

No. S180720

(Court of Appeal, Second Appellate Dist., Div. Five. No. B215788)
(County of Los Angeles Super. Ct. No. BS116362)

**IN THE SUPREME COURT OF
THE STATE OF CALIFORNIA**

SAVE THE PLASTIC BAG COALITION,
an unincorporated association

PLAINTIFF AND RESPONDENT

V.

CITY OF MANHATTAN BEACH,

a municipal corporation

DEFENDANT AND APPELLANT

**PLAINTIFF'S ANSWER TO AMICUS BRIEFS OF
HEAL THE BAY, CALIFORNIANS AGAINST WASTE,
AND MANHATTAN BEACH RESIDENTS ASSOCIATION**

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SAVE THE PLASTIC BAG COALITION

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I. INTRODUCTION

“As the most ubiquitous alternative to plastic, paper bags are themselves fraught with environmental impacts. The production of paper bags contributes to natural resource depletion, greenhouse gas emissions and additional waterborne wastes from the pulping and paper making process. A paper bag fee is critical in driving the use of the most sustainable option, reusable bags, rather than shifting consumer use from plastic to paper carryout bags.” (Heal the Bay, letter to City of Manhattan Beach dated June 2, 2008, AR 159-160 at 160.)

Plaintiff Save The Plastic Bag Coalition answers the amicus briefs filed by Californians Against Waste (“CAW”), Heal the Bay (“HTB”), and the Manhattan Beach Residents Association (“MBRA”).

The issues before this court are (i) whether the Coalition has standing; and (ii) whether the Coalition made a fair argument about paper bags. The Coalition addresses the fair argument issue in this brief. The standing issue is addressed in the Coalition’s answer to the amicus brief filed by the League of California Cities and the California State Association of Counties.

II. ARGUMENT

A. Heal The Bay’s Statements In Manhattan Beach Confirm That The Coalition Made A Fair Argument And That An EIR Should Have Been Prepared

On June 2, 2008, Heal the Bay submitted the letter to the City in which it stated as follows:

We also recommend that the City include a fee on paper carryout bags in its ordinance, consistent with the City of Santa Monica staff recommendation for action on single-use carryout bags. State law does not currently preclude cities from imposing fees on paper bags, only plastic bags. As the most ubiquitous alternative to plastic, paper bags are themselves fraught with environmental impacts. The

production of paper bags contributes to natural resource depletion, greenhouse gas emissions and additional waterborne wastes from the pulping and paper making process.¹ A paper bag fee is critical in driving the use of the most sustainable option, reusable bags, rather than shifting consumer use from plastic to paper carryout bags.

(AR 159-160 at 160.)²

At the Manhattan Beach City Council meeting on July 1, 2008, the President of Heal the Bay stated as follows:

Those [plastic bag] bans [in San Francisco and Oakland] did not include bioplastics, which is a *huge mistake*. And so by not doing the CEQA analysis specifically on what the environmental impacts were of not banning that, and moving towards bioplastics with the many problems that they cause, that was a major shortcoming.³

(AR 634, emphasis added.) Heal the Bay was saying that San Francisco's and Oakland's failure to prepare an EIR to study one of the alternatives to plastic bags resulted in a "huge mistake" impacting the environment. Heal the Bay was right. The same applies to paper bags.

¹ Footnote in letter: "Australian Department of the Environment and Heritage Plastic Shopping Bags – Analysis of Levies and Environmental Impacts Final Report, prepared by Nolan-ITU, December 2002, Page 33."

² The City admitted in the Initial Study: "There is a potential that the banning of plastic bags in the City of Manhattan Beach may result in an increase in paper bag usage." (AR 114a.) The California Grocers Association stated in a letter to the City: "It is reasonable to assume a phase-out on plastic carryout bags will cause consumers to switch to paper carryout bags which have their own environmental impacts." (AR 167.)

³ "Bioplastics" means compostable bags, which were not banned in San Francisco or Oakland. (AR 58, 171-172, 235-239.)

Heal the Bay's statements confirm that the Coalition made a fair argument and that the City should have prepared an EIR.

Heal the Bay never asked for an Initial Study or EIR on the proposed Manhattan Beach ordinance, which did not include a fee on paper bags. (AR 20-22.) An EIR would have included an analysis of a paper bag fee. (CEQA Guidelines §15126.6.) Heal the Bay never questioned or criticized the City for failing to impose such a fee or took issue with the City's attempts to suppress the paper bag issue. In fact, Heal the Bay retreated from its previously stated environment concerns when its President stated at the July 1, 2008 Manhattan Beach City Council meeting: "This is not about climate change in the decision that you are making today." (AR 633.)

Now Heal the Bay has joined the chorus of deniers of the impacts of paper bags in its amicus brief. Heal the Bay is not showing consistency or dependability in following through on its own environmental beliefs.

B. The City And CAW Apply A Blatant Double Standard In Describing The Impacts Of Plastic And Paper Bags

CAW's tirade against plastic bags is exactly the kind of one-sided presentation that the Coalition is complaining about. (CAW 5-10.) CAW never acknowledges that paper bags have any negative environmental impacts.

Further, when the City was considering the proposed ordinance, CAW wrote to the City supporting a plastic bag ban. In contrast to Heal the Bay's letter that acknowledged the environmental impacts of paper bags, CAW's letter did not mention paper bags at all. (AR 161.)

The City and CAW are applying a blatant double standard in a number of ways:

- The City and CAW argue for a plastic bag ban on environmental grounds, but they protest when the Coalition raises environmental concerns about paper bags in response. How can it be illegitimate to raise environmental concerns in response to an environmental initiative? The June 3, 2008 Staff Report stated that a plastic bag ban is “the best option for the sustainability of our environment.” (AR 16.) Surely the environmental impacts of paper bags also affect the “sustainability of our environment.”⁴
- When the City and CAW evaluate the environmental impacts of plastic bags, the impacts of every plastic bag in the world are taken into account and all plastic debris in the ocean.⁵ However, when the

⁴ For example, CAW complains about the amount of plastic bags that are landfilled -- “about 147,038 tons each year in California.” (CAW 5 citing AR 280.) But the Coalition is not allowed to complain when paper bags are landfilled. On the very same page in the record that CAW cites, it states that 386,097 tons of paper bags are landfilled each year in California. (AR 280.) CAW doesn’t mention that figure in its brief! *Why not?* In fact, paper bags produce much more solid waste and take up much more space in landfills than plastic bags, even after adjusting for the greater holding capacity and the 21% recycling rate of paper bags. (Franklin AR 418; Scottish AR 452; Boustead AR 476, 479, 513, 518-519; ULS AR 540.) A document in the record (AR 403) indicates that four out of five grocery bags are plastic, so if plastic bags are banned, the tonnage and volume of paper bags in landfills will increase enormously. The Court of Appeal said that one of the many fatal deficiencies in the Initial Study was that it did not address “whether the city has a landfill that would be impacted by any increased paper bag use.” *Save The Plastic Bag Coalition v. City of Manhattan Beach* (2010) 181 Cal.App.4th 521, 544.

⁵ For example, CAW states: “World-wide between 500,000,000,000 (500 billion) and 1,000,000,000,000 (1 trillion) plastic bags are used every single year. About 20 billion of those are distributed in California every single (Footnote cont’d on next page)

environmental impacts of paper bags are evaluated, they insist that the focus must be strictly limited to the small City of Manhattan Beach. (CAW 34-35, 46.)⁶

- The Initial Study is comprised *entirely* of bare assertions and opinions without *any* footnotes or citations to evidence or sources in the text. (AR 110-121.) There is no indication that the Initial Study or even the Staff Reports were written or reviewed by anyone with *any* scientific credentials whatsoever. (AR 16-22, 99-107, 110-121.) CAW is silent about that. However, CAW complains that there is “no indication in the record whether Mr. Lilenfeld [the editor of the ULS Report] has any qualifications whatever to render the opinions given in [the ULS Report].” (CAW 40-41.)⁷
- When the City and CAW evaluate the environmental impacts of plastic bags, they make blatantly overbroad and exaggerated claims

year.” (CAW 5, emphasis in brief; see also CAW 48 referring to the impacts of plastic bags on a global level.) CAW further states: “In California, public agencies spend millions of dollars every year trying to manage the problem [of plastic bags].” (CAW 6.) “Research indicates that the dense soup of plastic caught in the [North Pacific] Gyre may be twice the size of Texas.” (CAW 7 citing AR 115a and AR 296 which do not mention anything about an area twice the size of Texas or research indicating any such finding.)

⁶ For example, CAW states: “There are only about 217 licensed retailers in the entire city....” (CAW 34-35.) CAW also approves of Justice Mosk’s dissent in which he referred to “this small-scale application of the ordinance.” (CAW 46.)

⁷ The ULS Report is based on and cites to the four scientific studies listed at AR 537-538.

and engage in hyperbole, without regard to proving causation. (AR 17; CAW 5-10, 48.)⁸ However, when the environmental impacts of paper bags are evaluated, they insist on a strict showing of causation. (CAW 31-34.)⁹

- When the City and CAW evaluate the environmental impacts of plastic bags, distant impacts in the ocean are deemed relevant. (AR 115a, CAW 7-9.) However, when the environmental impacts of paper bags are evaluated, distant impacts such as CO₂ emissions and air and water pollution are deemed irrelevant.¹⁰
- The City (in both Staff Reports) and CAW cite the plastic bag ban in *Ireland* as evidence that banning plastic bags will not result in an increase in paper bags in Manhattan Beach and a *Swedish* Report about animal feed distribution bags in Europe. (AR 18, 104; CAW

⁸ For example, CAW states that “[i]n California, public agencies spend millions of dollars every year trying to manage the problem [of plastic bags].” (CAW 6.) As support, CAW cites AR 269 which is a page in the LA County Staff Report that cites general clean up costs for all litter, without indicating how much is attributable to plastic bags. Similarly, CAW makes sweeping claims are made about “plastic” and “debris,” as if all “plastic” and all “debris” are plastic bags. (CAW 5-9.)

⁹ For example, CAW states: “In this case, [the Coalition] failed to produce any evidence establishing that the City’s enactment of the plastic bag distribution ban ‘will culminate in,’ or is in some way linked to, a ‘reasonably foreseeable effect’ for which CEQA was intended to require review.” (CAW 34.)

¹⁰ Heal the Bay argues in its brief that the City was only required to take into account environmental impacts occurring “within its own city limits and surrounding areas.” (HTB 14.) This argument is discussed below.

18, 35.) CAW quotes from the record: "just about everyone in Ireland carries around a reusable bag." (CAW 18 citing AR 372.)¹¹ In its first Staff Report, the City also cited experience in *Australia* as evidence that a voluntary initiative to reduce plastic bags usage in Manhattan Beach would not work. (AR 18, 105.) However, the City and CAW say that the Scottish Report is not applicable to Manhattan Beach because Scotland is a far away country. (City's Opening Brief 2, 8, 15; City's Reply Brief 7; CAW 36, 39.)¹²

- The City in the July 1, 2008 Staff Report relied on the Swedish Report prepared for the European paper bag industry. (AR 102, 560-570.)¹³ However, the City in its litigation briefs and CAW try to

¹¹ There is nothing in the record about paper bags in Ireland, including whether they are even offered in that country, so it is impossible to draw any conclusions. (See Environment Ministry of Ireland document which does not mention paper bags. AR 354 -- identified at AR 257.) The City and CAW fail to mention this critical point.

¹² CAW states: "Many of the reports [submitted by the Coalition] were based on assumptions applicable to entire countries halfway around the globe, not the small City of Manhattan Beach." (CAW 39.) CAW makes this statement four pages after stating that "Ireland's campaign resulted in a majority of persons carrying reusable bags." (CAW 35.) Similarly, the City states that the Scottish Report is "based on a change in behavior of a European nation with a population of 5,116,900 as opposed to a seaside Southern California town of 33,852." (City's Reply Brief 3.) *What is Ireland?* In fact, the Scottish Report was submitted as a life cycle analysis of plastic and paper bags comparing greenhouse gas emissions, energy usage, air and water pollution, and solid waste, not only as evidence of likely consumer behavior. (Plaintiff's Answer Brief On The Merits 10-11.)

¹³ The City claimed that the Swedish Report was "prepared by an Independent Swedish Environmental Consulting Group." (AR 102, 560-*(Footnote cont'd on next page)*)

discredit the studies relied upon by the Coalition because they say they are tainted by industry bias. (CAW 40.)¹⁴

- CAW cites the testimony of local schoolchildren at the Manhattan Beach City Council meeting on July 1, 2008 regarding “plastic litter,” including nine-year-old Clara Hall. CAW quotes one of the children who testified that “picking plastic out of the sand” is “depressing.” (CAW 10, citing AR 643-644.) However, the City and CAW argue that the scientists who wrote and peer reviewed the studies showing that paper bags are worse for the environment than plastic bags should be ignored. (CAW 36-41.)

CAW’s sensationalized allegations about plastic bags are a distraction from the legal issue in this case which is whether the Coalition made a fair argument about paper bags. Moreover, the operative document is the Initial Study, not CAW’s brief.

570.) The Coalition did not object to the fact that it was an industry-sponsored study. The Coalition objected to the City *falsely* claiming that it was an independent study. (Plaintiff’s Answer Brief On The Merits 17, n.19.)

¹⁴ The Coalition objects to the City’s assertion that the editor of ULS has served on an advisory board for Wal-Mart and advised “the industry.” (City’s Reply Brief 3, n.1.) The City does not cite to the record and there is nothing in the record regarding any such industry connection. In any event, the ULS Report is based on the Boustead Report and other studies. (AR 537-538.) The Boustead Report was peer reviewed by an independent third party who is a Professor of Chemical Engineering at North Carolina State University and an expert on life cycle analysis. The professor reviewed all of the data in the report and proposed corrections that were adopted. (AR 476, 535-536.)

Applying a double standard will lead to poor environmental decision making on this issue. Passion for the environment is no substitute for clear thinking about the environment. An EIR is needed.

C. It Was The City's Responsibility To Write The Initial Study, Not The Coalition's

CAW argues that the Coalition should have presented substantial evidence of how a switch to paper bags would affect the environment based on local conditions in Manhattan Beach. CAW says that only such a localized study would have satisfied the fair argument requirement. (CAW 39.) CAW is really saying that the Coalition should have prepared the Initial Study. However, that was the City's responsibility, not the Coalition's. This Court has ruled as follows regarding Initial Studies:

[T]he Commission acknowledges that whether a particular activity qualifies for the common sense exemption presents an issue of fact, and that the agency invoking the exemption has the burden of demonstrating it applies. An agency's duty to provide such factual support "is all the more important where the record shows, as it does here, that opponents of the project have raised arguments regarding possible significant environmental impacts."

(*Muzzy Ranch Co. v. Solano County Airport Land Use Com.* (2007) 41 Cal.4th 372, 386, citation omitted.)

A public agency cannot shift responsibility to the public for gaps or deficiencies in an Initial Study. In *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, the Court of Appeal stated:

While a fair argument of environmental impact must be based on substantial evidence, mechanical application of this rule would defeat the purpose of CEQA where the local agency has failed to undertake an adequate initial study. The agency should not be allowed to hide behind its own failure to gather relevant data.... CEQA places the burden of environmental investigation on government rather than the public. If the

local agency has failed to study an area of possible environmental impact, a fair argument may be based on the limited facts in the record. Deficiencies in the record may actually enlarge the scope of fair argument by lending a logical plausibility to a wider range of inferences.

(*Id.* at 311.)

Local conditions had to be addressed before a determination could be made that an EIR was not required. In *Muzzy Ranch*, this Court stated as follows:

An agency obviously cannot declare "with certainty that there is no possibility that the activity in question may have a significant effect on the environment" (CEQA Guidelines, § 15061, subd. (b)(3)) if it has not considered the facts of the matter. Since legitimate questions were raised about the possible environmental impacts of the Commission's adopting the [Travis Air Force Base Land Use Compatibility Plan], the Commission had the burden to elucidate the facts that justified its invocation of CEQA's common sense exemption.

(*Muzzy Ranch, supra*, 41 Cal.4th at 387, citation omitted.)

The Court of Appeal confirmed that it was the City's responsibility to address local conditions in the Initial Study if it wished to rely on the common sense exemption. The court stated:

It may be that the city's population and the number of its retail establishments using plastic bags is so small and public concern for the environment is so high that there will be little or no increased use of paper bags as a result of the ordinance and little or no impact on the environment affected by the ordinance. But the *initial study* contains no information about the city's actual experience -- including, by way of example only: the number of plastic and paper bags consumed; recycling rates; the quantity of plastic bags disposed of in city trash; how the city disposes of its trash; whether plastic bags are a significant portion of litter found; how, when and in what quantities paper and plastic bags are delivered into the city; whether the city has a landfill that would be impacted by any increased paper bag use; whether there are recycling facilities or programs in the city or the surrounding area; and

what the likely impact will be of a campaign urging recycling and reusable bag use. There is no statutory exemption from compliance with the California Environmental Quality Act based on a city's geographical or population size.

(*Save The Plastic Bag Coalition, supra*, 181 Cal.App.4th at 544, emphasis added.) When preparing an Initial Study, “an *agency* must use its best efforts to find out and disclose all that it reasonably can.” (Guidelines §15144, emphasis added.)

The Initial Study consists entirely of unsubstantiated narrative and opinion, with no footnotes or citations to evidence whatsoever. (AR 110-121.) There is a list of publications at the front of the Initial Study (AR 112-113), but the text does not include citations to any of those documents. There is no indication that the Initial Study was prepared or reviewed by anyone with scientific credentials. An Initial Study supporting a Negative Declaration must be based on “substantial evidence.” (Guidelines §15063 (b).) The CEQA Guidelines state that “unsubstantiated opinion or narrative” does not constitute “substantial evidence.” (Guidelines §15384.)

The City and CAW are trying to shift responsibility for the deficiencies in the Initial Study to the Coalition. That is not the law. The Coalition made a fair argument, which is a low threshold. Indeed, the City Attorney admitted on the record that the Coalition had made a fair argument. (AR 48.) The burden then shifted to the City to establish in the Initial Study, based on substantial evidence, “*with certainty* that there is *no possibility* that the activity in question *may* have a significant effect on the environment.” (Guidelines §15061(b)(3), emphasis added.) The City failed

to discharge that burden. Therefore, it was required to prepare an EIR.¹⁵

D. The Generic Life Cycle Assessments Are Substantial Evidence Supporting A Fair Argument That An EIR Was Necessary

The Coalition presented generic scientific life cycle assessments, because plastic bags and paper bags are generic products. The Initial Study does not state that the plastic bags provided by stores in Manhattan Beach or that the plastic bags addressed in the Ordinance are in any way non-generic. If the City believed that such generic life cycle assessments were not valid because of unique conditions in Manhattan Beach, it should have stated the basis for its beliefs. In fact the City never *mentioned* any of the life cycle assessments in the text of the Initial Study (AR 110-121) except as follows:

One study (commissioned by the plastic bag industry) estimates that for every 1500 plastic bags it would take 1000 paper bags to replace them. Other studies find that paper bags may hold up to four times the volume of plastic bags.

(AR 115.)¹⁶ The list of publications at the front of the Initial Study does not include the Franklin, Scottish, or ULS Reports. (AR 112-113.)

¹⁵ CAW argues that that the City was not relying on the common sense exemption or any other exemption and that “any reference to the law on exemptions is irrelevant to the Court’s review of the City’s actual actions.” (CAW 25.) If the City was not relying on an exemption, what was it relying on to avoid preparing an EIR? CAW doesn’t say. If the City was relying on no exemption at all, it had no justification for not preparing an EIR.

¹⁶ The Initial Study did not identify the study commissioned by the plastic bag industry or the “other studies” that allegedly found that paper bags may hold up to four times the volume of plastic bags.

The Initial Study is the operative document that must support a Negative Declaration. (Guidelines §15063.) A staff report is not an Initial Study. Nevertheless, without waiving the point that the Initial Study is the only operative document, we can examine the reasons that the City gave in the July 1, 2008 Staff Report for effectively disregarding the life cycle assessments. The City made four observations:

- **Staff Report:** The studies do not address the impact of plastic bags on the marine environment, which is the City's "primary concern." (AR 102.)

Coalition comment: This does not negate the findings of the studies regarding the life cycle impacts of plastic and paper bags.¹⁷

- **Staff Report:** "[T]he paper versus plastic environmental impact debate becomes less meaningful if one believes that our environmentally conscience (sic) community will begin to take reusable bags for their shopping rather than rely on paper or plastic bags provided at the store." (AR 102.)

Coalition comment: The City was required to determine "with *certainty* that there is no *possibility* that the activity in question *may* have a significant effect on the environment." (Guidelines §15061(b)(3), emphasis added; see also Guidelines §15063(b).) "If one believes" does not meet that standard.

¹⁷ The Coalition's comments herein responding to the July 1, 2008 Staff Report were not made at the time as the comment period had ended on June 23, 2008. (AR 123.) The Council's vote on the proposed Ordinance was held on the same day as the Staff Report, July 1, 2008. (AR 657-658.)

- **Staff Report:** “In our overall review of the LCA [life cycle analysis] studies, we found that assumptions, such as the number of plastic bags compared to paper bags that are used to hold an equivalent amount of goods, varied from study to study. Other factors such as the amount of post-consumer recycled content included in the bags that were studied also varied, or were not explicitly described. We observed that differing results from the reports could be used selectively used to lend support to proponents of either plastic or paper bags.” (AR 102.)

Coalition comment: This is not a valid basis for simply disregarding all of the studies. The City did not identify any *specific* assumptions or data in any *particular* study as invalid or problematic in any way.¹⁸ In any event, even if the assumptions varied, all of the studies (except the irrelevant Swedish Report) still found that paper bags are worse than plastic bags on all counts except litter.¹⁹

¹⁸ The Coalition has addressed the issue of post-consumer recycled content in paper bags. (See Boustead table heading stating 30% recycled content and the effect of adding an additional 10% recycled content in Plaintiff’s Answer Brief On The Merits at pages 15-16.)

¹⁹ The City included the Swedish Report in its “overall review of the LCA studies.” (AR 102, n.8.) The Swedish Report is obviously based on different assumptions as it studied 55 lb capacity animal feed distribution sacks. (AR 543, 571.) The City also included a one-page *Washington Post* graphic in its “overall review of the LCA studies.” (AR 102, n.8.) The graphic does not state any assumptions or cite sources so it is not reliable. It states that four out of five grocery bags are plastic; some 14 million trees are cut down each year to make the paper bags used in this country; it takes more than four times more energy to make a paper bag than a plastic bag (2,511 BTUs vs. 594 BTUs); huge amounts of water, plus bleach, limestone and sulfurous acid, are used in making paper bags; an estimated 12 million (Footnote cont’d on next page)

- **Staff Report:** The Franklin and Swedish Reports contradict each other, proving that life cycle assessments are always unreliable. (AR 102-103.)
- **Coalition comment:** The Swedish Report is irrelevant.

The City's comments summarized above are the totality of the City's criticisms in the record. (AR 101-103.)

The Franklin, Scottish, Boustead and ULS Reports are substantial, overwhelming, and inescapable evidence supporting a fair argument. The City did not provide substantial reasons for rejecting them.

E. There Are No Studies In The Record That Support The City's Position

CAW argues that the City should have been allowed to weigh all of the evidence in deciding whether the Coalition had made a fair argument. (CAW 27-30.) But there was no opposing evidence to weigh on the issue of paper bags. All of the life cycle assessments (except the irrelevant Swedish Report) point in one direction: that paper bags have greater negative environmental impacts than plastic bags.²⁰

barrels of oil are used each year to make plastic bags in this country (which the Coalition strongly disputes); and many plastic bags become litter. (AR 403 identified at AR 402.) The graphic does not say how many barrels of oil are used cutting down 14 million trees, processing them into paper bags, and trucking them to stores. A barrel of oil is 42 gallons.

²⁰ CAW refers to "a South African Life Cycle Assessment." (CAW 19.) The South African study is the FRIDGE study, which is the fifth study listed on page 14 of CAW's brief. (AR 543-571.) The FRIDGE study is merely a summary of the Franklin Report and the Swedish Report. There is no separate South African life cycle analysis.

CAW says that the Initial Study noted that one study found that a single paper bag could take the place of four plastic bags. (CAW 35 citing AR 115.) But the Initial Study does not identify that study and there is no way of knowing what study was being referenced. (AR 115.)²¹

Even if a contradictory study existed, the City would still have been required to prepare an EIR. (Guidelines §15064(f)(1) (requiring an EIR if a fair argument is made, even if the agency is “presented with other substantial evidence that the project will not have a significant effect”); see also Guidelines §15063(b)(1) (requiring an EIR if “any aspect of the project . . . may cause a significant effect on the environment, regardless of whether the overall effect of the project is adverse or beneficial.”)

CAW *concedes* this point. It states in its brief:

That said, once an agency determines that there is actually substantial evidence in the record that supports a fair argument that a project may have a significant effect on the environment, the lead agency shall prepare an EIR even though it may also be presented with other substantial evidence that the project will not have a significant effect. (CEQA Guidelines, § 15064, subd. (f)(1); *Pocket Proctors v. City of Sacramento* (2004) 124 Cal.App.4th 903, 935.)

(CAW 29-30.)²²

²¹ CAW refers to comments that 40% of consumers in Manhattan Beach carry a reusable bag. (CAW 35 citing AR 652, 654, 656.) Those comments were made by Council Members and the Mayor. They are not substantial evidence. Moreover, the 40% reusable bag figure is not mentioned in the Initial Study or even the Staff Reports. (AR 16-19, 99-107, 110-121.) The Initial Study merely states that “at least some percentage of plastic bags are expected to be replaced by reusable bags rather than plastic bags.” (AR 115.)

²² The City complains that the Coalition ignores the LA County Staff (Footnote cont'd on next page)

F. Heal The Bay's Argument That Only Local Environmental Impacts Should Be Studied Is Contrary To Settled Law And Dangerous For The Distant Marine Environment That Heal The Bay Is Committed To Protect

Heal the Bay asserts that Manhattan Beach was only required to study environmental impacts occurring "within its own city limits and surrounding areas." (HTB 14.) That is a surprising position for Heal the Bay to take as its argument for a plastic bag ban in Manhattan Beach is based on alleged impacts in the ocean thousands of miles from California. (HTB at 10.) Actually, Heal the Bay wants to limit the discussion about the impacts of *paper* bags to the city limits of Manhattan Beach, not the impacts of plastic bags. This is a double standard.

This Court has ruled that there are no geographical limits on a CEQA evaluation of a project's environmental impacts. This Court stated:

Indeed, "the purpose of CEQA would be undermined if the appropriate governmental agencies went forward without an awareness of the effects a project will have on areas outside of the boundaries of the project area." Thus, the Commission is mistaken in its suggestion that agencies have no obligation

Report. (City's Reply Brief 5.) The report is at AR 259-315. Paper bags are addressed only at AR 296-297. At AR 296, county staff assert that paper bags are less likely to become litter; paper bags have a 21% recycling rate; and paper bags will biodegrade in the ocean. (The 21% paper bag recycling rate is used in the Boustead Report. AR 479, 513, 518-519.) Based only on those three assertions, County staff dismissed the impacts of paper bags. At AR 297, there is a table from an Australian Government study that County staffs describe as "the most comprehensive and comparable report" on the impacts of plastic and paper bags. The table shows that paper bags are *worse* for the environment than plastic bags regarding the only two factors in the table, greenhouse gases and energy use. The LA County Staff Report was not cited as the basis for any statement in the Initial Study. (AR 110-123.)

under CEQA to consider geographically distant environmental impacts of their activities.

(*Muzzy Ranch Co. v. Solano County Airport Land Use Com.* (2007) 41 Cal.4th 372, 387-88.) As an organization committed to protecting the marine environment far from land-based sources of pollution, Heal the Bay should be defending the *Muzzy* decision, not trying to undermine it.

G. The Residents Association's Plea For An Exemption From CEQA When A City Is "Acting Primarily With Environmental Consequences In Mind" Would Nullify CEQA

The Residents Association states:

In a case where the city is already acting primarily with environmental consequences in mind, the requirement to perform an EIR should be *lower*. A city must be allowed to enact regulations, ban items it sees as dangerous, and take steps to protect the environment without the delays and financial burdens required by an EIR.

(MBRA 3, emphasis in brief.) The Residents Association is asking this Court to give city councils and board of supervisors the power to suspend CEQA whenever they *think* that they are doing the right thing for the environment. There is no such power in CEQA. Guidelines §15063(b)(1) states that if any aspect of a project may have a significant negative effect on the environment, it must prepare an EIR, "regardless of whether the overall effect of the project is adverse or beneficial."

Such an argument was rejected in *Catron County Board of Commissioners v. U.S. Fish and Wildlife Service*, 75 F.3d 1429 (10th Cir. 1996). Refusing to let the Secretary of the Interior act under the Endangered Species Act ("ESA") without also satisfying the requirements of the National Environmental Policy Act ("NEPA"), the court stated:

While the protection of species through preservation of habitat may be an environmentally beneficial goal, Secretarial action under ESA is not inevitably beneficial or immune to improvement by compliance with NEPA procedure.... The short- and long-term effects of the proposed governmental action...are often unknown or, more importantly, initially thought to be beneficial, but after closer analysis determined to be environmentally harmful. Furthermore, that the Secretary believes the effects of a particular designation to be beneficial is equally immaterial to his responsibility to comply with NEPA. "[E]ven if the Federal agency believes that on balance the effect [of the action] will be beneficial," regulations promulgated by the Council on Environmental Quality (CEQ) nonetheless require an impact statement.... NEPA's requirements are not solely designed to inform the Secretary of the environmental consequences of his action. NEPA documentation notifies the public and relevant government officials of the proposed action and its environmental consequences and informs the public that the acting agency has considered those consequences. A federal agency could not know the potential alternatives to a proposed federal action until it complies with NEPA and prepares at least an EA.

(*Id.* at 1437.) Simply put, the unsupported beliefs of a city council or board of supervisors are irrelevant to an analysis of whether to conduct an EIR.

H. The City Failed To Prepare A Cumulative Analysis

CAW makes its case against plastic bags based on the alleged global impacts of all plastic bags, statewide and worldwide. (CAW 5-10, 48.) CAW points out that 20 billion plastic bags are used in California each year (CAW 5.) Based on a 1.5:1 plastic to paper ratio, they may be replaced by 13.33 billion paper bags each year.

The Coalition agrees with CAW that pretending that this issue is only about Manhattan Beach is false and unrealistic. Guidelines §15065(a)(3) states that an EIR must be prepared if a project has possible environmental effects that are individually limited but "cumulatively

considerable.” The same section defines “cumulatively considerable” as meaning the “incremental effects of an individual project are significant when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects.”

Emphasizing that environmental damages often result from the aggregation of smaller sources, the Court of Appeal in *Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98 stated as follows:

Cumulative impact analysis is necessary because the full environmental impact of a proposed project cannot be gauged in a vacuum. One of the most important environmental lessons that has been learned is that environmental damage often occurs incrementally from a variety of small sources. These sources appear insignificant when considered individually, but assume threatening dimensions when considered collectively with other sources with which they interact.

(*Id.* at 114, footnote omitted; see also *San Franciscans for Reasonable Growth v. City and County of San Francisco* (1984) 151 Cal.App.3d 61, 75 [even if a proposed project might not be implemented or is subject to approvals or other contingencies, it must be part of a cumulative analysis].)

The Coalition objected to treating Manhattan Beach in isolation. (AR 382.) The Coalition argued the cumulative impacts issue in the Superior Court (AA 515-517) and the Court of Appeal (Respondent’s Brief 39-45). The Coalition discussed the preexisting San Francisco plastic bag ban and the Los Angeles County phased plastic bag ban based on the administrative record. However, as the City did not properly analyze its own proposed ban in the Initial Study, the issue of its failure to prepare a cumulative analysis is not reached. If the City had properly analyzed its own proposed ban, a cumulative analysis would have been required.

III. CONCLUSION

The Coalition made a fair argument. As Heal the Bay stated in its letter to the City, paper bags are "fraught with environmental impacts." (AR 160.) Those impacts must be studied in an EIR.

It is remarkable that environmental groups, especially Heal the Bay, are saying that those impacts should not be studied. One would have thought that they would *want* an EIR to verify and evaluate the environmental impacts and the alternatives. Decision makers and the public need the facts. As Heal the Bay said, the failure to prepare an EIR before banning plastic bags in San Francisco was a "huge mistake." (AR 634.)

One "huge mistake" is enough!

DATED: September 15, 2010

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DATED: September 15, 2010

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

I am an active member of the State Bar of California and not a party to the within action. My business address is 350 Bay Street, Suite 100-328, San Francisco, CA 94133. I served the foregoing document described as **PLAINTIFF'S ANSWER TO AMICUS BRIEFS OF HEAL THE BAY, CALIFORNIANS AGAINST WASTE, AND MANHATTAN BEACH RESIDENTS ASSOCIATION** on the interested parties and amici in this action as follows.

BY FEDERAL EXPRESS: I maintain an account with Federal Express. On September 15, 2010, I placed a true copy of said document in a sealed Federal Express container and deposited it in a Federal Express drop-off receptacle in San Francisco, California. The Airbill was marked "FedEx Priority Overnight (Next business morning)" delivery; payment to be charged to sender's account; and permit delivery without signature. The names and addresses on the Airbill was as follows:

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BY MAIL: On September 15, 2010, I placed true copies of said document in sealed envelopes with postage fully prepaid in the U.S Mail at San Francisco, California. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after date of deposit for mailing stated herein. The envelopes were addressed as follows:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on September 15, 2010 at San Francisco, California.

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