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SAVE THE PLASTIC BAGS?: HOW THE CALIFORNIA SUPREME COURT WEAKENED ENVIRONMENTAL IMPACT REPORT REQUIREMENTS IN AN ATTEMPT TO PROTECT THE ENVIRONMENT

CHRISTINA MARSHALL SANTARPIO*

Abstract: The California Environmental Quality Act aims to protect the environment by requiring any public agency proposing a project that might have a significant effect on the environment to prepare an Environmental Impact Report (EIR). This Report would identify and attempt to mitigate environmental damage, as well as make the public aware of the project. In *Save the Plastic Bag*, the California Supreme Court held that the City of Manhattan Beach did not need to prepare an EIR in passing an ordinance banning plastic bags at point of sale retail stores within the city. The Supreme Court weakened the EIR requirement for future cases by ruling against challengers to the ban. This Comment argues that this lowered standard will allow more questionable projects to avoid the EIR requirement, which will represent lost opportunities to both inform the public about important projects and create new and innovative ways to mitigate future damage.

INTRODUCTION

A common question in many retail and grocery stores—“paper or plastic?”—has diminished in popularity as many clerks now choose plastic unless instructed otherwise. From a financial point of view, this approach makes sense: plastic bags are very lightweight, making for more efficient transport and less waste.¹ This translates into significant savings for retailers, as well; a standard plastic grocery bag costs one cent

* Staff Writer, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW, 2011–12.

¹ See John Roach, *Are Plastic Grocery Bags Sacking the Environment?*, NAT'L GEOGRAPHIC NEWS (Sept. 2, 2003), news.nationalgeographic.com/news/2003/09/0902_030902_plastic_bags.html; *Facts about Plastics Q&A*, SPI: THE PLASTICS INDUSTRY TRADE ASSOCIATION, <http://www.plasticsindustry.org/AboutPlastics/content.cfm?ItemNumber=791&navItemNumber=1124> (last visited Mar. 28, 2012).

and a paper bag costs four cents.² The immense growth in the popularity of plastic bags, however, has significant environmental costs.³

The Environmental Protection Agency (EPA) estimates that only seven percent of all plastics were recycled in 2009 (out of thirty million tons).⁴ The other ninety-three percent of plastic waste cannot biodegrade efficiently.⁵ Many discarded bags make their way into the ocean, coalescing into masses that harm and kill wildlife unlucky enough to live in its path.⁶ One group studying plastic bag usage in San Francisco estimated that one million plastic bags end up in San Francisco Bay yearly.⁷ Other bags slowly disintegrate into toxic pieces and seep into soil and water.⁸ Because plastic bags were only introduced into retail stores beginning in the 1970s, their long-term effect on the environment is unknown.⁹

Paper, the traditional alternative to plastic, is also environmentally flawed.¹⁰ Although paper bags are biodegradable, the process of manufacturing them uses significantly more energy and produces more wastewater than plastic bags.¹¹ Because they are larger and heavier, more energy is also required to distribute them.¹²

Save the Plastic Bag Coalition v. City of Manhattan Beach, a recent California Supreme Court decision, illustrates one approach that cities and towns are employing to deal with these environmental issues.¹³ The City of Manhattan Beach passed an ordinance banning the use of plastic bags at retail establishments.¹⁴ In response, the Save the Plastic Bag Coalition (Coalition), a group of businesses that produce and distribute plastic bags in and around the city, objected and brought suit to

² See Roach, *supra* note 1.

³ See *id.*

⁴ *Plastics*, ENVTL. PROT. AGENCY, <http://www.epa.gov/osw/consERVE/materials/plastics.htm> (last updated Sept. 22, 2011).

⁵ See Roach, *supra* note 1. "Once in the environment, it takes months to hundreds of years for plastic bags to break down." *Id.*

⁶ *Id.*

⁷ *About the Campaign*, SAVE THE BAY, <http://www.savesfbay.org/about-campaign> (last visited May 20, 2012).

⁸ Roach, *supra* note 1.

⁹ See *id.* Due to the extremely slow decomposition time, conclusive effects of plastic bags on the environment have not yet been determined. See *id.*

¹⁰ *Save the Plastic Bag Coal. v. City of Manhattan Beach*, 254 P.3d 1005, 1016 (Cal. 2011).

¹¹ *Id.* at 1009–10.

¹² See *id.* at 1008–10.

¹³ *Id.*

¹⁴ *Id.* at 1010.

enjoin the ban.¹⁵ Their primary argument was that a switch to paper bags would harm the environment; in addition, an obvious underlying motivation was that the coalition stood to lose money if plastic bags were banned.¹⁶ The Supreme Court of California ruled in favor of the city and upheld the ordinance, holding that the city was not required to prepare an Environmental Impact Report (EIR) because the environmental effects of increased paper bag usage in Manhattan Beach were not significant.¹⁷

This case demonstrates the tension between the court's general mandate to interpret the California Environmental Quality Act (CEQA) as widely as possible to protect the environment and exploitation of CEQA in a challenge brought by anti-environmental parties.¹⁸ Though the Supreme Court of California's decision in *Save the Plastic Bag* ultimately protected the environment, its reasoning was flawed in finding that widespread environmental effects need not be considered.¹⁹ Specifically, the case held that agencies were not required to conduct an "exhaustive analysis" of any and all environmental impacts of a project outside of its geographical boundaries.²⁰ While the ultimate holding of this case allowed Manhattan Beach to implement an environmentally friendly initiative, it did so in a way that could weaken EIR requirements for future projects.²¹

I. FACTS AND PROCEDURAL HISTORY

In June of 2008, Manhattan Beach's city manager issued a staff report recommending an ordinance banning the use of plastic bags at "point-of-sale" purchases within the city.²² The report concluded that CEQA did not apply to the ordinance, both because it would make no significant change to the environment and because it was exempted as a regulatory program to protect the environment.²³

The Coalition objected to the proposal, claiming that it would lead to exclusive paper bag use, which would have a negative impact on the

¹⁵ *Id.* at 1008.

¹⁶ See *Save the Plastic Bag Coal.*, 254 P.3d at 1008.

¹⁷ *Id.* at 1018.

¹⁸ See *id.* at 1015–16.

¹⁹ See *id.* at 1016.

²⁰ *Id.*

²¹ See *id.* at 1018.

²² *Save the Plastic Bag Coal. v. City of Manhattan Beach*, 254 P.3d 1005, 1008 (Cal. 2011).

²³ *Id.*

environment.²⁴ It demanded a full review under CEQA, and threatened to sue if its concerns were not addressed.²⁵ In response, the city conducted a study to evaluate any potential environmental impacts.²⁶

This study found that although a ban of plastic bags would have some negative environmental consequences, they would be “less than significant.”²⁷ This finding was based on a number of factors.²⁸ The study acknowledged that more energy is used and wastewater produced in producing and recycling paper bags.²⁹ On the other hand, the small size of Manhattan Beach—217 retail stores, 2 grocery stores, 3 drug stores, and a Target store—meant that few businesses would be affected by the ordinance.³⁰ Many other businesses, such as take-out restaurants, already used paper bags.³¹ In addition, the study mentioned that because paper bags can hold more, 1000 paper bags would replace 1500 plastic bags according to a conservative estimate.³² The study also predicted that some consumers would switch to reusable bags, rather than exclusively paper bags.³³ Finally, the study noted that paper bags would be required to have “40% recycled content,” and thus would not significantly affect landfills.³⁴ The study recommended adoption of the ordinance because of the insignificant anticipated increase in paper bag use, minimal impact on energy, lack of a threat to nearby natural habitats or human beings, and the fact that plastic bag litter would decrease.³⁵

In response, the Coalition provided studies suggesting that the “life cycle” of paper bags has a greater environmental impact than that of plastic bags.³⁶ It argued that this alternative information required a full EIR, as it created a reasonable possibility that paper bags would have a significant effect on the environment.³⁷ The city responded with a second staff report, this time addressing the “life cycle” studies.³⁸ This

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 1009.

²⁸ See *Save the Plastic Bag Coal.*, 254 P.3d at 1009.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Save the Plastic Bag Coal.*, 254 P.3d at 1009.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 1009–10.

report pointed out that these types of studies were extremely sensitive to context and could be interpreted in many different ways.³⁹ The city again supported the ordinance and suggested accompanying it with an outreach education program.⁴⁰

On July 15, 2008, the Manhattan Beach City Council adopted Ordinance No. 2115, officially banning plastic bags.⁴¹ In the ordinance, the council found that, although both plastic and paper bags can have negative environmental impacts, plastic bags are not biodegradable and often end up in the ocean, causing harm to marine life and contributing to the "Great Pacific Garbage Patch."⁴² In compliance with CEQA, the city also adopted a Negative Declaration, stating that the ordinance would have no significant negative impact on the environment.⁴³

Less than one month later, the Coalition petitioned the Los Angeles County Superior Court to enjoin the ordinance unless Manhattan Beach prepared a full EIR.⁴⁴ The Coalition argued that public rights were being threatened and that it had standing to enforce the city's duties under CEQA.⁴⁵ The city made two counter-arguments: first, that the Coalition did not have standing as a corporation, and second, that there was no evidence showing that the ordinance would have a substantial environmental impact.⁴⁶

The trial court granted the plaintiff's petition, finding that the Coalition had raised a "genuine environmental issue" and was not seeking a commercial advantage over a competitor.⁴⁷ The lower court also concluded that the evidence required an EIR.⁴⁸ On appeal, the Court of Appeal for the Second District affirmed the trial court, holding that the Coalition had standing and had submitted enough evidence to support an argument of a significant environmental impact.⁴⁹ The dissent in that opinion argued that "CEQA requirements would be stretched to the point of absurdity if a small city were required to pre-

³⁹ *Id.*

⁴⁰ *Save the Plastic Bag Coal.*, 254 P.3d at 1010.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *See id.*

⁴⁴ *Id.* at 1011.

⁴⁵ *Id.*

⁴⁶ *See Save the Plastic Bag Coal.*, 254 P.3d at 1011.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

pare an EIR” on this issue.⁵⁰ The City of Manhattan Beach appealed to the Supreme Court of California, which granted review.⁵¹

II. LEGAL BACKGROUND

California passed CEQA⁵² in 1970, which parallels the federal National Environmental Policy Act (NEPA).⁵³ Both NEPA and CEQA aim to provide a method to identify and mitigate potentially harmful environmental effects of anticipated projects through research and public discourse.⁵⁴ To accomplish this goal, CEQA requires that any public agency proposing a project that may have a “significant effect on the environment” in California prepare and file an EIR.⁵⁵ While this requirement has been criticized because of the uncertainty surrounding the preparation of an EIR,⁵⁶ it is a crucial element in accomplishing CEQA’s goal of “preventing environmental damage, while providing a decent home and satisfying living environment for every Californian.”⁵⁷

CEQA imposes requirements on certain projects, depending on their scope and source.⁵⁸ These requirements have been formulated as a three-part test introduced in *No Oil, Inc. v. City of Los Angeles*.⁵⁹ In *Muzzy Rancho Co. v. Colano Country Airport Land Use Commission*, the California Supreme Court specified that the first step is to determine whether the proposed activity is a “project.”⁶⁰ If it is not, CEQA will not apply.⁶¹ To qualify as a project, the activity must be carried out by a public agency or a person supported by public agencies, or must involve any “entitlement for use” by a public agency issued to that activity (e.g., a permit, lease, etc.).⁶² The Act defines a project as any activity that

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² See CAL. PUB. RES. CODE § 21000 (West 2011).

⁵³ See National Environmental Policy Act of 1969 § 102, 42 U.S.C. § 4332 (2006).

⁵⁴ 42 U.S.C. § 4321; CAL. CODE REGS. tit. 14, § 15002(a) (2011).

⁵⁵ CAL. CODE REGS. tit. 14, § 15002(f).

⁵⁶ John Watts, *Reconciling Environmental Protection with the Need for Certainty: Significance Thresholds for CEQA*, 22 *ECOLOGY L.Q.* 213, 216–17 (1995). “Businesses often do not know how long EIR review will take, whether unusually extensive mitigation measures will be necessary, or whether litigation will result. An important part of CEQA folklore is the ‘horror stories’ of projects gone awry.” *Id.*

⁵⁷ See CAL. PUB. RES. CODE § 21000(g).

⁵⁸ CAL. CODE REGS. tit. 14, §§ 15002(d), 15378.

⁵⁹ 529 P.2d 66, 69 (Cal. 1974).

⁶⁰ 160 P.3d 116, 120 (Cal. 2007).

⁶¹ CAL. CODE REGS. tit. 14, § 15060(c)(3).

⁶² *Id.* § 15378(a).

could result in a “direct physical change” or a “reasonably foreseeable indirect physical change” to the environment.⁶³

If a project is exempt through administrative regulations or it is clear that it will not affect the environment, the agency need not undertake any further study.⁶⁴ Courts refer to this as a “common-sense exemption” from CEQA; if the activity could not possibly significantly affect the environment, the agency will not have to prepare an EIR.⁶⁵ CEQA regulations have codified this exemption as well.⁶⁶ To fall under the common-sense exemption, however, a project cannot raise any reasonable questions about its future ramifications; it must either raise no question at all or, at the most, “remote or outlandish” possibilities.⁶⁷

The second step for any non-exempt activity is to undergo a preliminary study to determine whether the project “may have a significant effect on the environment.”⁶⁸ The CEQA regulations define a significant effect as a “substantial, or potentially substantial, adverse change in the environment.”⁶⁹ The Act strictly regulates the parameters of this initial study: evidence must be procured from facts; any assumptions must be reasonable and based on those facts; and any expert opinions must be supported by fact.⁷⁰ In addition, the initial study must include consideration of the effects throughout the entire project, from planning through operation.⁷¹

In *California Farm Bureau Federation v. California Wildlife Conservation Board*, the Court of Appeal in the Third District of California defined a “significant effect” under the act as a “substantial or potentially substantial adverse change in the physical conditions existing within the area affected by the project.”⁷² The issue in that case was whether a project to convert agricultural land into wildlife habitat was subject to CEQA requirements.⁷³ The court found that, although the proposed activity was designed to protect the environment, the agency was still required to show that there was “no possibility” that the project would harm the

⁶³ *Id.*

⁶⁴ *No Oil*, 529 P.2d at 69.

⁶⁵ *Cal. Farm Bureau Fed'n v. Cal. Wildlife Conservation Bd.*, 49 Cal. Rptr. 3d 169, 186 (Ct. App. 2006).

⁶⁶ CAL. CODE REGS. tit. 14, § 15061(b)(3).

⁶⁷ *Cal. Farm Bureau Fed'n*, 49 Cal. Rptr. 3d at 185.

⁶⁸ *No Oil*, 529 P.2d at 69.

⁶⁹ CAL. CODE REGS. tit. 14, § 15382.

⁷⁰ CAL. PUB. RES. CODE § 21082.2 (West 2011).

⁷¹ CAL. CODE REGS. tit. 14, § 15063(a)(1).

⁷² 49 Cal. Rptr. 3d at 185.

⁷³ *Id.* at 179.

environment.⁷⁴ CEQA compels the agency involved to use all factual and scientific information available to make this determination.⁷⁵ In addition, any evidence of social or economic changes that do not cause or come from environmental changes cannot be considered substantial evidence.⁷⁶

If the agency finds that there is substantial evidence of a significant environmental impact, CEQA requires the preparation of an EIR.⁷⁷ If the EIR identifies one or more significant effects on the environment, the agency must either find an alternative to mitigate or avoid these effects, or make a finding that the benefits of the project far outweigh the harms.⁷⁸ If an EIR is not required based on the initial study, the agency must issue a Negative Declaration.⁷⁹ In *Communities for a Better Environment v. South Coast Air Quality Management*, the court held that the decision to issue a Negative Declaration is reviewed for prejudicial abuse of discretion, which is established if the agency or city has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence.⁸⁰

In past cases, California courts have held that when proposed projects can or will have an effect on the environment, the agency must prepare an EIR.⁸¹ In *No Oil*, the Supreme Court of California explicitly held that in order to allow CEQA to protect the environment to the fullest, the threshold requirement for an EIR must be low.⁸² Thus, the current standard not only requires an EIR for projects with significant effects, but also for projects that *may* have significant effects on the environment.⁸³ This standard not only best promotes the true purpose of CEQA, but also allows an agency or city to inform other agencies and

⁷⁴ *Id.* at 186–87.

⁷⁵ See CAL. PUB. RES. CODE § 21082.2(a) (“The lead agency shall determine whether a project may have a significant effect on the environment based on substantial evidence in light of the whole record.”).

⁷⁶ CAL. CODE REGS. tit. 14, § 15384(a).

⁷⁷ *Id.* § 15063(b)(1).

⁷⁸ *Id.* §§ 15091, 15093(a) (“If the specific economic, legal, social, technological, or other benefits, including region-wide or statewide environmental benefits, of a proposal project outweigh the unavoidable adverse environmental effects, the adverse environmental effects may be considered ‘acceptable.’”).

⁷⁹ *Id.* § 15063(b)(2).

⁸⁰ 226 P.3d 985, 992 (Cal. 2011).

⁸¹ *No Oil*, 529 P.2d at 70, 77.

⁸² *Id.* at 77.

⁸³ *Id.*

the public that potential environmental effects have been considered and mitigated.⁸⁴

California is not alone in setting a low threshold requirement for the preparation of an EIR; out of the fourteen states that have environmental policy acts strongly mirroring NEPA, many courts have interpreted the state legislature's choice to use "may" to require reports in most projects with a conceivable effect on the environment.⁸⁵ In *H.O.M.E.S. v. New York State Urban Development Corp.*, the New York Supreme Court held that an EIS was required for a proposed domed stadium because it might significantly impact the environment, noting that the state threshold was lower than federal NEPA requirements.⁸⁶ Similarly, the Wisconsin Supreme Court found in *Wisconsin's Environmental Decade, Inc. v. Public Service Commission* that an EIS cannot be avoided "simply because describing the environmental effects of and alternatives to a particular agency action requires some degree of forecasting."⁸⁷

In Washington, courts have indicated that projects aimed at protection of the environment are not categorically exempt from the EIS requirement.⁸⁸ For example, in *Alpine Lakes Protection Society v. Washington State Department of Natural Resources*, the Washington Forest Practices Appeals Board argued that a new project of watershed analysis and geotechnical prescriptions was exempt from EIS requirements due to its positive effects and because it would have no adverse impact.⁸⁹ The court refused to exempt the project from the EIS requirement because the determination of whether an EIS was needed could not be based on "potential 'good/bad' effects of a proposal."⁹⁰

Some states with environmental policy acts choose to specifically define "significant impact," either through statute or by allowing agencies to set forth their own standards that are consistent with the governing statute.⁹¹ In Minnesota courts rely on four factors to determine

⁸⁴ *Id.* at 78.

⁸⁵ Mark A. Chertok, "Little NEPAS" and Their Environmental Impact Assessment Procedures, ALL-ABA: ENVIRONMENTAL LITIGATION 921, 923, 931 (2005), available at http://www.sprlaw.com/pdf/spr_little_nepa_ali_aba_0605.pdf; see, e.g., *H.O.M.E.S. v. N.Y. State Urban Dev. Corp.*, 418 N.Y.S.2d 827 (App. Div. 1979); *Wisconsin's Envtl. Decade, Inc. v. Pub. Serv. Comm'n*, 256 N.W.2d 149, 161 (Wis. 1977).

⁸⁶ 418 N.Y.S. 2d 827 [pin cite].

⁸⁷ 256 N.W.2d at 161.

⁸⁸ Chertok, *supra* note 85, at 932.

⁸⁹ *Alpine Lakes Prot. Soc'y v. Wash. State Dep't of Natural Res.*, 979 P.2d 929, 936 (Wash. Ct. App. 1999).

⁹⁰ *Id.*

⁹¹ Chertok, *supra* note 85, at 932.

whether an EIS is required of a project.⁹² These factors are: “the type, extent, and reversibility of environmental effects”, the “cumulative potential effects of future projects”; the amount that any effects are mitigated in “ongoing public regulatory authority”; and the amount that effects can be controlled based on other relevant studies.⁹³ These factors are articulated in the statute itself to provide guidance to agencies as to what level of impact requires an EIS.⁹⁴

In contrast to the court-created tests in Minnesota, the New York Environmental Conservation Law permits agencies to determine their own factors in the form of local or municipal legislation.⁹⁵ Taking advantage of this, New York City adopted a City Environmental Quality Review and a manual outlining criteria for specific issues, such as traffic and air quality.⁹⁶ These criteria allow agencies to predict what projects will and will not require an EIS.⁹⁷ As the American Law Institute notes, however, this approach may have the adverse effect of disincentivizing new and innovative approaches to environmental protection.⁹⁸

III. ANALYSIS

In *Save the Plastic Bag*, the California Supreme Court held that, although the Coalition had standing to bring suit, there was not sufficient evidence to warrant an EIR, noting that “substantial evidence and common sense support[ed] the city’s determination that its ordinance would have no significant environmental effect.”⁹⁹ The court reviewed the city’s decision for “prejudicial abuse of discretion”¹⁰⁰ and reversed the lower court’s holding that, because the ban “may” significantly impact the environment, an EIR was required.¹⁰¹

First, the court held that the only local effects would be “related to the transportation of paper bags, and possibly their disposal.”¹⁰² The disposal issue was mitigated, however, by the fact that the city used a

⁹² Minn. R. 4410.1700(7) (2011).

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ N.Y. COMP. CODES R. & REGS. tit. 6, § 617.14 (2011); Chertok, *supra* note 85, at 932–33; N.Y. ENVTL. CONSERV. LAW § 8–0107 (McKinney 2011).

⁹⁶ Chertok, *supra* note 85, at 932–33; MAYOR’S OFFICE OF ENVTL. COORDINATION, CITY ENVTL. QUALITY REVIEW: TECHNICAL MANUAL (1993).

⁹⁷ Chertok, *supra* note 85, at 933.

⁹⁸ *Id.*

⁹⁹ 254 P.3d 1005, 1008 (Cal. 2011).

¹⁰⁰ *Id.* at 1015–16.

¹⁰¹ *Id.* at 1016.

¹⁰² *Id.*

regional landfill, and its contribution to that landfill was minimal.¹⁰³ Second, the court found that any geographically widespread effects of the ban were “indirect and difficult to predict.”¹⁰⁴ Although the court acknowledged that under CEQA, the “project area” and the relevant environmental area are not necessarily the same, it rejected a contention that this might require an agency to “conduct an exhaustive analysis of all conceivable impacts a project may have in areas outside its geographical boundaries.”¹⁰⁵

The California Supreme Court dismissed the evidence presented by the Coalition, which relied in large part on “life cycle” studies of both paper and plastic bags, as insubstantial.¹⁰⁶ The court again emphasized the small scale of the ordinance, stating that an “overreliance” on such studies in this case was in error.¹⁰⁷ The court noted that the “life cycle” of these products must “not [be] allowed to swamp the evaluation of actual impacts attributable to the project at hand.”¹⁰⁸ However, as noted by the Appellate Court, the initial studies commissioned by Manhattan Beach did not provide actual statistics from the city itself, such as concrete amounts of plastic and paper bags used; how often such bags are recycled; how both types of bags are delivered to the city; or whether a campaign to encourage reusable bags would be successful.¹⁰⁹ In addition, the statute does not authorize a small city to avoid compliance with CEQA simply because of its size.¹¹⁰

Although the evidence presented by Manhattan Beach made a strong argument against the existence of significant environmental effects, the California Supreme Court analyzed this evidence improperly.¹¹¹ As the Court of Appeal noted in its own decision, the California Supreme Court ruled in *No Oil* that agencies are required to prepare an EIR “whenever it can be *fairly argued* on the basis of substantial evidence that the project may have significant environmental impact.”¹¹² The fact that “substantial evidence was presented that the project would

¹⁰³ *Id.* at 1016–17.

¹⁰⁴ *Id.* at 1017.

¹⁰⁵ *Save the Plastic Bag Coal.*, 254 P.3d at 1017.

¹⁰⁶ *See id.*

¹⁰⁷ *Id.* at 1018.

¹⁰⁸ *Id.*

¹⁰⁹ *Save the Plastic Bag Coal. v. City of Manhattan Beach*, 105 Cal. Rptr. 3d 41, 58 (Ct. App. 2010), *rev'd*, 254 P.3d 1005 (2011).

¹¹⁰ *Id.*

¹¹¹ *See Save the Plastic Bag Coal.*, 254 P.3d at 1017–18.

¹¹² *Save the Plastic Bag Coal.*, 105 Cal. Rptr. 3d at 55 (emphasis added) (quoting *No Oil, Inc. v. City of Los Angeles*, 529 P.2d 66, 75 (Cal. 1974)).

not have such impact” is irrelevant in this “fair argument” standard.¹¹³ Furthermore, CEQA guidelines require consideration of all factual and scientific data available in determining whether or not an EIR is required.¹¹⁴ Therefore, relying solely on the evidence produced by the preliminary studies undertaken by Manhattan Beach is not sufficient.¹¹⁵ In holding that no EIR was required here, the court violated its own previous low threshold standard.¹¹⁶

Had the California Supreme Court required Manhattan Beach to prepare an EIR before implementing this ban on plastic bags, it is possible—and even probable, given all of the evidence—that the ordinance would still have been enacted.¹¹⁷ The CEQA does not require an EIR in order to discourage all future projects; it only attempts to require “informed decisionmaking with respect to the environmental effects of a proposed project.”¹¹⁸ In this case, given the intent of the ordinance to protect the environment, it was in the interest of Manhattan Beach to fully understand the ramifications of its actions.¹¹⁹ Had the EIR not revealed any significant adverse effects, the ordinance would have been enforced as intended and the city would have concrete knowledge that its actions would have an ultimately beneficial effect on the environment.¹²⁰ If, alternatively, the EIR had shown that the effect of banning plastic bags would be to harm the environment, the City could have implemented alternative ordinances to accomplish the same goal.¹²¹

For example, in 2002, Ireland imposed a small tax on the use of plastic bags in an attempt to reduce pollution.¹²² Within five months of the introduction of the tax, the Environment Minister of Ireland, Martin Cullen, announced that the use of plastic bags had dropped by ninety percent and the country had already raised €3.5 million in reve-

¹¹³ *Id.* (emphasis added).

¹¹⁴ See CAL. PUB. RES. CODE § 21082.2(a) (West 2011).

¹¹⁵ See *Save the Plastic Bag Coal.*, 254 P.3d at 1016–18.

¹¹⁶ *No Oil*, 529 P.2d at 77.

¹¹⁷ See CAL. CODE REGS. tit. 14, § 15093(a) (2011). If an EIR predicts negative environmental effects from a project, the regulations may still allow the project, as long as the benefits outweigh unavoidable harms. *Id.*

¹¹⁸ See *Save the Plastic Bag Coal.*, 105 Cal. Rptr. 3d at 58.

¹¹⁹ See *Save the Plastic Bag Coal.*, 254 P.3d at 1009.

¹²⁰ See CAL. CODE REGS. tit. 14, § 15093(a).

¹²¹ Elisabeth Rosenthal, *Motivated by a Tax, Irish Spurn Plastic Bags*, N.Y. TIMES (Feb. 2, 2008), <http://www.nytimes.com/2008/02/02/world/europe/02bags.html>.

¹²² *Id.*

nues.¹²³ According to a 2008 New York Times article, most shoppers in Ireland switched to reusable bags rather than to paper bags for their shopping.¹²⁴ That article reported that Cullen had threatened a tax on paper bags if retailers started using them at the same levels they had used plastic bags before, which probably contributed to the measure's success.¹²⁵

Given the increased press surrounding plastic bag ordinances, the preparation of an EIR by Manhattan Beach would not be difficult.¹²⁶ For example, one California website has compiled a list of draft EIR's and ordinances regarding these bans.¹²⁷ In addition, Master Environmental Assessments have been prepared by various organizations, assisting different local governments in preparing their own EIR's.¹²⁸

Beyond the flawed reasoning of the holding of *Save the Plastic Bag*, the California Supreme Court has potentially undermined the strength of the EIR requirement in a wide variety of cases, especially regarding the issue of climate change.¹²⁹ For example, by applying the court's reasoning in *Save the Plastic Bag* to a project that might contribute to the greenhouse gases effect, an agency may be successful in bypassing CEQA requirements and completing the project simply because the effects to the immediate area did not exist or were too small to be considered.¹³⁰ In the future, one way that the California legislature might avoid this pitfall would be to specify EIR requirements in the statute rather than granting this much discretion to the courts, as legislatures in New York or Minnesota did.¹³¹ By providing agencies and cities with concrete guidelines, projects would be less likely to find loopholes in CEQA that would help them circumvent preparation of an EIR.¹³²

¹²³ *Irish Bag Tax Hailed Success*, BBC NEWS, WORLD EDITION (Aug. 20, 2002), <http://news.bbc.co.uk/2/hi/europe/2205419.stm>.

¹²⁴ Rosenthal, *supra* note 121.

¹²⁵ *See id.*

¹²⁶ *See id.*

¹²⁷ *Plastics Bag Ordinances/Background Materials*, STOPWASTE.ORG (last visited Mar. 29, 2012), <http://www.stopwaste.org/home/index.asp?page=1003>.

¹²⁸ *Master Environmental Assessment (MEA)*, GREEN CITIES CAL. (last visited Mar. 29, 2012), <http://www.greencitiescalifornia.org/mea>.

¹²⁹ 254 P.3d at 1018.

¹³⁰ *Id.* at 1016.

¹³¹ *Supra* notes 91–98 and accompanying text.

¹³² *Supra* notes 91–98 and accompanying text.

CONCLUSION

In *Save the Plastic Bag*, the Supreme Court of California reversed a Court of Appeal decision and permitted Manhattan Beach to enforce an ordinance banning plastic bags at point-of-sale purchases within the city without first preparing an EIR.¹³³ In doing so the court ignored its own precedent and did not fully consider the Coalition's arguments in determining whether they had "fairly argued" that the ban *might* have a substantial effect on the environment.¹³⁴ This holding represents a possible weakening of the requirement for preparation of an EIR for future cases.¹³⁵

A ruling for the Coalition in this case, in spite of the group's obvious financial motivation, would most likely not have resulted in harming the environment.¹³⁶ Had Manhattan Beach been compelled to prepare an EIR, the ordinance likely would still have passed.¹³⁷ Even if the EIR somehow prevented the ordinance, the city could have utilized other options, such as a tax on plastic bags or a program designed to encourage the use of reusable bags rather than paper or plastic.¹³⁸ Finally, the California legislature could have avoided this problem (or prevent it from occurring in the future) by enacting more specific guidelines in the CEQA for this issue.¹³⁹

¹³³ *Supra* notes 13–17 and accompanying text.

¹³⁴ *Supra* notes 111–116 and accompanying text.

¹³⁵ *Supra* note 21 and accompanying text.

¹³⁶ *Supra* notes 16, 18–21 and accompanying text.

¹³⁷ *Supra* note 117 and accompanying text.

¹³⁸ *Supra* notes 121–125 and accompanying text.

¹³⁹ *Supra* notes 91–98, 131–132 and accompanying text.