offices in Los Angeles, San Francisco, and Sacramento. Environment California works to preserve state parks, protect public health, build a clean energy future, and keep plastic out of the Pacific Ocean. Environment California is committed to ending environmental damage and wildlife injuries from marine debris, and has worked to ban single-use plastic bags in local communities and statewide.

Seventh Generation Advisors (“SGA”) is organized as a 501(c)(3) non-profit corporation and was founded by former Secretary of the

California Environmental Protection Agency Terry Tamminen. SGA puts into modern practice the ancient Native American philosophy that the decisions we make today should result in a sustainable world seven generations into the future. SGA works in the areas of energy, water, and natural resources, and is known worldwide for climate change policy. For the last six years, SGA has focused its ocean work solely on source reduction of plastic trash. SGA works locally, regionally, nationally, and internationally on plastic trash reduction, and specifically plastic bag ban legislation and policy. SGA serves as the facilitator and coordinator for the Clean Seas Coalition, a growing group of environmentalists, scientists, lawmakers, students, community leaders, and businesses pushing to strengthen laws reducing trash in seas and on beaches. SGA also acts as the clearinghouse for information for both the California and Atlantic divisions of the Clean Seas Coalition. SGA brings this action on its own institutional behalf, and on behalf of its board and staff who regularly enjoy and will continue to enjoy surfing, bathing, swimming, and recreating in the waters of Los Angeles County. The interests of SGA, its board, and its staff in surfing, bathing, swimming, and recreating in the waters of Los Angeles County have been, and will continue to be, harmed by the prevalence of physical trash, including single-use bags, impacting Los Angeles coastal waterbodies.

Pursuant to California Rules of Court, Rule 8.200, subd. (c)(3), *amici* declare that no party or counsel for a party in the pending appeal authored the accompanying brief in whole or in part. Furthermore, no party, counsel for party, or other person or entity made a monetary contribution intended to fund the preparation or submission of the accompanying brief.

The decision of this Court will directly affect *amici*, and *amici* may assist the Court's decision through their unique perspectives. Accordingly, *amici* respectfully request the permission of the Justices to file this *amici curiae* brief.

Dated: December 13, 2012

By: \_\_\_\_\_  
Sean B. Hecht  
Frank G. Wells Environmental Law  
Clinic  
Counsel for *Amici* Surfrider Foundation,  
Heal the Bay, The 5 Gyres Institute,  
Environment California Research and  
Policy Center, and Seventh Generation  
Advisors.

## *AMICI CURIAE BRIEF*

### **I. Introduction**

Ordinance No. 2010-0059 (“Ordinance”) (Joint App. (“JA”), Vol. 3, 464-473; 592 [3 JA 464-473: 592]), which prohibits stores in unincorporated areas of Los Angeles County (“County”) from providing customers with plastic carryout bags and requires those stores to sell each paper carryout bag for 10 cents, does not impose a tax subject to the voting requirements of Proposition 26. The Ordinance, including its requirement that consumers who wish to purchase paper carryout bags pay 10 cents each (“Bag Purchase Requirement”) (Ord. § 12.85.040), is a valid exercise of the County’s regulatory police power, and is not a tax. Article XI, section 7 of California’s Constitution permits the County to make and enforce ordinances to protect the general health and welfare. The County enacted the Ordinance pursuant to its constitutional police powers as a rational regulatory response to the serious impacts to public health and welfare that plastic bags impose on Los Angeles County, its residents, and the region. The Court should uphold the Superior Court’s judgment to protect the Ordinance and other environmental regulatory programs from voting requirements that were designed for government revenue-raising mechanisms.

The Ordinance regulates economic transactions between private parties to achieve positive environmental outcomes. Plastic bag use has

significant environmental and economic impacts. The Ordinance has been remarkably successful in reducing both plastic and paper carryout bag waste. In the year since its enactment, the County Department of Public Works cites that the Ordinance has resulted in a 94 percent reduction in single-use bag usage at large retailers and pharmacies, including the elimination of all single-use plastic bags and a 25 percent reduction in paper bags. (L.A. County Dept. of Public Works, Implementation of the County of Los Angeles Plastic and Paper Carryout Bag Ordinance (Nov. 2012) p. 1 (hereafter County's November 2012 Status Report).<sup>1</sup>)

Quite unlike a tax, the Ordinance has resulted in public cost-savings as well as positive environmental outcomes, which is why numerous local governments across the state and nation have adopted similar laws and why the Ordinance receives broad-based public support. The Ordinance is now under legal attack from the plastic bag manufacturing industry. While Appellants assert in their Reply Brief that the use of plastic bags is not at issue in this lawsuit (Appellants' Reply Brief at p. 26), their aim is to invalidate the entire Ordinance, including the ban on plastic bags. This case is an attempt by a major plastic bag manufacturer to use Proposition 26 as a mechanism to invalidate the plastic bag ban under the guise of attacking the Ordinance's other provision, which mandates that retailers not

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<sup>1</sup> Available at < <http://dpw.lacounty.gov/epd/aboutthebag/PDF/Bag%20Ban%20Status%20Nov%202012.pdf>>.

offer single-use paper bags for free, and instead require consumers to purchase those bags if consumers want them. Unfortunately for local governments, this lawsuit is one prong of a large-scale, coordinated attack by the plastics industry on bag bans across California and the nation.

## **II. Argument**

### **A. The Ordinance is a Valid Exercise of the County’s Police Power as an Integral Piece of a Regulatory Program to Remedy the Harmful Economic and Environmental Impacts of Plastic Bag Pollution.**

A county has broad authority to make and enforce ordinances. (Cal. Const., art. XI, § 7.) A county ordinance generally will “be upheld if ‘it is reasonably related to promoting the public health, safety, comfort, and welfare, and if the means adopted to accomplish that promotion are reasonably appropriate to that purpose.’” (*Sunset Amusement Co. v. Bd. of Police Commissioners* (1972) 7 Cal.3d 64, 72 [101 Cal.Rptr. 768, 496 P.2d 840] [citations omitted].) The County Board of Supervisors properly exercised its police power to protect public health and welfare in enacting the Ordinance.

The Ordinance was enacted to reduce the County’s economic burden from litter and to protect the health of waterways and the public from plastic debris. Each year, approximately six billion single-use plastic bags are consumed in the County. (Certified Record (“CR”), Vol. 1, 0047 [1 CR 0047].) Plastic bags are easily carried by the air and water, and make up as

much as 25 percent of the litter stream.<sup>2</sup> (*See, e.g.*, 1 CR 0057-0058 [noting that plastic bags constituted 25 percent of the weight and 19 percent of the volume of trash collected during the 2004 Great Los Angeles River Clean Up].) As noted in the County’s environmental review documents, the County’s objective is to

substantially reduce the operational cost and environmental degradation associated with the use of plastic carryout bags in the County, particularly the component of the litter stream composed of plastic bags, and reduce the associated government funds used for prevention, cleanup and enforcement efforts.

(2 JA 0476, 0521.) Other goals of the Ordinance include blight prevention, protection of coastal waterways and wildlife, sustainability, and landfill disposal reduction. (*Ibid.*) The Ordinance has been effective at reducing the use of plastic bags as well as paper bags in the County. (County’s November 2012 Status Report, *supra*, at p. 1.)

**1. The Ordinance Constitutes a Proper Exercise of the County’s Police Power, and Thus Does Not Impose a Tax, as a Matter of Law.**

As the County has demonstrated in its brief, and as the Superior Court has held, the Ordinance is well within the County’s constitutional police powers. These powers extend to the limits of the County’s regulatory authority. “A city’s police power ‘is not a circumscribed

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<sup>2</sup> The California Integrated Waste Management Board estimates that plastic bags comprise 0.4 percent of California’s total waste stream by weight, but contribute significantly to litter, especially within catch basins (openings in the curb into which stormwater flows). 3 JA 0045.

prerogative, but is elastic and, in keeping with the growth of knowledge and the belief in the popular mind of the need for its application, capable of expansion to meet existing conditions of modern life, and thereby keep pace with the social, economic, moral, and intellectual evolution of the human race.’’ (*Richeson v. Helal* (2007) 158 Cal.App.4th 268 [70 Cal.Rptr.3d 18], opn. mod. Dec. 21, 2007, review den. Feb. 20, 2008 [citation omitted].) Legislative enactments that further legitimate regulatory objectives under the traditional police powers should be construed broadly, with a presumption of validity. When a county’s action “is challenged as not being a valid exercise of police power, all presumptions favor its validity, and it will be upheld unless its unconstitutionality clearly and unmistakably appears.” (*San Diego County Veterinary Medical Assn. v. County of San Diego* (2004) 116 Cal.App.4th 1129 [10 Cal.Rptr.3d 885]; *Community Memorial Hospital v. County of Ventura* (1996) 50 Cal.App.4th 199, 206 [56 Cal.Rptr.2d 732].)

Contrary to Appellants’ arguments, “legitimate exercise of the police power” cannot violate Proposition 26, which regulates only exercises of the taxing power. (*See* Appellants’ Reply Brief at pp. 25-26.) A legitimate use of the police power is not, and cannot be, a tax. Thus, Proposition 26 cannot apply to the Ordinance at all if the Ordinance is not a “levy, charge, or exaction” under Proposition 26’s definition. (Cal. Const., art. XIII C, § 1, subd. (e).) The County has demonstrated that the Ordinance does not fall

into any of these categories. (Respondents' Brief at pp. 16-34.) Rather, the County's purpose in enacting the Ordinance was to use its regulatory power to substantially reduce costs and environmental degradation from the use of plastic bags. (2 JA 0476, 0521.) Thus, any doubt must be resolved in favor of viewing the Ordinance as a lawful exercise of police powers (although there is no such doubt here). While Appellants claim in their Reply Brief that the Ordinance is "an extraordinary and unprecedented usurpation of power by a local government, and would raise serious constitutional questions" (Appellants' Reply Brief at p. 25), they cite no authority at all for this proposition, which is demonstrably incorrect given the many other local governments that have enacted similar laws. (*See infra* pt. II.B.3.) They have not made any showing that this is the case, much less the "clear[] and unmistakabl[e]" demonstration of unconstitutionality required by law.

As the County has established in its brief, the Ordinance is not a "levy, charge, or exaction" under Proposition 26; moreover, based on the record in front of the Court and the clear evidence of the purpose and effect of the Ordinance that we outline below, the Ordinance is a valid exercise of traditional police powers to protect public health, safety, comfort, and welfare, employing means reasonably appropriate to that purpose.

**2. The County Properly Exercised its Police Power in Response to the Negative Economic Consequences of Plastic Bag Litter.**

As the County has demonstrated in its Respondents' Brief, courts do not and should not examine the economic wisdom of legislative enactments. (Respondents' Brief at p. 44 and authority cited therein; *Loska v. Superior Court* (1986) 188 Cal.App.3d 569, 575 [233 Cal.Rptr. 213] [holding that "a city has broad discretion to determine what is reasonable in endeavoring to protect public safety, health, morals, and general welfare."].) Nonetheless, evidence of the economic benefits of the Ordinance is useful here to demonstrate that the County's regulation furthers legitimate governmental objectives.

The Ordinance is reasonably related to promoting the economic welfare of the County and its residents. Plastic bag litter has significant negative economic consequences for local governments and consumers. Single-use plastic bags do not biodegrade, and travel easily through air and water. (3 JA 0521-0524; 2 CR 049.) Consequently, single-use plastic bags contribute significantly to the County's larger plastic debris problem. Plastic debris imposes significant direct costs on the County, including costs associated with landfill trash, marine pollution, urban and beach blight, and litter clean-up. Moreover, banning plastic bags—which are a major component of trash—reduces the regulatory costs of complying with state and federal rules that require the County to eliminate all trash from local waterways. Additionally, individual taxpayers and consumers within the County benefit economically from the plastic bag ban because of both

reduced costs to the County and net savings for individual consumers. Finally, the plastic bag ban reduces the negative economic impacts of plastic pollution on coastal recreation and tourism in the County. The Ordinance reasonably and appropriately reduces the impacts of single-use bags in the County. Reducing the negative economic impacts of single-use bag litter on the County and its residents is well within the police power of the County. In stark contrast to Appellants' attempts to paint the Ordinance as a burden on consumers, the Ordinance saves taxpayers money by reducing litter clean-up costs and eliminating costs of providing free bags.

***a. Single-Use Plastic Bags Impose Significant Direct Economic Costs on the County.***

Discarded plastic bags impose significant direct costs on the County. According to the California Department of Transportation, state and local governments in California spend over \$375 million per year on litter prevention and cleanup. (3 JA 0521-0522; Don't Trash California, CalTrans, Facts at a Glance.<sup>3</sup>) The County Department of Public Works and the Los Angeles County Flood Control District implement a variety of programs to reduce litter in the County. (6 CR 1559-1561; 3 JA 0521-0522.) For example, the County sweeps over 81,000 miles of streets weekly to prevent litter from entering catch basins and the storm drain system, and cleans out litter from 78,000 County-owned catch basins and

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<sup>3</sup> Available at <<http://www.donttrashcalifornia.info/pdf/Statistics.pdf>>.

additional city-owned catch basins at least once per year. (5 CR 1561.)

The County also installs and maintains devices to remove litter from the storm drain system. (*Ibid.*)

Each year, the County and the Los Angeles County Flood Control District spend \$24 million or more on these and other cleanup and litter prevention and education programs. (3 JA 0521-0522; 3 CR 713.) This sum includes the costs of maintenance of structural and treatment control best management practices, municipal street cleaning, catch basin cleaning, trash collection and recycling, and associated capital costs. (3 CR 713.) Cleanup and litter prevention costs increased in the years leading up to the Ordinance, from \$18.1 million during fiscal year (FY) 2005-2006 to over \$24 million in FY 2008-2009.<sup>4</sup>

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<sup>4</sup> See L.A. County Municipal Storm Water Permit (Order 01-182) Individual Annual Report Form (Oct. 2010) *available at* <<http://www.ladpw.org/wmd/NPDESRSA/AnnualReport/2010/Appendix%20D%20%20Principal%20Permittee%20Annual%20Report/Individual%20Annual%20Report%202009-10.pdf>>; L.A. County Municipal Storm Water Permit (Order 01-182) Individual Annual Report Form (Oct. 2009), *available at* <<http://dpw.lacounty.gov/wmd/NPDESRSA/AnnualReport/2009/Appendix%20D%20%20Principal%20Permittee%20Annual%20Report/Principal%20Permittee%20Annual%20Report.pdf>>; L.A. County Municipal Storm Water Permit (Order 01-182) Individual Annual Report Form (Oct. 2008), *available at* <<http://dpw.lacounty.gov/wmd/NPDESRSA/AnnualReport/2008/Appendix%20D%20%20Principal%20Permittee%20Annual%20Report/Principal%20Permittee%20&%20County%20Annual%20Report%20FY07-08.pdf>>; L.A. County Municipal Storm Water Permit (Order 01-182) Individual Annual Report Form (Oct. 2007), *available at* <<http://www.ladpw.org/wmd/NPDESRSA/AnnualReport/2007/Appendix%20D%20%20Principal%20Permittee%20Annual%20Report/Annual%20Rpt%2006-07.pdf>>; L.A. County Municipal Storm Water

By drastically reducing the number of plastic bags sent to landfills, the Ordinance also reduces plastic bag control costs at waste facilities. Plastic bags require local landfill and solid waste transfer station operators to implement costly measures to prevent bags from escaping their facilities. (3 JA 0525; 6 CR 1557.) On top of the costs of providing cover and fences, each landfill spends approximately \$25,000 per month and each solid waste transfer station spends approximately \$1,500 per month to send roving patrols to pick up littered plastic bags. (3 JA 0525; 6 CR 1557.) Roving patrol costs are passed onto County residents in the form of higher trash disposal costs. (6 CR 1557; 1 CR 58.)

***b. Single-Use Plastic Bags Impose Significant Regulatory Costs on the County and its Taxpayers.***

The Ordinance will significantly reduce costs to the County and numerous other entities in complying with mandatory federal pollution limits for trash-impaired waterways. These pollution limits, which implement the Federal Water Pollution Control Act (the “Clean Water Act”) and state-law water quality requirements, recognize the significant economic and environmental costs of litter, including plastic bag debris. Trash pollution limits are enforced through the Clean Water Act’s Total Maximum Daily Loads (“TMDLs”), which specify the maximum amount

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Permit (Order 01-182) Individual Annual Report Form (Oct. 2006) available at <[http://www.ladpw.org/wmd/NPDESRSA/AnnualReport/2006/Appendix%20D%20%20Principal%20Permittee%20Annual%20Report/PrincipalPermittee\\_AnnualReportFY05-06.pdf](http://www.ladpw.org/wmd/NPDESRSA/AnnualReport/2006/Appendix%20D%20%20Principal%20Permittee%20Annual%20Report/PrincipalPermittee_AnnualReportFY05-06.pdf)>.

of a pollutant that can be discharged into a given waterway from all sources. (33 U.S.C § 1313, subd. (d)(1)(A); 40 C.F.R. § 130.7, subd. (b).) The TMDL for trash in the Los Angeles River and Ballona Creek—both of which discharge untreated stormwater directly onto local beaches and into the Pacific Ocean—requires a 10 percent annual reduction in trash entering the waterways, down to a target of zero trash by 2014. (5 CR 1561.)

Compliance with the trash TMDL measures will cost the County and its taxpayers money. Households in the Los Angeles River watershed will fund approximately half of the Los Angeles River compliance cost through fees, which are predicted to increase to approximately \$14.55 per household per year. (L.A. Regional Water Quality Control Bd., *Trash Total Maximum Daily Loads for the Los Angeles River Watershed* (2007) p. 42 (hereafter *L.A. River TMDL*).<sup>5</sup>) The other half of the cost will be borne by commercial, industrial, municipal, and public entities. (*Ibid.*) By passing the Ordinance, the County has decreased its regulatory compliance costs by reducing trash pollution at the source. Additionally, the Ordinance has reduced regulatory compliance costs associated with the Santa Monica Bay Marine Debris TMDL, which covers the Ballona Creek watershed. The Regional Water Quality Control Board provided the County a three-year extension on the compliance deadline associated with the Santa Monica

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<sup>5</sup> Available at <<http://www.epa.gov/waters/tmdl/docs/34863-RevisedStaffReport2v2.pdf>>.

Bay Marine Debris TMDL in response to the County's ban of single-use plastic bags, among other items. (Wu, L.A. Regional Water Quality Control Bd., Monitoring Trash, TMDLs and Efforts towards Compliance (2011) p. 19.<sup>6</sup>)

***c. Single-Use Plastic Bags Impose Costs on Consumers and Taxpayers That Will be Reduced by Implementation of the Ordinance***

Single-use bags harm all consumers, and especially the poor, because bag purchase costs are embedded in the prices of food, and because litter clean-up costs are charged to taxpayers. (Respondents' Brief at p. 37; 3 JA 0521-0522.) Grocery stores currently embed 2 to 5 cents per plastic bag and 5 to 23 cents per paper bag in food prices. (3 JA 0556-0557; 6 CR 1511; 3 JA 0556.) Thus, by eliminating the cost to retailers of providing bags free of charge, the Ordinance saves approximately \$18 to \$30 per person per year.<sup>7</sup> (3 JA 556 [noting that the annual cost to retailers of providing plastic bags and paper bags is \$18 and \$30 respectively per

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<sup>6</sup> Available at

<[http://www.waterboards.ca.gov/mywaterquality/monitoring\\_council/collaboration\\_network/docs/ewu081711.pdf](http://www.waterboards.ca.gov/mywaterquality/monitoring_council/collaboration_network/docs/ewu081711.pdf)>.

<sup>7</sup> Another estimate by AECOM Technical Services of the hidden cost of plastic bags in Los Angeles County in 2010 is \$3.25 per person annually, assuming each person uses 433 bags each year at an average cost of \$0.008 per plastic bag. 5 CR 155. The Metropolitan Washington Council of Governments' estimate of hidden costs is similar to the County's, noting that the average consumer pays \$37.50 per year in hidden bag costs. Metropolitan Washington Council of Governments, Plastic Bag Report 2012 Update (Nov. 5 2012) p. 11, available at <<http://www.mwcog.org/uploads/pub-documents/p15dW1820121105113857.pdf>>.

consumer, and such costs were passed along to consumers].) Against these clear savings to taxpayers, the County estimates that the combined costs of the Ordinance to each unincorporated County resident is less than \$4 per year, including the cost of purchasing replacement plastic bags for trash liners and their associated taxes. (County’s November 2012 Status Report, *supra*, at p. 1.) It should be noted that this cost is less than the County’s original estimate of \$5.72 per resident per year because paper bag consumption has decreased rather than increased following implementation of the Ordinance, and the State Board of Equalization has since determined that paper bags are not taxable items. (*Ibid.*)

***d. Plastic Bag Pollution Has Negative Impacts on Coastal Recreation and Tourism***

Plastic bag debris that ends up on County beaches reduces recreational opportunities and negatively impacts the County’s tourism industry. Floating debris, including plastic bags, will end up on beaches or in the ocean if not captured and removed, repelling visitors. (L.A. River TMDL, *supra*, at p. 7.) According to a report prepared for the California Natural Resources Agency, “[a]ll economic activities relating to coastal recreation are affected by the quality of the environment,” and the level of participation in coastal recreation industries affects many other industries and sectors of the economy. (Kildow & Colgan, National Ocean Economics Program, California’s Ocean Economy: A Report to the

Resources Agency, State of California (2005) p. 106 [noting, e.g., coastal recreation's impacts on the hotel, restaurant, and service industries].<sup>8</sup>)

According to the report, tourism in California generates more than \$75 billion in spending every year. (*Ibid.*) "California has the largest Ocean Economy in the United States, ranking number one overall for both employment and gross state product . . . ," with a gross state product of approximately \$42.9 billion in 2000. (*Id.* at p. 1 [defining "Ocean Economy" to include coastal tourism and recreation, construction, living resources, offshore minerals, ship and boat building and repair, and maritime transportation and ports].) Southern California's world-famous sandy beaches and desirable weather conditions are critical components of the state's tourism industry. (*Ibid.*) In 2000, over twelve million people visited California beaches, each person making an average of more than twelve trips per year. (*Id.* at 107). One study estimated that local beachgoers in California spend as much as \$9.5 billion annually, with the average visitor making \$25 in beach-related expenditures per trip.

(Hannemann et al., Southern California Beach Valuation Project (2004) p. 1 [citing Pendleton, Harnessing Ocean Observing Technologies to Improve Beach Management: Examining the Potential Economic Benefits of An Improvement in the Southern California Coastal Ocean Observing System

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<sup>8</sup> Available at [http://resources.ca.gov/press\\_documents/CA\\_Ocean\\_Econ\\_Report.pdf](http://resources.ca.gov/press_documents/CA_Ocean_Econ_Report.pdf).

(2004)].<sup>9</sup>) This study estimates the average annual expenditures of beach visitors in Los Angeles and Orange Counties to be \$1.8 billion in 2004.

(*Ibid.*) In addition, the non-market value associated with beach-going visits in California is estimated to range from \$2.25 billion to \$7.5 billion annually. (Pendleton, *The Non-Market Value of Beach Recreation in California* (2006) 74 *Shore & Beach* 34, 37.<sup>10</sup>) Preventing plastic bag litter from ending up on beaches, where it interferes with recreational activities, thus protects the value of beach tourism and other beach recreation in the County.

***e. The Ordinance Reasonably and Appropriately Reduces the Impacts of Single-Use Bags in Los Angeles County***

Reducing the negative economic impacts of single-use bag litter on Los Angeles County and its residents is well within the police power of the County. The Ordinance has achieved a 94 percent reduction in overall plastic and paper bag usage at large stores and pharmacies, which includes eliminating all single-use plastic bags and reducing paper bag usage by 25 percent. (County's November 2012 Status Report, *supra*, at p. 1.) In stark contrast to Appellants' attempts to paint the Ordinance as a burden on consumers, the Ordinance can save taxpayers money by reducing litter clean-up costs and eliminating costs of providing free bags. By drastically

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<sup>9</sup> Available at <[http://coastalsocioeconomics.noaa.gov/core/scbeach/scab\\_modelling\\_final.pdf](http://coastalsocioeconomics.noaa.gov/core/scbeach/scab_modelling_final.pdf)>.

<sup>10</sup> Available at <[http://www.valueofwaves.org/uploads/1/1/4/2/11420190/pendleton\\_and\\_kildow\\_2006.pdf](http://www.valueofwaves.org/uploads/1/1/4/2/11420190/pendleton_and_kildow_2006.pdf)>.

reducing the amount of plastic bags sent to landfills, the Ordinance also reduces plastic bag control costs at waste facilities.

**3. The County Properly Exercised its Police Power in Response to Urban Blight, Marine Pollution, and Other Negative Environmental Consequences of Plastic Bag Litter.**

By reducing plastic bag use and pollution, the Ordinance promotes the public health and safety of the County and its residents, as well as the welfare of the environment within the County and beyond. By achieving a 94 percent reduction in overall plastic and paper bag usage at large stores and pharmacies and eliminating all single-use plastic bags (County's November 2012 Status Report, *supra*, at p. 1), the Ordinance reduces litter and protects waterways and public health from the deleterious effects of plastic bag debris, including local impacts on marine life, quality of life, tourism, and recreation in our neighborhoods, waterways, and beaches, as well as more far-reaching impacts on our oceans.

***a. Plastic Bags Are Ubiquitous and Represent a Significant Portion of Plastic Trash Pollution.***

Single-use plastic bags make up a significant portion of the urban litter stream and marine plastic debris. Manufacturers produce plastic bags at such a large volume that Guinness World Records has named the plastic bag "the most ubiquitous consumer item in the world." (Doucette, *The Plastic Bag Wars* (Aug. 4, 2011) Rolling Stone

<<http://www.rollingstone.com/politics/news/the-plastic-bag-wars->

20110725> [as of Dec. 6, 2012]). American shoppers consume about 102 billion single-use plastic bags annually. (*Ibid.* See also U.S. Internat. Trade Com., Polyethylene Retail Carrier Bags from Indonesia, Taiwan, and Vietnam, pub. No. 4080 (May 2009) p. IV-7 [including statistics for 2008 U.S. plastic bag consumption].<sup>11</sup>) Assuming that the average plastic bag is one foot long, if the United States population tied its annual consumption of plastic bags together in a giant chain, the chain could reach around the Earth's equator 773 times.<sup>12</sup>

Due to their lightweight nature and the fact that they may last indefinitely, plastic bags are more likely than reusable bags to end up as litter and to impact water quality locally and globally. (3 JA 521-524.) Most of the trash in the ocean is plastic. (Gordon, Eliminating Land-Based Discharges of Marine Debris in California: A Plan of Action from the Plastic Debris Project (Cal. Coastal Com. 2006) p. 2 [reporting that 60 to 80 percent of all marine debris, and 90 percent of all floating debris, is plastic].<sup>13</sup>) Plastic pollution is found floating in all of the world's oceans from the polar regions to the equator. (Allsopp et al., GreenPeace, Plastic

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<sup>11</sup> Available at <[http://www.usitc.gov/publications/701\\_731/pub4144.pdf](http://www.usitc.gov/publications/701_731/pub4144.pdf)>.

<sup>12</sup> This calculation is based on the Earth's equatorial circumference of 25,000 miles (132,000,000 feet) and a 2008 U.S. plastic bag consumption of almost 102 billion bags. See U.S. Internat. Trade Com., Polyethylene Retail Carrier Bags from Indonesia, Taiwan, and Vietnam, *supra*, at p. IV-7.

<sup>13</sup> Available at <[www.plasticdebris.org/CA\\_Action\\_Plan\\_2006.pdf](http://www.plasticdebris.org/CA_Action_Plan_2006.pdf)>.

Debris in the World's Oceans (2006) p. 5.<sup>14</sup>) Over the past twenty-five years, plastic bags have been one of the top items collected on International Coastal Cleanup Day. (Ocean Conservancy, Tracking Trash: 25 Years of Action for the Ocean (2011) p. 5.<sup>15</sup>) The Ocean Conservancy reports that, on International Coastal Cleanup Day in 2010, plastic bags were the most commonly collected item after cigarettes and plastic bottles, accounting for 10 percent of total debris items collected worldwide. (*Id.* at 34. *See also* Ocean Conservancy, The Ocean Trash Index (2012) p. 36 [evidencing that over 64,000 plastic bags were collected in California on International Coastal Cleanup Day in 2012].<sup>16</sup>) Over the last twenty-five years, International Coastal Cleanup volunteers have collected more than 7 million plastic bags. (Ocean Conservancy, Tracking Trash: 25 Years of Action for the Ocean, *supra*, at p. 5.) This number is staggering, especially given that International Coastal Cleanup events only happen once per year.

***b. Plastic Bags Harm the Environment, Especially the Marine Environment.***

Plastic bag pollution adversely impacts the environment generally and marine wildlife in particular, as extensively documented in the County's Final Environmental Impact Report (FEIR) entitled "Ordinances

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<sup>14</sup> Available at <[http://www.unep.org/regionalseas/marinelitter/publications/docs/plastic\\_ocean\\_report.pdf](http://www.unep.org/regionalseas/marinelitter/publications/docs/plastic_ocean_report.pdf)>.

<sup>15</sup> Available at <[http://act.oceanconservancy.org/pdf/Marine\\_Debris\\_2011\\_Report\\_OC.pdf](http://act.oceanconservancy.org/pdf/Marine_Debris_2011_Report_OC.pdf)>.

<sup>16</sup> Available at <<http://www.oceanconservancy.org/our-work/marine-debris/2012-icc-data-pdf.pdf>>.

to Ban Plastic Carryout Bags in Los Angeles County.” (3 JA 481-503.)

Plastic bags are made from fossil fuels—typically, natural gas and petroleum. (Lajeunesse, *Plastic Bags: Plastic Bags are Not Created Equal Because They Are Meant for Different Purposes* (2004) 82 *Chemical & Engineering News* 51.<sup>17</sup>) Most plastic bags, although designed to be used only for minutes, may never degrade. (3 JA 0538-0540; Assemb. Bill No. 2449 (2005-2006 Reg. Sess.) § 1 [codified at Pub. Res. Code §§ 42250-42257].) Negatively buoyant plastics, including plastic bags, wraps, and films, have been found in the marine environment worldwide, and represent the majority of marine debris on the seafloor.<sup>18</sup> Plastic bags also have been found to accumulate in the nearshore environment (Hinojosa & Thiel, *Floating Marine Debris in Fjords, Gulfs and Channels of Southern Chile* (2009) 58 *Marine Pollution Bulletin* 341; Galgani et al., *Distribution and Abundance of Debris on the Continental Shelf of the Bay of Biscay and in Seine Bay* (1995) 30 *Marine Pollution Bulletin* 58; Galgani et al.,

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<sup>17</sup> Available at

<<http://pubs.acs.org/cen/whatstuff/stuff/8238plasticbags.html>>.

<sup>18</sup> Galgani et al., *Litter on the Sea Floor Along European Coasts* (2000) 40 *Marine Pollution Bulletin* 516; Hess, Ribic, & Vining, *Benthic Marine Debris, with an Emphasis on Fishery-Related Items, Surrounding Kodiak Island, Alaska, 1994–1996* (1999) 38 *Marine Pollution Bulletin* 885; Stefatos et al., *Marine Debris on the Seafloor of the Mediterranean Sea: Examples from Two Enclosed Gulfs in Western Greece* (1999) 36 *Marine Pollution Bulletin* 389; Galgani, Souplet, & Cadiou, *Accumulation of Debris on the Deep Sea Floor of the French Mediterranean Coast* (1996) 142 *Marine Ecology Progress Series* 225; Kanehiro, Tokai, & Matuda, *Marine Litter Composition and Distribution on the Seabed of Tokyo Bay* (1995) 31 *Fisheries Engineering* 195.

*Distribution and Abundance of Debris on the Continental Shelf of the North-Western Mediterranean Sea* (1995) 30 *Marine Pollution Bulletin* 30, 713–717.)

When plastic bag fragments find their way to the sea, seabirds and fish mistake them for food. (Teuten et al., *Transport and Release of Chemicals from Plastics to the Environment and to Wildlife* (2009) 364 *Philosophical Transactions of the Royal Society B: Biological Sciences* 2027, 2037.<sup>19</sup>) Floating plastic bags can resemble jellyfish, a common food source for sea turtles, and researchers commonly have found plastic bags in sea turtles' digestive tracts. (3 JA 0499, 0539; 5 CR 1266; Mrosovsky et al., *Leatherback Turtles: The Menace of Plastic* (2009) 58 *Marine Pollution Bulletin* 287 [noting that 37 percent of Leatherback turtle necropsies from 1968 to 2009 showed plastic in their stomachs, and plastic bags were the most commonly found item].<sup>20</sup>) Over 267 different species, from seabirds to turtles, seals, sea lions, whales, and fish, have suffered from entanglement or ingestion of marine debris, including plastic bags. (Allsopp et al., Greenpeace, *Plastic Debris in the World's Oceans*, *supra*, at p. 5; Laist, *Impacts of Marine Debris: Entanglement of Marine Life in Marine Debris Including a Comprehensive List of Species with Entanglement and Ingestion Records* (1996), in Coe & Rogers, *Marine*

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<sup>19</sup> Available at <<http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2873017/>>.

<sup>20</sup> Available at <[http://5gyres.org/media/Leatherback\\_turtles\\_The\\_menace\\_of\\_plastic.pdf](http://5gyres.org/media/Leatherback_turtles_The_menace_of_plastic.pdf)>.

Debris—Sources, Impacts and Solutions pp. 99-139.) Ingestion can lead to internal blockages and starvation, reproductive failure, toxic poisoning, and death. (U.S. Environmental Protection Agency, *Marine Debris Impacts*, <[http://www.epa.gov/owow/oceans/debris/md\\_impacts.html](http://www.epa.gov/owow/oceans/debris/md_impacts.html)> [as of Nov. 7, 2012] (hereafter EPA Marine Debris Impacts).) The County’s FEIR studied the impacts of plastic bag litter on marine wildlife local to the Southern California coast (3 JA 481-503; 537-39) and identified the endangered leatherback, green, loggerhead, and olive ridley turtles, amongst other marine wildlife, as threatened by the ingestion of plastic debris, including plastic bags. (3 JA 489-95; 538-39.)

Left in the marine environment, plastic breaks down into smaller and smaller particles that attract and accumulate toxic chemicals from surrounding seawater. Through ultraviolet degradation and hydrolysis (reactions that cause chemicals to decompose), plastic loses its elasticity; powered by the wind and waves, plastic gradually breaks down into smaller particles, eventually forming tiny particles of plastics called “microplastics.” (5 CR 1283; Cole et al., *Microplastics As Contaminants in the Marine Environment: A Review* (2011) 62 *Marine Pollution Bulletin* 2588;<sup>21</sup> Thompson et al., *Lost at Sea: Where is All the Plastic?* (2004) 304 *Science* 838; Andrady, *Plastics in the Environment* (2003) in *Plastics in the*

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<sup>21</sup> Available at <<http://www.sciencedirect.com/science/article/pii/S0025326X11005133>>.

Environment (ed. Andrady) p. 762.<sup>22</sup>). Microplastics, including fragmented plastic bags, can adsorb many persistent organic pollutants (POPs) in seawater, including polychlorinated biphenyls (PCBs), dichlorodiphenyltrichloroethane (DDT) and its metabolites, and polybrominated diphenyl ethers (PBDEs), and act as a global transport mechanism for these chemicals.<sup>23</sup> POPs are synthetic compounds used for pest and disease control, agriculture, and industry. (Stevenson, U. of So. Cal. Sea Grant, Plastic Debris in the California Marine Ecosystem: A Summary of Current Research, Solutions, Strategies, and Data Gaps (2011) p. 23 (hereafter Plastic Debris in the California Marine Ecosystem).<sup>24</sup>)

They have been linked to disease, behavioral and physical abnormalities, and adverse reproductive, developmental, neurological, endocrine, and

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<sup>22</sup> Available at <<http://www.sciencemag.org/content/304/5672/838>>.

<sup>23</sup> U.S. Environmental Protection Agency, Marine Debris in the North Pacific – A Summary of Existing Information and Identification of Data Gaps (2011) p. 9 (hereafter EPA Marine Debris in the North Pacific), available at <<http://www.epa.gov/region9/marine-debris/pdf/MarineDebris-NPacFinalAprvd.pdf>>; Teuten et al., *supra*, 364 *Philosophical Transactions of the Royal Society B: Biological Sciences* at 2036, 2040-42 [demonstrating that as a seabird, the Short-tailed shearwater, ingests additional plastic fragments, more PCBs accumulate in its tissues]. See also Rios et al., *Quantification of Persistent Organic Pollutants Adsorbed on Plastic Debris from the Northern Pacific Gyre's "Eastern Garbage Patch"* (2010) 12 *J. of Environmental Monitoring* 2226; Teuten et al., *Potential for Plastics to Transport Hydrophobic Contaminants* (2007) 41 *Environmental Science & Technology* 7759; Mato et al., *Plastic Resin Pellets as a Transport Medium for Toxic Chemicals in the Marine Environment* (2001) 35 *Environmental Science & Technology* 318.

<sup>24</sup> Available at <[http://calost.org/pdf/science-initiatives/marine%20debris/Plastic%20Report\\_10-4-11.pdf](http://calost.org/pdf/science-initiatives/marine%20debris/Plastic%20Report_10-4-11.pdf)>.

immunologic health impacts. (*Ibid.*) Strikingly, plastic debris has been found to accumulate contaminants at up to one million times the amount found in water alone. (EPA Marine Debris Impacts, *supra*; *see also* EPA Marine Debris in the North Pacific, *supra*, at p.9.)

Other pollutants may be added to plastics at the time of manufacturing and ultimately leach into the environment. (Plastic Debris in the California Marine Ecosystem, *supra*, at p. 24.) Up to 50 percent of the weight of plastics can consist of fillers, reinforcements, and additives, which are used as, for example, flame retardants and colorants. (*Ibid.*) Two of the most common plastic additives are phthalates and bisphenol A (BPA), which are linked to endocrine disruption in wildlife and humans. (*Ibid.*) Marine debris can act as a transport mechanism for these endocrine disrupters. (EPA Marine Debris in the North Pacific, *supra*, at p. 8. *See generally* Koch & Calafat, *Human Body Burdens of Chemicals Used in Plastic Manufacture* (2009) 364 *Philosophical Transactions of the Royal Society B: Biological Sciences* 2063.<sup>25</sup>) One study suggests that, due to the pervasive nature of plastic debris and wide use of plastics, these toxic chemicals may impact the entire food chain. (*See* EPA Marine Debris in the North Pacific, *supra*, at p.8.) Indeed, harmful chemicals leached by plastics are already present in the bloodstream and tissues of almost every

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<sup>25</sup> Available at <<http://rstb.royalsocietypublishing.org/content/364/1526/2063.full>>.

one of us, including newborns.<sup>26</sup> Microplastics pose similar threats to the more than 180 species of marine wildlife that have ingested them (Teuten et al., *supra*, 364 Philosophical Transactions of the Royal Society B: Biological Sciences at pp. 2036, 2040-42).

***c. Plastic Bags Harm Recreational Resources, Urban Communities, and Ecosystems in and Around Los Angeles County.***

Plastic bag pollution contributes significantly to litter and marine pollution in the County. Approximately six billion single-use plastic bags are consumed each year. (4 CR 1536.) This is equivalent to 600 bags per person per year. (*Ibid.*) Prior to the Ordinance, over 95 percent of plastic bags used in the County were discarded, creating approximately 45,000 tons of plastic bag waste every year. (*Ibid.*) Single-use plastic bags also made up as much as 25 percent of the litter stream. (1 CR 0057-0058.) During the 2004 Great Los Angeles River Clean Up, for example, plastic film litter, a category that includes plastic bags, made up 34 percent of the

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<sup>26</sup> For example, the National U.S. Environmental Protection Agency's Human Adipose Tissue Survey of 1986 identified styrene residues in all samples of human fat tissue taken in 1982. Leaching of BPA also has led to widespread human exposure. Ninety-five percent of people in a recent UC Centers of Disease Control study had a measurable amount of BPA in their urine. The prevalence and levels of BPA in the study are consistent with blood and tissue levels detected in 100 percent of pregnant women and their fetuses in Germany and Japan. These findings suggest that humans are continuously exposed to BPA. Vom Saal, *Low-Dose bisphenol A: Confirmed by an Extensive Literature* (2005) 7 Chemistry & Industry 14, available at <<http://endocrinedisruptors.missouri.edu/pdfarticles/vomsaalC-I2005.pdf>>.

total 60 cubic feet of litter collected. (4 CR 1558.)

All of this plastic bag trash and litter impairs the beneficial uses of waterways and watersheds in Los Angeles County. For example, the Los Angeles River, which flows into the Pacific Ocean, provides recreation benefits and habitat for numerous species of fish, birds, ducks, frogs, and turtles. (L.A. River TMDL, *supra*, at p. 7.) The river is accessible by County residents and used for many forms of recreation, including walking, jogging, horseback riding, bicycling, bird watching, photography, and crayfishing. (*Id.* at 8.) Habitat and recreational uses are impaired by plastic bag trash in the river, which deters recreational use and tourism and harms wildlife. (*Id.* at 15.)

Trash in waterways also creates significant local water quality problems. (*Ibid.*) Plastic trash can negatively affect local resources by inhibiting the growth of aquatic vegetation, by reducing spawning and other habitat for wildlife, and through ingestion by wildlife, as described further above. (*Ibid.*) The Los Angeles storm-drainage system consists of 1,500 miles of underground pipes and channels that are designed to prevent flooding and to channel stormwater through a collection system out to sea. (1 CR 190.) Stormwater runs from the street, into the gutter, and into a catch basin, and then is channeled directly into the ocean. (*Ibid.*) Thus, if not properly controlled, floating debris like plastic bags inevitably ends up on beaches where it repels visitors and degrades coastal waters. (L.A.

River TMDL, *supra*, at p. 16.) Eliminating plastic bags from the waste stream significantly reduces the negative impacts of plastic bag pollution on recreational resources, urban communities, and ecosystems.

Moreover, plastic bag litter captured in catch basins and other devices can prevent storm drains from functioning properly to prevent flooding. (1 CR 173.) Los Angeles County relies on more than 80,000 catch basins to collect runoff throughout its six major watersheds. (*Ibid.*) Plastic bags that are caught in storm drains can clog catch basins, storm drain inlet racks, and other devices. (*Ibid.*) This reduces the ability of the drainage system to channel flood waters and may result in flooding of adjacent neighborhoods. (*Ibid.*)

**B. Bag Bans and Purchase Requirements are Proven, Effective Policy Tools Utilized by Jurisdictions Across California and Throughout the World to Reduce Bag Pollution and Its Negative Economic and Environmental Impacts.**

Bag bans and purchase requirements are essential policy tools for governments burdened by plastic bag pollution. Neither recycling nor voluntary bag reduction programs are effective at combating the harmful economic and environmental impacts of single-use bags. The experiences of the numerous jurisdictions around the country and throughout the world that have successfully implemented single-use bag bans and purchase requirements show that these tools are effective at reducing plastic bag usage with minimal burden to consumers. While a plastic bag ban, on its

own, would have positive environmental impacts and would be amply justified without the Bag Purchase Requirement, the Ordinance's strategy—banning plastic bags and requiring consumers to pay retailers for paper bags—was developed to reduce plastic bag usage while minimizing any corresponding increase in paper bag usage. This strategy has had positive economic and environmental results for Los Angeles County, even more so than initially predicted.

**1. Neither Recycling nor Voluntary Reduction Programs are Effective at Combating Plastic Bag Pollution.**

Bag bans and purchase requirements are essential policy tools for local governments unable to recycle their way out of the plastic bag litter problem. In spite of the existence of recycling policies and voluntary single-use bag reduction programs, most plastic bags are never recycled, and instead enter the waste stream, storm sewer systems, and too often, the ocean. (3 JA 0540 [noting that the statewide recycling rate for plastic bags is still only 1 to 5 percent]. *See also 2009 Statewide Recycling Rate for Plastic Carryout Bags: At-Store Recycling Program* (Apr. 6, 2011) Cal. Dept. of Resources Recycling & Recovery <<http://www.calrecycle.ca.gov/Plastics/AtStore/AnnualRate/2009Rate.htm> > [as of Dec. 6, 2012] [reporting that the statewide recycling rate for plastic bags was only about 3 percent in 2009]). For instance, four years after Assembly Bill No. 2449 instituted a pilot program requiring most large

California retailers to host in-store plastic bag recycling programs, the statewide plastic bag recycling rate has remained virtually unchanged. (*The Failure of Plastic Bag Recycling* (Feb. 6, 2012) Californians Against Waste <<http://www.cawrecycles.org/node/5232>> [as of Dec. 6, 2012].)

Plastic bag recycling programs fail to solve the litter problem because plastic bags are extraordinarily costly and difficult to recycle. (6 CR 1555; Romer, *The Evolution of San Francisco's Plastic-Bag Ban* (2007) 1 Golden Gate U. Envtl. L.J. 439, 445.<sup>27</sup>) Thin, lightweight plastic bags placed in curbside recycling bins often jam screens used to separate materials and damage recycling equipment, thus hindering the overall recycling process. (6 CR 1555; *Bring Your Own Bag*, City of San Jose <<http://www.sanjoseca.gov/index.aspx?nid=1526>> [as of Dec. 6, 2012].)

As one illustration, the City of San Jose estimates costs of one million dollars per year to repair municipal recycling equipment jammed by plastic bags. (*Bring Your Own Bag*, City of San Jose <<http://www.sanjoseca.gov/index.aspx?nid=1526>> [as of Dec. 6, 2012].)

*See also* City of San Jose, Draft Environmental Impact Report: Single-Use Carryout Bag Ordinance, File No. PP09-193 (July 2012) p. 35 [“The City’s experience with recycling plastic bags has been that processing costs

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<sup>27</sup> Available at <<http://plasticbaglaws.org/wordpress/wp-content/uploads/2010/04/The-Evolution-of-SFs-Plastic-Bag-Ban.pdf>>.

greatly exceed their value”].<sup>28</sup>) Plastic bag recycling is further hindered by the fact that the market is limited for recycled plastic bags. (6 CR 1555. See Moore Recycling Associates Inc., 2010 National Postconsumer Plastic Bag & Film Recycling Report (Jan. 2012) p. 3 [reporting that almost half of all plastic film, including plastic bags, recovered in the United States in 2010 was shipped overseas for processing].<sup>29</sup>) Recovered plastic bags cannot be recycled into new plastic bags; recycled bags can only be “down-cycled” into other plastic products that are not themselves recyclable. (Romer, *supra*, 1 Golden Gate U. Env'tl. L.J. at p. 445.)

Failed examples of voluntary plastic bag reduction programs in Los Angeles County, the City of San Francisco, and Santa Clara County demonstrate that restrictions and price signals are necessary to adjust consumer behavior. In 2008, the County launched its “Single Use Bag Reduction and Recycling Program,” a voluntary recycling program with a target plastic bag disposal reduction of 30 percent by July 2010. (1 CR 0060-0061; 5 CR 1306-1307; L.A. County, Single Use Bag Reduction and Recycling Program: Program Resource Packet (Oct. 2008) p. 1.<sup>30</sup>) In

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<sup>28</sup> Available at <<http://www.sanjoseca.gov/index.aspx?NID=2435>> [scroll down to “Single-use Carryout Bag EIR” and select “Draft EIR”].

<sup>29</sup> Available at <<http://plastics.americanchemistry.com/Education-Resources/Publications/2010-National-Postconsumer-Plastic-Bag-Film-Recycling-Report.pdf>>.

<sup>30</sup> Available at <[http://dpw.lacounty.gov/epd/aboutthebag/PDF/ResourcePacket\\_100108.pdf](http://dpw.lacounty.gov/epd/aboutthebag/PDF/ResourcePacket_100108.pdf)>.

November 2010, the County Department of Public Works reported that the voluntary recycling program “was not successful in achieving its goals” as “[o]ver a two-year period and despite State law requirements under AB 2449 . . . . not more than eight (8) stores at any given time had met the minimum participation levels.” (3 CR 0720.) The County Board of Supervisors responded by enacting the Ordinance.

Voluntary bag reduction programs in San Francisco and Santa Clara County had similarly lackluster results. In November 2005, San Francisco forged an agreement with grocers to reduce plastic bag usage by 10 million bags through a one-year voluntary program and public education campaign; but most retailers failed to report their numbers by the reporting deadline, even though the city extended the deadline three times. (Romer, *supra*, 1 Golden Gate U. Envtl. L.J. at pp. 445-46.) Without verifiable numbers, San Francisco’s voluntary program was declared a failure. (*Id.* at p. 446.) Like the County, San Francisco has since enacted an ordinance banning traditional plastic carryout bags and requiring consumers to purchase paper bags. (S.F. Environment Code, §§ 1701-1709.) Santa Clara County, too, scrapped its voluntary “Got Bags” single-use bag reduction program in favor of an ordinance after administrators saw only a 2 percent increase in reusable bag use. (Santa Clara Ord. No. NS-517.77, adding ch. XVII to Santa Clara County Ord. Code div. B11; Acting Dir. of Agriculture & Environmental Management, letter to Board of Supervisors of Santa Clara

County re single-use carryout bags, Apr. 13, 2010, p. 3.<sup>31</sup>)

**2. Bag Bans and Purchase Requirements Are the Favored Policy Tools to Reduce the Negative Impacts of Bag Litter Worldwide.**

In contrast to the failure of plastic bag recycling and voluntary reduction programs to reduce litter, bag bans and purchase requirements have been extraordinarily effective at addressing the negative environmental and economic consequences of single-use bags. Indeed, police power bag restrictions are the generally favored policy tool to address plastic bag pollution, as evidenced by the fact that much of the world's population resides in a jurisdiction with single-use plastic bag restrictions. At least thirty-seven other countries outside of the United States have adopted policies to restrict single-use plastic bags, including China, Italy, Mexico City, Delhi, and some of the world's least-developed nations, like Bangladesh and Ethiopia. (*Retail Bags Report Maps and Related Detailed Lists*, Fla. Dept. of Environmental Protection <http://www.dep.state.fl.us/waste/retailbags/pages/mapsandlists.htm> [as of Dec. 11, 2012].)

Bag bans are so widely supported that the United Nations Environmental Programme Executive Director has called upon all nations

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<sup>31</sup> Available at <<http://www.sccgov.org/keyboard/attachments/BOS%20Agenda/2010/April%2013,%202010/202926812/KeyboardTransmittalWeb202991800.PDF>>.

of the world to take action: “[T]hin film single use plastic bags which choke marine life[] should be banned or phased-out rapidly everywhere—there is simply zero justification for manufacturing them anymore, anywhere.” (*Report Brings to the Surface the Growing Global Problem of Marine Litter* (June 8, 2009) U.N. Environment Prog.

<http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=589&ArticleID=6214&l=en> [as of Dec. 6, 2012]. *See also* The Future We Want, Final Rep. of the U.N. Conf. on Sustainable Development, Rio de Janeiro, Brazil, June 20-22, 2012, ¶163 [“We note with concern that the health of the oceans and marine biodiversity are negatively affected by marine pollution, including marine debris, especially plastic . . . .”].<sup>32)</sup>

Successful international examples of bag bans and purchase requirements demonstrate that such policies are effective at achieving positive environmental outcomes for local governments with minimal burdens to retailers and consumers.

Ireland is the most frequently cited example of an effective price signal-based policy. In 2002, Ireland began requiring consumers to pay 0.15 Euros for single-use plastic bags in order to reduce rural plastic bag litter.<sup>33</sup> (Convery, McDonnell, & Ferreira, *The Most Popular Tax in Europe? Lessons from the Irish Plastic Bags Levy* (2007) 38 Environmental

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<sup>32</sup> Available at <http://www.uncsd2012.org/>.

<sup>33</sup> Unlike the Ordinance, Ireland’s bag policy constitutes a levy or charge because revenues inure to the government.

& Resource Economics 1, 2.<sup>34</sup>) The price signal effectively altered consumer behavior. (*Id.* at p. 10 [stating the Irish case study proves, when taken in consideration with evidence from other jurisdictions, that “where policymakers are trying to reduce plastic bag consumption considerably and there is a well-developed and defined retail market . . . a consumer-based ‘downstream’ levy is the appropriate policy measure.”].)

Researchers estimate that the price signal has reduced the number of single-use plastic bags in Ireland’s litter stream by 94 percent and increased areas of Irish landscape that are “clear” of plastic bag litter by 21 percent. (*Id.* at p. 7.) Likewise, Ireland’s National Litter Pollution Monitoring System reported that plastic bag litter fell from 5 percent of national litter before the requirement to a mere 0.22 percent in 2004. (*Ibid.*) Researchers have since declared that Ireland’s policy “has proved so popular with the Irish public that it would be politically damaging to remove it,” and found that it “induces . . . an enthusiasm and affection from those who are liable to pay it.” (*Id.* at pp. 2, 10.)

China has implemented an effective policy combining a ban with a price signal. In 2008, China banned ultra-thin plastic bags (which are more likely than thicker bags to be carried by wind into the litter stream) and required consumers to pay retailers for thicker plastic bags. (Romer, A

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<sup>34</sup> Available at <[https://wiki.umn.edu/pub/ESPM3241W/S12TopicSummaryTeamFour/Lessons\\_from\\_Irish\\_Plastic\\_bag\\_levvy.pdf](https://wiki.umn.edu/pub/ESPM3241W/S12TopicSummaryTeamFour/Lessons_from_Irish_Plastic_bag_levvy.pdf)>.

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Golden Gate U. Envtl. L.J. 377, 388-89.<sup>35</sup>) China's policy also achieved remarkable environmental outcomes: overall plastic bag use decreased by two-thirds, or 40 billion bags, in the first year of implementation alone.

(*Ibid.*)

### **3. Bag Bans and Purchase Requirements Are the Favored Policy Tools to Reduce the Negative Impacts of Bag Litter in California and Throughout the United States.**

In the United States, numerous local governments in addition to the County have banned and/or require purchase of single-use plastic bags, including Fairbanks, Alaska; Telluride, Colorado; Washington, D.C.; and Maui, Hawaii. (Romer, *supra*, 5 Golden Gate U. Envtl. L.J. at p. 412.)

Within the State of California, fifty-three local jurisdictions, including San Francisco, Monterey, and Palo Alto, are covered by ordinances implementing plastic bag bans and/or purchase requirements.

(Plasticbaglaws.org, California Single-Use Bag Ordinances (Dec. 1, 2012).<sup>36</sup>) Within the County, the cities of Calabasas, Long Beach, Malibu,

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<sup>35</sup> Available at <[http://plasticbaglaws.org/wordpress/wp-content/uploads/2010/04/article\\_Wolf-in-Sheeps-Clothing.pdf](http://plasticbaglaws.org/wordpress/wp-content/uploads/2010/04/article_Wolf-in-Sheeps-Clothing.pdf)>

<sup>36</sup> Available at <[http://plasticbaglaws.org/wordpress/wp-content/uploads/2010/05/PBL-Single-Use-Bag-Ordinances\\_CA\\_Status\\_Dec-2012\\_CAW-links2.pdf](http://plasticbaglaws.org/wordpress/wp-content/uploads/2010/05/PBL-Single-Use-Bag-Ordinances_CA_Status_Dec-2012_CAW-links2.pdf)> [listing the following California localities, in addition to the County, that have adopted combined ban and purchase requirement ordinances: City of Calabasas, City of Fort Bragg, City of Laguna Beach, City of Long Beach, City of Millbrae, City of Monterey,

Manhattan Beach, Pasadena, Santa Monica, and West Hollywood have all adopted ordinances banning plastic bags.<sup>37</sup> At the state level, California's Ocean Protection Council has called upon the California Legislature to ban or require consumers to purchase single-use plastic bags. (Cal. Ocean Protection Council, An Implementation Strategy for the California Ocean Protection Council Resolution to Reduce and Prevent Ocean Litter (Nov. 20, 2008) p. 8.<sup>38</sup>) The West Coast Governors' Agreement on Ocean Health Action Plan (2006) has identified marine debris, including plastic, as a priority area for all three West Coast states. (Off. of the Governors of Wash., Ore., & Cal., West Coast Governors' Agreement on Ocean Health Action Plan (July 29, 2008).<sup>39</sup>).

Local governments in the United States that have enacted single-use

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City of Ojai, City of Pasadena, City of San Jose, City of Santa Cruz, City of Santa Monica, City of Solana Beach, City of Sunnyvale, City of Ukiah, City of Watsonville, City of West Hollywood, City and County of San Francisco, Alameda County Waste Management Authority, Unincorporated Marin County, Unincorporated Mendocino County, San Luis Obispo County Integrated Waste Management Authority, County of San Mateo, Unincorporated Santa Clara County, and Unincorporated Santa Cruz County].

<sup>37</sup> Calabasas Ord. No. 2011-282; Long Beach Ord. No. ORD-11-0009; Malibu Ord. No. 323; Manhattan Beach Ord. No. 2115, as amended; Pasadena Ord. No. 7214; Santa Monica Ord. No. 2348 (CCS); West Hollywood Ord. No. 12-898. For copies of all Los Angeles County cities' plastic bag ban ordinances, see *About the Bag*, L.A. County Dept. of Public Works <<http://dpw.lacounty.gov/epd/aboutthebag/ordinancebasics.cfm>> [as of Dec. 6, 2012].

<sup>38</sup> Available at <[http://www.opc.ca.gov/webmaster/ftp/pdf/opc\\_ocean\\_litter\\_final\\_strategy.pdf](http://www.opc.ca.gov/webmaster/ftp/pdf/opc_ocean_litter_final_strategy.pdf)>.

<sup>39</sup> Available at <[http://www.opc.ca.gov/webmaster/ftp/pdf/docs/Documents\\_Page/Reports/WCGA\\_ActionPlan\\_low-resolution.pdf](http://www.opc.ca.gov/webmaster/ftp/pdf/docs/Documents_Page/Reports/WCGA_ActionPlan_low-resolution.pdf)>.

bag restrictions report positive outcomes. Washington, D.C. became the first U.S. jurisdiction to require consumers to pay for single-use bags in 2009, when it mandated that food and liquor retailers collect five cents per paper or plastic carryout bag provided. (1 CR 0052; Romer, *supra*, 5 Golden Gate U. Envtl. L.J. at p. 385.) As a result of the bag policy, the District of Columbia Office of Tax and Revenue estimated that affected retailers issued 86 percent fewer bags in January 2010 (about 3.3 million bags) as compared to the estimated number of bags issued per month in 2009 (22.5 million bags). (1 CR 0053.) According to a survey conducted by the Alice Ferguson Foundation, 74 percent of polled District of Columbia residents reported that they reduced their plastic bag usage in response to the price signal. The majority of surveyed businesses that offered bag reduction estimates reported that consumption of single-use bags is at least 50 percent lower as a result of the policy. (Metropolitan Washington Council of Governments, Plastic Bag Report 2012 Update, *supra*, at p. 12. *See also* Steve Raabe, OpinionWorks, mem. to Exec. Dir. of Alice Ferguson Fund Tracy Bowen re Public Perceptions and Willingness to Address Litter in the District of Columbia, Feb. 15, 2011, p. 6 [noting 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.”].<sup>40</sup>)

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<sup>40</sup> Available at <<http://fergusonfoundation.org/wp-content/uploads/2012/05/>

There is evidence that these policy tools are equally as effective in California municipalities. San Jose, California’s third largest city, was motivated to restrict single-use bags by trash-impaired local waterways and the urban blight caused by litter. (Kerrie Romanow, City of San Jose, mem. to Transportation & Environment Com. re: Bring Your Own Bag Ordinance Implementation Results and Actions to Reduce EPS Foam Food Ware, Nov. 20, 2012, p. 3.<sup>41</sup>) Since January 2012, San Jose’s “Bring Your Own Bag” ordinance has prohibited all single-use bags except for recycled-content paper bags, which consumers must purchase for 10 cents (until 2014, when the purchase requirement escalates to 25 cents). (*Id.* at p. 2.) As of November 2012, San Jose reports “downward trends in presence of single-use plastic bags in street, storm drain, and creek litter, and an upward trend in use of reusable bags by shoppers.” (*Ibid.*) The City of San Jose’s 2012 litter surveys indicate that plastic bag litter has been reduced by “approximately 89 percent in the storm drain system, 60 percent in the creeks and rivers, and 59 percent in City streets and neighborhoods, when compared to [pre-ordinance] data . . . .” (*Id.* at p. 5). Additionally, as a result of the “Bring Your Own Bag” ordinance, observed reusable bag usage in San Jose skyrocketed from 4 percent of bags to approximately 62 percent of bags. (*Ibid.*) Significantly, California Waste Solutions, which

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AFF\_DC\_-ResearchMemo021511.pdf>.

<sup>41</sup> Available at <[http://www3.sanjoseca.gov/clerk/CommitteeAgenda/TE/20121203/TE20121203\\_d5.pdf](http://www3.sanjoseca.gov/clerk/CommitteeAgenda/TE/20121203/TE20121203_d5.pdf)>.

collects recycling from the majority of San Jose's single-family residences, reports a 35 to 50 percent reduction in downtime associated with plastic bags and film jamming screening machines in its facility. (*Ibid.*)

**4. The Ordinance Has Already Achieved Positive Economic and Environmental Results in Los Angeles County.**

Given the effectiveness of bag bans and purchase requirements around the world, it is little surprise that the Ordinance has had positive economic and environmental effects in the County. (*See infra* pt. II.A.) The Ordinance has been successful in altering consumer behavior. As stated above, the Ordinance already has resulted in a 94 percent reduction in single-use bag usage at large retailers and pharmacies, including the elimination of all single-use plastic bags and a 25 percent reduction in paper bags. (County's November 2012 Status Report, *supra*, at p. 1.) Most retailers "report that customers have quickly adapted and are now quite used to the ban." (*Ibid.*)

The County's plastic bag ban would provide an important regulatory tool on its own. Nonetheless, the County's plastic bag ban and paper Bag Purchase Requirement are complementary; the Bag Purchase Requirement augments the benefits of the plastic bag ban by providing incentives for consumers to use reusable bags instead. Although paper bags are a preferable choice to plastic bags given that they are biodegradable and recycled at a higher rate than plastic bags, paper bags are not without their

own environmental impacts. Allowing consumers to purchase a paper bag allows consumers to consider the environmental impacts associated with paper bag usage. The production of paper bags depletes forests and other natural resources, emits greenhouse gasses, and pollutes water bodies with toxic chemicals. (Kinsella et al., *The State of the Paper Industry* (2007) pp. 3-5.<sup>42</sup>) The U.S. paper industry is the nation's largest industrial user of water per ton of product, is the third largest industrial consumer of energy, ranks fourth among industrial sectors in the release of toxic chemicals in water, and ranks third in toxic air emissions. (*Id.* at p. 3.) Compounding the environmental impacts of paper bag production is the fact that only about 50 percent of paper bags are recycled in the United States. (U.S. Environmental Protection Agency, *Municipal Solid Waste in the United States: 2009 Facts and Figures* (Dec. 2010) table 4, p. 40.<sup>43</sup>)

The County's November 2012 Status Report states that, during the first full year of implementation of the Ordinance, large retailers provided approximately 125,000 paper bags per store, which is significantly less than the 196,000 paper bags and over two million plastic bags provided per store prior to the Ordinance. (County's November 2012 Status Report, *supra*, p. 2.) Thus, the Ordinance has been successful in reducing plastic bag usage

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<sup>42</sup> Available at <<http://www.greenpressinitiative.org/documents/StateOfPaperInd.pdf>>.

<sup>43</sup> Available at <<http://www.epa.gov/osw/nonhaz/municipal/pubs/msw2009rpt.pdf>>.

without inciting a corresponding surge in paper bag usage. Paper bag usage continues to decline each quarter. (*Ibid.*)

**C. This Lawsuit is One Prong of a Large-Scale, Coordinated Attack by the Plastics Industry on Grassroots Efforts to Minimize Plastic Bag Pollution Across California and the Nation.**

Given that Appellants are members of the plastics industry and not the paper industry,<sup>44</sup> it is likely that Appellants' claims against the Bag Purchase Requirement represent a pretextual effort by the plastics industry to attack the County's plastic bag ban. Indeed, in the context of the plastics industry's large-scale attack on single-use bag restrictions across the nation, this lawsuit appears to be an attempt by Appellants to protect profits at the expense of local taxpayers and our marine and riverine environments.

As a recent law journal article has noted, the plastics industry has "sued or threatened to sue virtually every California municipality that has recently taken steps to adopt a plastic bag ordinance." (Romer, *supra*, 5 Golden Gate U. Envtl. L.J. at p. 378. *See* Stephen L. Joseph, Counsel to Save the Plastic Bag Coalition, mem. to California cities and counties re Restaurant Bags, Oct. 31, 2012, p. 1 ["Save The Plastic Bag Coalition . . . will sue *every* city or county that adopts an ordinance that bans, restricts, limits, or requires a charge for plastic bags at any restaurant or "food

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<sup>44</sup> Appellants include Hilex Poly Co., LLC, a South Carolina plastic bag manufacturer, and two of its employees. Respondents' Brief at p. 1, fn. 2.

facility.” (emphasis in original)].<sup>45</sup>) Three plastic bag manufacturers even sued ChicoBag, a California small business that manufactures reusable bags and is sympathetic to environmental concerns about single-use bags. Plastic bag manufacturers sued ChicoBag for false advertising and unfair competition in the State of South Carolina, which has no anti-SLAPP (Strategic Lawsuit Against Public Participation) laws. (*Bag Wars / Plastic Giants Sue Reusable Bag Entrepreneur for Loss of Sales*, ChicoBag, <<http://www.chicobag.com/sued-by-plastic-press-release>> [as of Dec. 11, 2012].)

With over 1.4 million employees, the plastics industry is one of the largest manufacturing industries in the United States and a powerful special interest lobbying force against policies that propose to restrict the industry. (Romer, *supra*, 1 Golden Gate U. Env'tl. L.J. at p. 442.) The American Chemistry Council, a \$120 million industry group whose members include ExxonMobil and Dow Chemical, has established groups that include top bag manufacturers, like Hilex Poly Co., LLC, to oppose plastic bag bans with the help of the same lobbying firm that fought tobacco regulation in the 1990s. (Doucette, *The Plastic Bag Wars* (Aug. 4, 2011) Rolling Stone <<http://www.rollingstone.com/politics/news/the-plastic-bag-wars-20110725>> [as of Dec. 6, 2012]. See also *Full Summary Disclosure Report*

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<sup>45</sup> Available at <<http://savetheplasticbag.com/UploadedFiles/STPB%20restaurant%20bag%20memo.pdf>>.

– 6/1/09 to 7/27/09 for *Coalition to Stop the Seattle Bag Tax* (July 27, 2009) Seattle Ethics & Elections Comm’n,  
<<http://www2.seattle.gov/ethics/eldata/filings/popfiling.asp?prguid={C877AEFE-CE2E-4345-9CF5-843FA5493793}>> [as of Dec. 6, 2012]  
[evidencing that the Coalition to Stop the Seattle Bag Tax, which is nearly wholly funded by the American Chemistry Council, spent \$1.4 million to defeat Seattle’s 20-cent plastic bag fee].) Significantly, some of the same special interests that help fund the plastics industry’s challenges to bag bans were also among the largest supporters of Proposition 26. (*See Who is Funding California’s Proposition 26?*, Oil Change Internat. (Oct. 5, 2010) <<http://prop26.dirtyenergymoney.com/>> [as of Dec. 6, 2012].) “The [opposition] effort includes well-placed political donations, intensive lobbying at both the state and national levels, and a pervasive PR campaign designed to shift the focus away from plastic bags to the supposed threat of canvas and paper bags — including misleading claims that reusable bags ‘could’ contain bacteria and unsafe levels of lead.” (Doucette, *The Plastic Bag Wars* (Aug. 4, 2011) Rolling Stone <<http://www.rollingstone.com/politics/news/the-plastic-bag-wars-20110725>> [as of Dec. 6, 2012].) The American Chemistry Council even successfully lobbied California school officials to rewrite curricula, textbooks, and teacher’s guides to include positive messages about plastic bags. (Susanne Rust, *Plastic Bag Lobbying Group Influences Curriculum*

(Aug. 19, 2011) S.F. Chronicle

<<http://www.sfgate.com/green/article/Plastic-bag-lobbying-group-influences-curriculum-2334747.php>> [as of Dec. 11, 2012].)

In stark contrast to the goliath plastics industry, the County's Ordinance is the result of a grassroots movement. Many County residents issued letters in support of the Ordinance. In total, the County received over 1800 postcards from County residents in support of banning single-use carryout bags. (5 CR 1129-1204.) The groundswell of local support for the Ordinance and public recognition of its environmental benefits only further solidifies that the Bag Purchase Requirement is a proper use of the County's police power to enact ordinances to protect the general health and welfare from the adverse impacts of plastic bag pollution, and not a tax subject to Proposition 26.

For all of the foregoing reasons, the Amici respectfully request this Court to affirm the judgment below.

Dated: December 13, 2012

Respectfully Submitted,

Frank G. Wells Environmental Law  
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By:

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## CERTIFICATION OF WORD COUNT

I certify that the total word count of this brief, including footnotes, is 12,036 words, as determined by the word count of the Microsoft Word program on which this brief was prepared.

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**DECLARATION OF SERVICE BY U.S. MAIL**

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen and am not a party to the within action; my business address is 405 Hilgard Avenue, Los Angeles, California 90095.

On December 14, 2012, I served the foregoing document described as:

**APPLICATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF IN SUPPORT OF RESPONDENTS COUNTY OF LOS ANGELES, ET AL.; PROPOSED BRIEF OF *AMICI CURIAE* SURFRIDER FOUNDATION, HEAL THE BAY, THE 5 GYRES INSTITUTE, ENVIRONMENT CALIFORNIA RESEARCH AND POLICY CENTER, and SEVENTH GENERATION ADVISORS.**

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Executed on December 14, 2012, at Los Angeles, California.

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Jeanne Fontenot