

1 LATHAM & WATKINS LLP
2 Christopher W. Garrett (Bar No. 100764)
3 *christopher.garrett@lw.com*
4 Daniel P. Brunton (Bar. No. 218615)
5 *daniel.brunton@lw.com*
6 12670 High Bluff Drive
7 San Diego, California 92130
8 Telephone: (858) 523-5400
9 Facsimile: (858) 523-5450

6 Paul N. Singarella (Bar No. 155393)
7 *paul.singarella@lw.com*
8 Emily Haws (Bar No. 319653)
9 *emily.haws@lw.com*
10 650 Town Center Drive, 20th Floor
11 Costa Mesa, California 92626-1925
12 Telephone: (714) 540-1235
13 Facsimile: (714) 755-8290

10 Attorneys for Petitioners and Plaintiffs
11 Jose Gameros, Reinaldo Gatica, Javier Rodriguez,
12 California Restaurant Association, and Dart
13 Container Corporation of California

13 SUPERIOR COURT OF THE STATE OF CALIFORNIA

14 COUNTY OF SAN DIEGO

15
16 JOSE GAMEROS, REINALDO GATICA,
17 JAVIER RODRIGUEZ, CALIFORNIA
18 RESTAURANT ASSOCIATION, AND
19 DART CONTAINER CORPORATION OF
20 CALIFORNIA,

21 Petitioners and Plaintiffs,

22 v.

23 CITY OF SAN DIEGO, AND DOES 1-100,

24 Respondents and Defendants.
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27
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Superior Court of California,
County of San Diego

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CASE NO. 37-2019-00013383-CU-TT-CTL

**VERIFIED PETITION FOR WRIT OF
MANDATE AND COMPLAINT FOR
INJUNCTIVE AND DECLARATORY
RELIEF**

[Code Civ. Proc. §§ 1060, 1085, 1094.5;
Pub. Res. Code §§ 21000 et seq. (California
Environmental Quality Act or "CEQA")]

1 **I. INTRODUCTION**

2 1. The City of San Diego (“City”) violated the California Environmental Quality Act
3 (“CEQA”) by adopting an ordinance to ban the distribution of polystyrene foam (“foam” or
4 “EPS”) food containers in San Diego (“Ordinance”) without first preparing any environmental
5 analysis with respect to the potential environmental impacts of the proposed ban.¹ Not a single
6 sentence of analysis; simply two conclusory sentences stating that the ban is exempt from
7 CEQA. Despite hundreds of pages of testimony, reports, and letters—including detailed expert
8 letters, reports, and studies raising serious concerns regarding potentially significant
9 environmental impacts from such a ban—the City disregarded all of the testimony, reports and
10 studies, did not even ask to have it reviewed, and adopted a two-sentence conclusion without any
11 analysis or support:

12 The proposed Ordinance is exempt from the provisions of the
13 California Environmental Quality Act (CEQA) pursuant to Section
14 15061(b)(3) of Title 14 of the California Code of Regulations
15 because it can be seen with certainty that there is no possibility that
16 the proposed Ordinance would have a significant adverse effect on
17 the environment. Further, the proposed Ordinance is exempt from
18 CEQA on the separate and independent ground that it is an action of
19 a regulatory agency (the City) for the “maintenance, restoration,
20 enhancement, and protection of the environment” pursuant to
21 Section 15308 of Title 14 of the California Code of Regulations,
22 through the regulation of the distribution of expanded polystyrene
23 products.

19 2. Evidence before the City when it adopted the Ordinance uniformly showed that a
20 ban on EPS, which is recyclable, *will not* reduce litter or trash and *will* result in polystyrene foam
21 being substituted with replacement products that have far greater environmental impacts and
22 result in increased litter and trash.

23 3. This substitution effect and the significant environmental problems a ban creates
24 is well recognized by experts and regulators. Indeed, as was presented in testimony and reports
25 to the City Council, three California State agencies—the California Department of Toxic
26 Substance Control, the California State Water Resources Control Board, and CalRecycle—with

27
28 ¹ Polystyrene foam is sometimes referred to as expanded polystyrene or EPS.

1 broad expertise in hazardous waste, water quality, and recycling have specifically analyzed bans
2 and rejected them as having potentially significant environmental impacts and being ineffective
3 and counterproductive.

4 4. The State Water Resources Control Board (“State Board”), the State of
5 California’s top water-quality regulator, in 2015 rejected a policy that would have encouraged
6 bans statewide, finding after detailed study that bans cause *significant environmental impacts*
7 because products that replace polystyrene foam after it is banned have significant environmental
8 impacts:²

9 [B]ans on polystyrene food containers would cause a shift to
10 materials with other significant environmental impacts (University
of California at San Diego 2006).

11 In other words, the State’s lead water quality regulator found—after years of detailed technical
12 study—that bans of polystyrene foam create significant environmental impacts. Yet the City,
13 after no analysis, and without even acknowledging the existence of the State Board’s analysis
14 and conclusion (which was presented to the City Council), found that there is no possibility a ban
15 would have significant impacts. This standing alone is enough for the Court to overturn the
16 City’s finding and to find that the City violated CEQA. CEQA does not allow the City to waive
17 off the State Board’s explicit finding that bans cause significant environmental impacts (made
18 after years of technical analysis) with two conclusory sentences. The City’s finding was not
19 supported by substantial evidence—it was not supported by any evidence, rather, it ignored the
20 mountain of evidence that bans do cause environmental impacts.

21 5. Similarly, the California Department of Toxic Substances Control (“DTSC”)
22 found that bans “often create new problems when substitutions are made”,³ and CalRecycle, as
23 part of a detailed study on polystyrene commissioned by the Legislature, found that bans are “not

24 _____
25 ² Cal. State Water Res. Control Bd., *Amendment to the Water Quality Control Plan for the*
26 *Ocean Waters of California to Control Trash and Part 1 Trash Provisions of the Water Quality*
27 *Control Plan for Inland Surface Waters, Enclosed Bays, and Estuaries of California A-19* (Apr.
28 7, 2015),
https://www.waterboards.ca.gov/water_issues/programs/trash_control/docs/trash_a_040715.pdf.

³ Cal. EPA and Cal. Dep’t of Toxic Substances Control, *California Green Chemistry*
Initiative Final Report 2 (Dec. 2008).

1 an effective long-term solution.”⁴

2 6. Members of the public, including the American Chemistry Council (“ACC”), Dart
3 Container Corporation of California (“Dart Container Corporation,” or “Dart”), and numerous
4 small business owners and residents submitted hundreds of pages of evidence—including
5 approximately twenty-five expert reports, scientific studies, and government studies containing
6 detailed technical analysis—showing that banning the distribution of polystyrene foam may
7 cause numerous significant environmental and health impacts and would not eliminate litter and
8 will undermine recycling. The studies and reports showing that the ban may cause significant
9 environmental impacts included reports by leading academics, consultants, and government
10 agencies. Among the numerous studies and reports submitted regarding potential environmental
11 impacts and the effectiveness of such a ban were reports from Dr. Mark Berkman, an expert in
12 applied microeconomics, with a PhD from The Wharton School of the University of
13 Pennsylvania, Ramboll, one of the world’s leading environmental consultant firms, and The
14 Acheson Group, one of the nation’s foremost experts on food safety. Also studies by the State
15 Board, California’s leading water-quality regulator, and Dr. Mark Grey, an expert with decades
16 of expertise in trash and water quality were submitted.

17 7. The City simply ignored the mountains of evidence presented to it—it ignored
18 the findings of other agencies, it ignored the academic experts from prestigious institutions, and
19 it ignored the dozens of technical and expert reports submitted to it. Not only did the City not
20 prepare an environmental impact report, as CEQA requires, but it also failed to conduct any
21 analysis of the Ordinance. There was no screening analysis, no initial study, no expert report—
22 nothing but two sentences of conclusory findings with no analysis.

23 8. The clear evidence presented to the City demonstrated that the proposed ban will
24 have environmental impacts with respect to a host of environmental resources: increased energy
25 consumption, increased greenhouse gas emissions, decreases in water quality, increases in
26 marine litter, increased water use, increased regulated air emissions, increased forest products

27
28 ⁴ Cal. Integrated Waste Mgmt. Bd., *Use and Disposal of Polystyrene in California* 6 (Dec. 2004), <https://www2.calrecycle.ca.gov/Publications/Download/563>.

1 consumption, and increases in the amount of material sent to landfill facilities. The expert
2 analysis submitted to the City was very clear that the ban may have significant impacts that need
3 to be analyzed in an environmental impact report. For example, Ramboll stated: “A ban on
4 certain EPS products, as is being considered by the City, would result in potentially significant
5 environmental impacts.”⁵ And regarding specific impacts, the expert analysis concluded as
6 follows:

- 7 • “[T]he increased use of substitute products could have, and is not necessarily limited
8 to, significant environmental effects within the following CEQA technical areas:
9 utilities and service systems, hydrology/water quality, biological resources, air
10 quality, greenhouse gases (“GHGs”), aesthetics, and agriculture/forest resources.”⁶
- 11 • “An EPS ban would impact the City’s waste systems (e.g., recycling, composting,
12 and landfill operations).”⁷
- 13 • “[I]ncreasing the prevalence of non-EPS plastics in use may increase marine litter.”⁸
- 14 • “[S]ubstituting other single-use products in place of EPS will result in increased
15 criteria air pollutant emissions.”⁹
- 16 • “[S]ubstituting other single-use products in place of EPS will result in increased
17 greenhouse gas emissions.”¹⁰
- 18 • “[T]he proposed ban is very unlikely to achieve its stated purpose and very likely to
19 have unintended consequences. These include higher levels of air pollution, water
20 consumption, and material consumption. The ban will also discourage investment and
21 innovation in efforts to recycle EPS.”¹¹

23 ⁵ Ramboll, *Research Regarding the Environmental Impacts of Substitutes to EPS 2* (Oct.
2018) (“*2018 Ramboll Report*”).

24 ⁶ *Id.* at 2.

25 ⁷ *Id.*

26 ⁸ *Id.*

27 ⁹ *Id.*

28 ¹⁰ *Id.*

¹¹ The Brattle Grp., Letter Report 1 (Jan. 7, 2019) (“*2019 Brattle Report*”).

1 • “A ban is likely to increase litter and trash.”¹²

2 9. The City offered no explanation at all regarding its conclusion that the Ordinance
3 would not have significant environmental impacts and that it was exempt. And the City cannot
4 assume that San Diego is a small jurisdiction so that what it does will not make much of a
5 difference. Quite the contrary, with a population of approximately 1.4 million people, the City
6 of San Diego is the second largest city in California, and the eighth largest in the United States.
7 The City is very large geographically—spanning 370 square miles, including 44 miles of
8 shoreline. And the City is a significant economy in itself—its economy is approximately the size
9 of Portugal’s. So when the City adopts a City-wide ban, the potentially significant
10 environmental impacts are magnified. Again, the City did no analysis of the ban’s potential
11 impacts given the size of the City and its economy.

12 10. Additionally, the ban is directly contrary to San Diego’s recycling goals. EPS is
13 recyclable. Many of the substitute products are not and have significant environmental and
14 health issues. Indeed, in 2017, the City announced a program to recycle EPS, including “all
15 foam food and drink containers.”¹³ Now, the City is reversing course with no reasonable
16 explanation and banning EPS, despite acknowledging that it is recyclable. By banning this
17 recyclable material, the City is acting directly contrary to its own zero waste goals.

18 11. The City’s ban also undermines the City’s Climate Action Plan (“CAP”), which
19 includes “zero waste” as a key component. And the ban will increase use of local landfills which
20 are already capacity constrained. Despite hundreds of pages of expert analysis showing that the
21 ban may, and, in fact, *will*, have significant environmental impacts, the City simply ignored the
22 evidence submitted to it showing that the ban is directly contrary to its own CAP.

23 12. As described further below, in this suit, Petitioners ask the Court to require the
24 City to set aside the Ordinance and to conduct an environmental impact report as CEQA requires
25 before reconsidering the ban.

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27 ¹² Ramboll, Follow-up to October 14 Memorandum Regarding Potential Impacts of EPS
Ban Ordinance 5 (Jan. 7, 2019) (“*2019 Ramboll Report*”).

28 ¹³ *I Love a Clean San Diego, The Right Way to Recycle: Polystyrene Foam* (Dec. 20, 2017),
<https://www.ilacsd.org/2017/12/20/the-right-way-to-recycle-polystyrene-foam/>.

1 13. The City needs to evaluate mitigation measures and alternatives in an
2 environmental impact report, including the alternative of promoting and expanding recycling
3 instead of banning a recyclable material.

4 **II. THE PARTIES**

5 14. Petitioner and Plaintiff Jose Gameros owns and operates Mariscos El Golosito, a
6 small San Diego seafood restaurant that has been in business for more than 25 years. Gameros
7 stated his opposition to the City’s proposed polystyrene ban, prior to the City Council’s adoption
8 of the ban, by letter submitted to the City. Gameros has a direct and beneficial interest in the
9 City’s compliance with CEQA and in the protection of San Diego’s environment.

10 15. Petitioner and Plaintiff Reinaldo Gatica works at, and is the son of the owner of,
11 Orlando’s Taco Shop, a San Diego small business in operation for at least six years. Expanded
12 polystyrene has been used at Orlando’s Taco Shop for many years. Gatica sent the City of San
13 Diego a letter expressing his opposition to the ban. Gatica has a direct and beneficial interest in
14 the City’s compliance with CEQA and in the protection of San Diego’s environment.

15 16. Petitioner and Plaintiff Javier Rodriguez is the owner and operator of Antojitos
16 Colombianos, a San Diego small business for at least seven years. Prior to the City Council’s
17 adoption of the expanded polystyrene ban, Rodriguez sent the City of San Diego a letter
18 expressing his opposition to the ban. Rodriguez has a direct and beneficial interest in the City’s
19 compliance with CEQA and in the protection of San Diego’s environment.

20 17. Petitioner California Restaurant Association (“CRA”) is a not-for-profit trade
21 association based in Auburn, California. CRA represents the interests of thousands of
22 restaurants across California, including restaurants in San Diego that benefit from and rely on
23 San Diego’s unique coastal environment. CRA has a direct and beneficial interest in the City’s
24 compliance with CEQA and in the protection of San Diego’s environment.

25 18. Petitioner Dart Container Corporation of California is a Michigan Corporation,
26 which has at all relevant times been in good standing and qualified to do business in California.
27 Dart exhausted its administrative remedies. Dart Container Corporation manufactures foam
28 products that are banned by the Ordinance. The Ordinance will therefore have a severe effect on

1 Dart Container Corporation’s business in San Diego and Dart Container Corporation has a direct,
2 substantial beneficial interest in this case.

3 19. Respondent City of San Diego is a political subdivision of the State of California.
4 The City is the “lead agency” for the purposes of Public Resources Code section 21067, with
5 principal responsibility for conducting environmental review of the Ordinance and complying
6 with CEQA and other state laws.

7 20. The Notice of Exemption does not identify any other real parties in interest, and
8 therefore there is no requirement to name any additional real parties in interest as parties.
9 Petitioners are unaware of any other parties that CEQA requires as named real parties under
10 applicable law or the true names and capacities of Respondents/Defendants/Real Parties
11 fictitiously named herein as Does 1 through 100, inclusive, and sues such
12 Respondents/Defendants/Real Parties by fictitious names. Petitioners will amend this Petition,
13 with leave of the Court if necessary, to allege the fictitiously named
14 Respondents/Defendants/Real Parties’ true names and capacities if ascertained.

15 **III. JURISDICTION AND VENUE**

16 21. This Court has jurisdiction pursuant to Code of Civil Procedure sections 1060,
17 1085, and 1094.5, and Public Resources Code sections 21168 and 21168.5.

18 22. Petitioners performed all conditions precedent to filing this Petition and
19 Complaint, including, but not limited to, exhausting all administrative remedies.

20 23. Venue is proper in this Court because Respondent City of San Diego is located in
21 the County of San Diego, and the violations of Petitioners’ rights occurred in the County of San
22 Diego.

23 24. Petitioners have standing to assert their claims because they have a material
24 interest in ensuring that the City properly analyzes and mitigates the effects of the Ordinance.
25 Petitioners have a legitimate interest in foam, plastics, recycling, and the environment.
26 Petitioners have no plain, speedy, or adequate remedy at law.

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1 **IV. FACTUAL BACKGROUND**

2 **A. The City adopted its proposed ban with no CEQA review, despite substantial**
3 **evidence that a ban may have significant environmental impacts and that**
4 **CEQA exemptions do not apply.**

5 25. The City Council held the first reading of the Ordinance on October 15, 2018.

6 26. A staff report accompanied the Ordinance. It contained a conclusory assertion—
7 with no analysis—that the Ordinance is exempt from CEQA. The portion of the staff report
8 addressing the ban’s environmental impacts states in its entirety:

9 The proposed Ordinance is exempt from the provisions of the
10 California Environmental Quality Act (CEQA) pursuant to Section
11 15061(b)(3) of Title 14 of the California Code of Regulations
12 because it can be seen with certainty that there is no possibility that
13 the proposed Ordinance would have a significant adverse effect on
14 the environment. Further, the proposed Ordinance is exempt from
15 CEQA on the separate and independent ground that it is an action of
16 a regulatory agency (the City) for the “maintenance, restoration,
17 enhancement, and protection of the environment” pursuant to
18 Section 15308 of Title 14 of the California Code of Regulations,
19 through the regulation of the distribution of expanded polystyrene
20 products.

21 27. With the agenda packet that accompanied the draft Ordinance, the City also
22 included a report by Equinox Project titled “Recommendations for Reducing or Banning Foam
23 Food Containers.” The report by the Equinox Project is a high-level report discussing foam bans
24 generally. It is not a San Diego-specific analysis of potential impacts of banning foam, nor is it a
25 cumulative-impacts analysis of bans across the state. Indeed, the report acknowledges that “the
26 production of alternative food service containers may have a greater environmental impact than
27 EPS production, since EPS requires relatively little energy and water to produce.”

28 28. Also included with the draft Ordinance was a resolution finding the Ordinance is
exempt from CEQA. The resolution includes no analysis whatsoever, but finds “the Council of
the City of San Diego, using its independent judgment, has determined that the Project will not
have a significant effect on the environment.” The resolution does not describe how the City
made that finding or what evidence it was relying on. The resolution found the Ordinance
exempt from CEQA under both the “common sense exemption” and under the Class 8 exemption

1 for “actions taken by regulatory agencies, as authorized by state or local ordinance, to assure the
2 maintenance, restoration, enhancement, or protection of the environment where the regulatory
3 process involves procedures for protection of the environment.” 14 Cal. Code Regs., § 15308.

4 29. The City failed to do any environmental analysis on the ban despite substantial
5 evidence that the public submitted that the ban may have significant environmental impacts and
6 is not exempt from CEQA. At the October 15, 2018 hearing, dozens of members of the public
7 spoke or submitted letters to the City urging it not to adopt the ban. ACC submitted a letter
8 urging the City to expand recycling of polystyrene foam, rather than banning this
9 environmentally superior material. CRA submitted a presentation on behalf of its members
10 showing that alternatives to EPS could be 145% more expensive than EPS. And approximately
11 156 independent restaurants submitted letters urging the City not to adopt the ban.

12 30. Also at the October 15, 2018 hearing, Dart Container Corporation submitted an
13 extensive comment letter through its counsel. The letter and its attachments were approximately
14 335 pages of analysis, technical reports, and expert materials—including two expert reports
15 prepared specifically analyzing San Diego’s proposed ban. The letter included approximately 11
16 technical studies and papers supporting the comment letter and demonstrating how the ban will
17 have significant environmental impacts. The expert studies show that product bans simply
18 replace one type of trash with another without reducing overall trash and result in other,
19 potentially more harmful, products ending up in waterways. Included with the comment letter
20 were expert reports by Ramboll and The Acheson Group specifically analyzing the potential
21 impacts of the Ordinance in the City of San Diego. The evidence submitted to the City showed
22 that the Ordinance would result in environmental impacts including greater energy use, pollutant
23 emissions, and water use, and further demonstrates that foam has life-cycle advantages over
24 substitute products. In addition, the evidence showed that foam is recyclable, and a ban would
25 undermine San Diego’s ability to meet the recycling goals in the City’s Zero Waste Plan and the
26 GHG goals in the City’s CAP. The report by The Acheson Group showed that, as a result of
27 foam’s lesser porousness and better insulating qualities, it offers greater protection against
28 foodborne illness and communicable diseases than alternative single-use food service products.

1 Dart Container Corporation specifically explained in its comments that the City could not rely on
2 a CEQA exemption, but was required to prepare an environmental impact report to study these
3 and other potential impacts from the Ordinance.

4 31. The City ignored all of the evidence submitted to it showing that the ban could
5 have significant impacts. It did not conduct any CEQA analysis, and did not even respond to the
6 materials submitted showing that the ban could have significant impacts.

7 32. Despite the voluminous evidence showing that a ban could have significant
8 environmental impacts, on October 15, 2018, the City Council voted 5-3 to adopt the Ordinance.
9 On the same day, the City Council adopted a resolution finding the Ordinance exempt from
10 CEQA.

11 33. Under the City Charter, the Ordinance required a second reading by the City
12 Council for its adoption. San Diego City Charter § 275(c).

13 34. On January 8, 2019, the City held a public hearing and a second reading of the
14 Ordinance. Again, numerous small business owners testified against a proposed ban. Dart
15 Container Corporation once again submitted comments asking the City to complete an analysis
16 under CEQA before considering a ban and urging the City to look at alternatives such as
17 recycling instead of a ban.

18 35. Dart Container Corporation's letter for the January 8, 2019 hearing included
19 approximately 14 expert reports, included approximately 1,318 pages of technical analysis,
20 study, and reports, and further demonstrated that the ban may have significant environmental
21 impacts. Two of the additional technical reports specifically analyzed potential impacts of the
22 Ordinance in San Diego—a second report by Ramboll and a report by the Brattle Group.

23 36. Dart Container Corporation's January 7, 2019 letter to the City and technical
24 reports cite potential impacts from the Ordinance, including preventing the City from meeting its
25 recycling goals in the City's Zero Waste Plan and the GHG goals in the City's CAP, increasing
26 odor complaints from local composting facilities, and additional impacts regarding landfill space,
27 biological resources, forest resources, air quality, hydrology and water quality, micro-litter, and
28 increasing demand at landfills and composting facilities. The Ramboll report also explained that,

1 based on Ramboll’s survey, homeless shelters in San Diego use foam. Banning foam would
2 impose greater costs on the shelters, and also deprive the vulnerable homeless population of a
3 safe, sanitary, superior insulator—polystyrene foam. The ban could thus increase foodborne
4 illness and have significant impacts related to public health, including the health of homeless
5 persons. Once again, Dart Container Corporation (and other commenters) explained that the
6 City could not rely on a CEQA exemption.

7 37. As it had done in the prior hearing, the City simply ignored the evidence
8 submitted to it showing that the ban may have significant environmental impacts. Despite the
9 evidence that a ban may have numerous significant environmental impacts, at the January 8,
10 2019 second reading of the Ordinance, the City voted 6-3 to adopt the Ordinance.

11 38. Upon information and belief, the City Clerk transmitted the Ordinance to the
12 Mayor on January 8, 2019. The Mayor declined to sign the Ordinance. Under the City’s
13 Charter, “final passage” of the Ordinance occurred on or about January 24, 2019—ten business
14 days after the Clerk transmitted the Ordinance to the Mayor. San Diego City Charter § 280(c)(2)
15 (Mayor “shall act upon each resolution or ordinance within ten business days of receiving the
16 City Clerk’s transmittal”); §295(a)(2) (“If the time for approval or veto by the Mayor has expired
17 and no action has been taken by the Mayor, the date of expiration of that time shall be deemed
18 the date of its final passage.”).

19 39. The City filed a notice of exemption under CEQA for the ordinance on
20 February 6, 2019.

21 40. Under its own terms, the Ordinance becomes effective “on the thirtieth day from
22 and after its final passage”—which was on or about February 23, 2019. Similarly, by the
23 Ordinance’s own terms, the ban becomes effective 90 days after the Ordinance’s effective date—
24 which will be on or about May 24, 2019.

25 41. Examples of the multiple significant impacts that the ban may have are described
26 further below.

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1 **B. The ban will not reduce trash or litter, and it may substantially increase**
2 **trash and litter; the City must analyze this potential impact in an**
3 **environmental impact report.**

4 42. One of the City’s purported reasons for the ban was to address litter. But
5 evidence submitted to the City shows that the ban will not reduce litter. Rather it is likely to
6 increase trash and litter, including litter that may be carried to San Diego’s waterways and
7 ultimately to the ocean. Once again, evidence that the ban is likely to increase trash and litter
8 was submitted to the City. Based on the record in front of the City Council there was clear
9 evidence of potentially significant environmental impacts that the City must analyze in an
10 environmental impact report. But the City simply ignored it, without any meaningful
11 explanation and without any CEQA analysis. In fact, there was no analysis from the City to even
12 explain its rationale for the asserted CEQA exemptions. Just two conclusory sentences.

13 43. Substantial evidence presented to the City, including expert reports from the
14 State, demonstrate that the ban would not be effective in reducing trash or litter. One reason that
15 the Ordinance will not reduce trash or litter is the substitution effect. People will not stop using
16 single-use food containers after the ban goes into effect. Rather, they will use substitute products
17 that may also be littered. This is common sense, and it is also affirmed by multiple experts. Dr.
18 David Sunding, Thomas Graff Professor in the College of Natural Resources at University of
19 California, Berkeley, studied this issue and concluded: “No study has been conducted showing
20 that bans of polystyrene materials are successful in reducing overall litter. In fact, a recent report
21 shows that due to a substitution of alternative products for banned PS [polystyrene] products,
22 litter volume remains the same or even increases after the implementation of a PS ban.”¹⁴

23 44. Dr. Mark Grey, another expert with deep expertise in trash and water quality,
24 explains that plastic bag bans are not a good analogue for polystyrene foam bans. There are
25 readily available reusable substitutes for plastic bags, but there are not readily available reusable
26

27 ¹⁴ The Brattle Grp., *Comments on the Draft Amendments to Statewide Water Quality*
28 *Control Plans to Control Trash* 9 (Aug. 5, 2014) (“2014 Brattle Report”).

1 substitutes for polystyrene foam food containers.¹⁵

2 45. Michael Harding, another expert with over 35 years of experience in pollution
3 control, similarly finds that bans of polystyrene foam do not reduce litter because litter is a
4 problem of human behavior: “The source of all categories of trash and litter is anthropogenic,
5 meaning that if one particular type of container, bag or food ware is banned (i.e.,
6 plastic/polystyrene) whatever material takes its place will in all likelihood be discarded and
7 introduced into the storm drain unless public education programs, improved collection
8 management, anti-littering enforcement programs are proportionally increased.”¹⁶

9 46. The State Board analyzed empirical data from before and after a polystyrene foam
10 ban in San Francisco. It also found a substitution effect:¹⁷

11 Data from the City of San Francisco’s Streets Litter Re-Audit report
12 confirmed that eliminating all food-related polystyrene would
13 simply change the type of litter found on our streets and in our
14 waterways, and result in an increase in the non-polystyrene related
litter items, thus, showing no overall reduction in litter (or trash to
the waterways) (City of San Francisco 2008).

15 47. In sum, the evidence shows that the City’s ban will not reduce litter or trash.
16 Rather, it will change the composition of the litter and trash. As discussed below, substitute
17 products are likely to have greater environmental impacts than polystyrene foam.

18 48. In addition, because of polystyrene foam’s superior insulating properties, and
19 because more replacement products are needed to meet the performance of foam, there will
20 likely be more trash and more litter after the ban. As Ramboll stated in its expert report:¹⁸

21 _____
22 ¹⁵ Dr. Mark Grey, PhD, *Proposed Polystyrene Foam Food Ware Ban in San Jose Will Not
Reduce Trash Loads in Storm Drains and Receiving Waters* (Aug. 2013).

23 ¹⁶ Michael Harding, *Comments on Bay Area Stormwater Management Agencies
24 Association’s Preliminary Baseline Trash Generation Rates for San Francisco Bay Area MS4s
and Trash Load Reduction Tracking Method 2* (Mar. 20, 2012).

25 ¹⁷ Cal. State Water Res. Control Bd., *supra* note 2, at 19.

26 ¹⁸ *2019 Ramboll Report, supra* note 12, at 4; *see also 2018 Ramboll Report, supra* note 5, at
27 2 (“[B]anning EPS food containers is expected to result in the increased use of other single-use
28 products where there will be at least a one-for-one product substitution. Due to the superior
insulation properties of EPS, there is likely a greater than one-for-one product substitution based
on the attempts to reproduce the insulation properties of EPS (e.g., the use of multiple coffee cup
sleeves).”).

1 Due to the superior insulation properties of EPS, there is likely a
2 greater than one-for-one product substitution based on the attempts
3 to reproduce the insulation properties of EPS. Often when a hot
4 beverage is served inside a paper cup, an additional layer of
5 insulation such as a sleeve or another cup is used to make the
6 beverage safe or comfortable to hold. This generates more waste
7 compared to simply using one EPS cup. Given the size of the San
8 Diego market, this could cause a significant increase in trash and
9 litter in San Diego.

6 This phenomenon of people double cupping hot beverages (like hot coffee) is well-known and is
7 cited as inspiration for the invention of the cup sleeve.¹⁹

8 49. Additionally, according to Ramboll, “Consumers are also more likely to litter
9 substitutes to EPS because they may wrongly believe that littering products marketed as
10 ‘biodegradable’ does not impact the environment. A national survey to examine littering
11 behavior in the United States found that littering was reported more frequently in instances when
12 the item was biodegradable.”²⁰ Keep America Beautiful explains the phenomenon as follows:
13 “Littering was reported more frequently in instances when the person was in a hurry, no trash
14 can was nearby, *the item was biodegradable*, there was a sense that someone else would pick it
15 up, and *when the item was not recyclable*.”²¹ In other words, people may wrongly think that
16 littering paper or compostable products is benign, so they are more likely to litter those products
17 than polystyrene foam. The government agency tasked with increasing recycling in California
18 has acknowledged this same effect.²²

19 50. Thus, the ban will not be effective in reducing litter or trash. But more than that,
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21 ¹⁹ Colleen Connolly, *How the Coffee Cup Sleeve Was Invented*, Smithsonian.com (Aug. 16,
22 2013), <https://www.smithsonianmag.com/arts-culture/how-the-coffee-cup-sleeve-was-invented-119479/>.

23 ²⁰ 2019 Ramboll Report, *supra* note 12, at 5.

24 ²¹ Action Research, Inc., *Littering Behavior in America: Results of a National Study 4* (Jan.
25 2009), https://www.kab.org/sites/default/files/News&Info_Research_LitteringBehaviorinAmerica_2009_Report_Final.pdf (emphasis added).

26 ²² Cal. Integrated Waste Mgmt. Bd., *supra* note 4, at 6 (“[U]sing biodegradable food service
27 products alone”—as might result from a ban—“will not eliminate litter problems”; indeed,
28 “[s]ome have argued that it may even increase litter if consumers believe that it no longer poses
an environmental problem”); *see also* 2019 Brattle Report, *supra* note 11, at 1 (“[B]ased on
available research, a ban on EPS will not reduce litter levels in San Diego, and may increase
litter levels.”).

1 it may actually increase litter and trash—both because people need to use more of replacement
2 products (e.g., double cupping) and because people are more likely to litter replacement products
3 that they may wrongly believe are environmentally benign.

4 51. This evidence was submitted to the City before the ban, but the City simply
5 ignored it. The City made no attempt to analyze the Ordinance’s potential impact of additional
6 trash and littering. The City did not even acknowledge this potential impact—despite the ample
7 technical support for it, including from state agencies charged with protecting California’s
8 environment. This impact is potentially significant, and the City must analyze it in an
9 environmental impact report.

10 **C. The ban will increase GHG emissions and San Diego is particularly**
11 **vulnerable to climate change.**

12 52. The public submitted technical reports and evidence showing that a ban may
13 increase greenhouse gas emissions. But instead of analyzing this potentially significant impact
14 in an environmental impact report, the City ignored the evidence of this potentially significant
15 impact.

16 53. It is imperative for the City of San Diego to address climate change and other
17 environmental concerns.²³ As the Mayor has stated, the “[C]ity’s responsibility is to ensure a
18 clean, sustainable San Diego for generations to come.”²⁴

19 54. In 2015, the City of San Diego enacted the CAP to much fanfare.²⁵ The CAP
20 outlines a series of steps that, when implemented, would lead to the City achieving required
21 greenhouse gas reductions by 2035.²⁶

22 55. The City’s CAP states that “research from state, regional, and local agencies
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24 ²³ City of San Diego, *Climate Action Plan 1* (Dec. 2015),
25 https://www.sandiego.gov/sites/default/files/final_july_2016_cap.pdf.

26 ²⁴ *Id.*

27 ²⁵ City of San Diego, *Mayor Faulconer’s Climate Action Plan Wins Unanimous City*
Council Approval (Dec. 15, 2015),
https://www.sandiego.gov/mayor/news/releases/20151215_climateactionplanvote.

28 ²⁶ *Id.*

1 indicate that the City of San Diego faces serious vulnerabilities from climate change impacts.”²⁷
2 These impacts include increases in air pollution and mosquito populations, increased wildfire
3 and drought, and rising sea levels.²⁸

4 56. As a City built around the coast and the San Diego Bay in particular, the City
5 must pay close attention to reducing climate change and its impacts.²⁹ According to sea-level
6 rise models, areas within the City may be more vulnerable to regularly occurring inundation and
7 flooding over time.³⁰ A map of where flooding is projected to occur due to sea level rise by the
8 year 2100 is below.³¹

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23 ²⁷ City of San Diego, *supra* note 23, at 56.

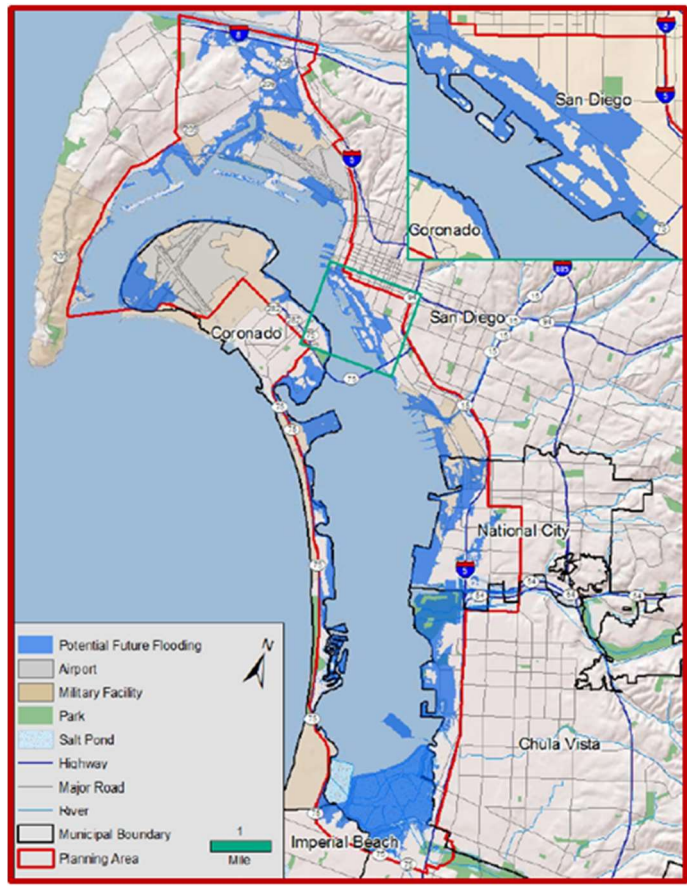
24 ²⁸ *Id.*

25 ²⁹ ICLEI-Local Governments for Sustainability, *Sea Level Rise Adaptation Strategy for San*
26 *Diego Bay* (2012), at iv, https://www.imperialbeachca.gov/vertical/sites/%7B6283CA4C-E2BD-4DFA-A7F7-8D4ECD543E0F%7D/uploads/San_Diego_Bay_SLR_Adaptation_Strategy_Complete.pdf.

27 ³⁰ *Id.*

28 ³¹ *Id.* at 15.

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57. Due to the serious risk of sea level rise within the City of San Diego, the City’s 2008 General Plan includes provisions requiring setbacks from the coast in areas subject to sea level rise.³²

58. Despite these risks and the City’s seemingly serious commitment to fighting climate change, the City adopted the ban on polystyrene foam, which is likely to increase greenhouse gas emissions because substitutes for polystyrene foam food service ware use more energy and water. Specifically, there was evidence before the City when it acted that the life cycle of foam containers generates lower greenhouse gas emissions.³³

59. Banning polystyrene foam will result in the use of substitute products, some of which have been shown to have a larger GHG emissions footprint. Specifically, polystyrene foam clamshell food containers have lower greenhouse gas emissions per functional unit than

³² City of San Diego, *supra* note 23, at 59.

³³ 2014 Brattle Report, *supra* note 14, at 17.

1 higher-grade polymers like polyethylene terephthalate (EPS is 32% lower) and polypropylene
2 (EPS is 9% lower).³⁴ A shift to an alternative polymer could lead to an increase in net
3 greenhouse gas emissions. And polystyrene cups have a 39% lower life cycle global warming
4 potential than coated paperboard cups (21% lower even without the insulating sleeve) and 34%
5 lower than solid polylactic acid (PLA) cups.³⁵

6 60. The City of San Diego’s ban of polystyrene foam runs directly contrary to the
7 City’s own stated concerns about and efforts to reduce GHG emissions. The ban may have
8 significant impacts on the environment and greenhouse gases in particular due to the use of
9 replacement products with greenhouse gas impacts higher to those of foam. The Ordinance must
10 be set aside until the City complies with CEQA and prepares an environmental impact report that
11 analyzes the greenhouse gas impacts associated with substituting polystyrene foam with
12 alternative products.

13 **D. Because alternative products have greater environmental impacts and use**
14 **more environmental resources in their lifecycles, the Ordinance may have**
15 **substantial impacts with respect to a host of environmental resources.**

16 61. Members of the public submitted ample evidence to the City showing greater
17 environmental impacts associated with substitute products than with foam. But the City failed to
18 analyze these impacts of the Ordinance in an environmental impact report and instead simply
19 ignored them.

20 62. A 2004 California Integrated Waste Management Board study reviewed life cycle
21 analyses of foam and other products and determined that “[i]n many cases, PS [polystyrene] is
22 superior in a variety of ways to several alternative products.”³⁶ In fact, “[p]rovided PS is used
23 appropriately and reused, recycled, or disposed of properly, it appears to have net positive
24 impacts.”³⁷

25 ³⁴ 2018 Ramboll Report, *supra* note 5, at 9.

26 ³⁵ *Id.*

27 ³⁶ Cal. Integrated Waste Mgmt. Bd., *supra* note 4, at 19.

28 ³⁷ *Id.*

1 63. Based on several life-cycle assessments, it is clear that polystyrene food service
2 products consume less energy and water and generate less greenhouse gases in production and
3 transport than their substitutes.³⁸

4 64. Alternatives to foam are associated with increased energy consumption. The life
5 cycle of foam containers consumes less energy than that of alternative products.³⁹ For example,
6 studies have found that foam plates have significantly lower total energy requirements than
7 coated paperboard alternatives,⁴⁰ and that foam containers use significantly less energy than
8 paper-based or corn-based alternatives, primarily due to polystyrene’s much lower weight.⁴¹
9 Energy generation is a major cause of air pollution and a major source of greenhouse gas
10 emissions.⁴² By one estimate, energy demands account for 78 percent of greenhouse gas
11 emissions.⁴³

12 65. Alternatives to foam are associated with greater greenhouse gas emissions. The
13 life cycle of foam containers generates lower greenhouse gas emissions than compostable
14 substitute products.⁴⁴ Foam clamshell food containers have lower greenhouse gas emissions per
15 functional unit than other petroleum-based polymers like polyethylene terephthalate and
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17 ³⁸ 2014 Brattle Report, *supra* note 14, at 17. See also Dr. Mark Berkman & Dr. David
18 Sunding, The Brattle Grp., *Economic Analysis of SB568’s Proposed Polystyrene Foam Ban 5*
(Aug. 2011) (“2011 Brattle Report”).

19 ³⁹ 2014 Brattle Report, *supra* note 14, at 17.

20 ⁴⁰ Franklin Associates, *Life Cycle Assessment of Hefty Polystyrene Foam Plates and Two*
Coated Paperboard Disposable Plates (Nov. 30, 2015),
21 https://www.pactiv.com/Pactiv/PDF/LCA_of_Foam_and_Paper_Plates_with_PR_Approval.pdf.

22 ⁴¹ See Am. Chemistry, *New Study: Polystyrene Foam Foodservice Cups and Plates Use*
Less Energy (Mar. 24, 2011),
23 [https://www.americanchemistry.com/Media/PressReleasesTranscripts/ACC-news-releases/New-](https://www.americanchemistry.com/Media/PressReleasesTranscripts/ACC-news-releases/New-Study-Polystyrene-Foam-Cups-and-Plates-Use-Less-Energy.html)
[Study-Polystyrene-Foam-Cups-and-Plates-Use-Less-Energy.html](https://www.americanchemistry.com/Media/PressReleasesTranscripts/ACC-news-releases/New-Study-Polystyrene-Foam-Cups-and-Plates-Use-Less-Energy.html) (citing Franklin Associates,
24 *Life Cycle Inventory of Foam Polystyrene, Paper-based, and PLA Foodservice Products* (Feb. 4,
2011), [https://www.plasticfoodservicefacts.com/wp-](https://www.plasticfoodservicefacts.com/wp-content/uploads/2017/12/Peer_Reviewed_Foodservice_LCA_Study-2011.pdf)
[content/uploads/2017/12/Peer_Reviewed_Foodservice_LCA_Study-2011.pdf](https://www.plasticfoodservicefacts.com/wp-content/uploads/2017/12/Peer_Reviewed_Foodservice_LCA_Study-2011.pdf)).

25 ⁴² Union of Concerned Scientists, *Clean Energy*, <https://www.ucsusa.org/clean-energy> (last
26 visited March 1, 2019).

27 ⁴³ David Biello, *How to Solve Global Warming: It’s the Energy Supply*, *Scientific American*
Apr. 13, 2014, [https://www.scientificamerican.com/article/how-to-solve-global-warming-its-the-](https://www.scientificamerican.com/article/how-to-solve-global-warming-its-the-energy-supply/)
[energy-supply/](https://www.scientificamerican.com/article/how-to-solve-global-warming-its-the-energy-supply/).

28 ⁴⁴ *Id.*

1 polypropylene.⁴⁵ Foam cups have lower life cycle global warming potential than coated
2 paperboard cups and solid polylactic acid cups.⁴⁶ Larger emissions of greenhouse gases lead to
3 higher concentrations in the atmosphere.⁴⁷ The accumulation of greenhouse gases in the
4 atmosphere has been well-studied as a source of global warming.⁴⁸ The City of San Diego has
5 recognized reducing greenhouse gases as an important State and City goal.⁴⁹

6 66. Alternatives to foam are associated with decreases in water quality. The
7 papermaking process demands large amounts of fresh water and produces large quantities of
8 wastewater.⁵⁰ Wastewater discharges for pulp and paper mills contain chemicals, including
9 lignin, cellulosic compounds, phenols, mercaptans, sulfides, and chlorinated compounds.⁵¹
10 These chemicals end up in aquatic ecosystems in part because many wastewater treatment plants
11 do not filter out the chemicals completely.⁵² The chemicals have toxic effects on marine life and
12 species.⁵³

13 67. Alternatives to foam are associated with increased water use. The life cycle of
14 foam containers consumes less water due to the paper making process demanding large amounts
15 of fresh water and producing large quantities of wastewater.⁵⁴ For example, polystyrene
16 clamshells use up to four times less water to produce than PLA clamshells.⁵⁵ California is
17 already faced with decreasing rainfall and snow pack feeding the state's freshwater systems, and
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19 ⁴⁵ *2018 Ramboll Report, supra* note 5, at 9.

20 ⁴⁶ *Id.*

21 ⁴⁷ EPA, Overview of Greenhouse Gases, <https://www.epa.gov/ghgemissions/overview-greenhouse-gases> (last visited March 1, 2019).

22 ⁴⁸ *See* EPA, Greenhouse Gases, <https://www.epa.gov/report-environment/greenhouse-gases> (last visited March 1, 2019).

23 ⁴⁹ City of San Diego, *supra* note 23, at 3.

24 ⁵⁰ *2018 Ramboll Report, supra* note 5, at 9-10.

25 ⁵¹ *Id.*

26 ⁵² ScienceDaily, *Chemicals In Our Waters Are Affecting Humans And Aquatic Life In Unanticipated Ways* (Feb. 21, 2008).

27 ⁵³ *2018 Ramboll Report, supra* note 5, at 9-10.

28 ⁵⁴ *Id.* at 2-3.

⁵⁵ *See* American Chemistry, *supra* note 41.

1 droughts are expected to become more dangerous and more frequent in the state.⁵⁶ Precipitation
2 over California may diminish by as much as 15% within 20 to 30 years.⁵⁷

3 68. Alternatives to foam are associated with increases in particulate emissions.
4 Production of common plastic substitutes to EPS—polyethylene terephthalate (PET) and
5 polypropylene (PP)—result in greater particulate emissions (PM10) compared to EPS on a “per-
6 cup” basis.⁵⁸ PET production results in up to five times the particulate emissions of EPS on a
7 “per-cup” basis.⁵⁹ Particles can be carried over long distances by wind; when they settle on
8 water or land, they cause water acidity, upset water nutrient balance, deplete soil of nutrients,
9 damage sensitive forests and farm crops, affect biodiversity, and contribute to acid rain effects.⁶⁰

10 69. Alternatives to foam are associated with increased VOC emissions. EPS has
11 lower uncontrolled VOC emissions than paper or PET products.⁶¹ Paper production results in up
12 to five times the VOC emissions compared to EPS on a “per-cup” basis.⁶² VOCs react with
13 nitrogen oxides to form ozone, the main constituent of smog.⁶³

14 70. Alternatives to foam are associated with increased criteria air pollutant emissions.
15 Compostable materials have potential environmental impacts due to composting facilities having
16 meaningful air emissions (e.g., bioaerosols, volatile organic compounds).⁶⁴ Lead, one criteria air
17 pollutant, causes decreased growth and reproductive rates in plants and animals, and neurological
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20 ⁵⁶ Evan Halper, *Climate scientists see alarming new threat to California*, L.A. Times, Dec.
21 5, 2017, <http://www.latimes.com/politics/la-na-pol-climate-california-20171205-htmstory.html>.

22 ⁵⁷ *Id.*

23 ⁵⁸ *2018 Ramboll Report, supra* note 5, at 7.

24 ⁵⁹ *Id.*

25 ⁶⁰ EPA, Health and Environmental Effects of Particulate Matter (PM),
26 <https://www.epa.gov/pm-pollution/health-and-environmental-effects-particulate-matter-pm> (last
27 visited March 1, 2019).

28 ⁶¹ *2018 Ramboll Report, supra* note 5, at 7.

⁶² *Id.*

⁶³ EPA, Volatile Organic Compound (VOC) Control Regulations,
<https://www3.epa.gov/region1/airquality/voc.html> (last visited March 1, 2019).

⁶⁴ *2018 Ramboll Report, supra* note 5, at 3.

1 effects in vertebrates.⁶⁵

2 71. Alternatives to foam are associated with increased forest products consumption.
3 Paper-based product manufacturing impacts forests and other biological resources, and increases
4 GHG emissions through increased harvesting, which could be significant.⁶⁶ Demand for wood
5 products such as paper is a major cause of damage to tropical forests, and that demand is
6 expected to increase over the next half century.⁶⁷

7 72. Alternatives to foam are associated with increases in the amount of material sent
8 to landfilling facilities. EPS is almost 95% air; it generates less solid waste both in weight and
9 volume than other comparable alternative products.⁶⁸ The U.S. is in the midst of a garbage
10 crisis; some recycling facilities are so full they have stopped sorting through plastic and paper
11 altogether and are sending it all to landfill.⁶⁹ Moreover, compostable food products are not
12 recyclable in the City of San Diego,⁷⁰ and PLA materials cannot be recycled and will
13 contaminate the recycling stream if not disposed of properly.⁷¹

14 73. Alternatives to foam are associated with impacts on the marine environment. For
15 example, expanded polystyrene foam is a much smaller contributor to litter in marine
16 environments than other materials.⁷² Alternative products do not biodegrade in marine
17 environments. Almost all biodegradable plastics are designed to break down in soil, not water.
18 Hence, issues similar to conventional plastics can be anticipated for biodegradable plastics.⁷³

20 ⁶⁵ EPA, Basic Information about Lead Air Pollution, <https://www.epa.gov/lead-air-pollution/basic-information-about-lead-air-pollution#ecosystems> (last visited March 1, 2019).

21 ⁶⁶ *Id.* at 4.

22 ⁶⁷ Union of Concerned Scientists, *Planting for the Future: How Demand for Wood*
23 *Products Could Be Friendly to Tropical Forests* (Oct. 2014), <https://www.ucsusa.org/our-work/global-warming/stop-deforestation/planting-future-demand-wood-products>.

24 ⁶⁸ *2018 Ramboll Report*, *supra* note 5, at 2.

25 ⁶⁹ Carly Cassella, *There's a Trash Crisis in The US Happening Right Now*, ScienceAlert
(Dec. 6, 2018), <https://www.sciencealert.com/the-us-has-nowhere-to-put-its-recycling>.

26 ⁷⁰ *2018 Ramboll Report*, *supra* note 5, at 15.

27 ⁷¹ *Id.*

27 ⁷² *Id.* at 2-3.

28 ⁷³ *Id.* at 16.

1 Polystyrene foam is not a major contributor to plastic debris in the ocean.⁷⁴ Studies do not show
2 foam to be a hazard to marine life.⁷⁵

3 74. To take one example of increased impacts caused by alternatives to foam, a
4 common alternative to a foam cup, a Polyethylene Coated Paper cup with a corrugated sleeve, is
5 associated with greater energy use, higher solid weight, higher solid waste volume, greater water
6 emissions, and greater GHG emissions than a foam cup.⁷⁶

7 75. The ban by San Diego of EPS is not analogous to the ban of plastic bags by the
8 City of Manhattan Beach. First, as noted by Dr. Mark Grey, plastic bag bans are not a good
9 analogue for polystyrene foam bans. There are readily available reusable substitutes for plastic
10 bags, but there are not readily available reusable substitutes for polystyrene foam food
11 containers. Moreover, the negative environmental effects of a polystyrene ban in San Diego will
12 have a much greater environmental impact than a ban in a much smaller city. Environmental
13 impacts of a polystyrene ban correlate with the size of the region in which it is implemented.⁷⁷
14 San Diego is the eighth most populous city in the United States, with a population of
15 approximately 1.4 million, 40 times larger than Manhattan Beach, a land area 93 times larger
16 than Manhattan Beach, and a coastline over 20 times longer.⁷⁸

17 76. Retail sales and sales from accommodation and food service in the City of San
18 Diego are 23 times those of Manhattan Beach, and waste disposal rates are 42 times greater.⁷⁹ In
19 effect, a much larger amount of disposable products such as shopping bags and food containers
20 are used and disposed of (or littered) in San Diego.⁸⁰ The environmental impacts of an EPS ban
21 in San Diego are significant given its size and footprint.

23 ⁷⁴ Dr. Angelique White, *Comments on Amendments to Statewide Water Quality Control*
24 *Plans to Control Trash 2* (Aug. 2014).

25 ⁷⁵ *Id.* at 3.

26 ⁷⁶ *Id.* at 13.

27 ⁷⁷ *2019 Ramboll Report, supra* note 12, at 2.

28 ⁷⁸ *Id.* at 2-3.

⁷⁹ *Id.* at 3.

⁸⁰ *Id.*

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E. The ban will harm San Diego’s vulnerable homeless population and put public health at risk; the City must analyze these potential impacts in an environmental impact report.

77. Evidence was submitted to the City showing that the Ordinance will hurt San Diego’s homeless population by increasing the costs for non-profits that serve the homeless community and that it threatens public health by depriving the homeless community of a safe, sanitary means to keep their food safe for consumption. Instead of analyzing these impacts in an environmental impact report, the City simply ignored them.

78. San Diego has the fourth-largest homeless population in the United States, with 8,576 homeless in 2018 as reported by the U.S. Department of Housing and Urban Development.⁸¹ San Diego has the second most homeless veterans of any City in the United States—1,312 homeless veterans.⁸² The City also has 876 “unaccompanied homeless youth,”

⁸¹ U.S. Dep’t of Hous. and Urban Dev., *The 2018 Annual Homeless Assessment Report (AHAR) to Congress* 20 (Dec. 2018), <https://www.hudexchange.info/resources/documents/2018-AHAR-Part-1.pdf>.

⁸² *Id.* at 62.

1 and 78.8 percent of these homeless children are what HUD defines as “unsheltered.”⁸³ This
2 means they live and sleep on the street or in other locations not suitable for human habitation.⁸⁴

3 79. San Diego lacks sufficient resources to meet the needs of its homeless population.
4 For example, a recent press report recounts that San Diego’s shelters are falling short of goals in
5 finding permanent housing for the homeless.⁸⁵ The strain on resources is becoming more acute
6 in recent months as the federal government releases asylum seekers and immigrants on to the
7 streets with no resources. According to press reports, “Federal authorities have released
8 thousands of migrant families in San Diego over the past two months, sometimes straight into the
9 streets and otherwise leaving them to find their way as they await asylum proceedings.”⁸⁶ The
10 same press account says that the City has said they are willing to help, but that so far this offer
11 has been just talk: “The [C]ity and [C]ountry both said they are willing to step in and do what
12 they can, but so far it’s mostly remained at the conversation level.”⁸⁷ As such, “the burden of
13 providing the shelter continues to remain on the nonprofits....”⁸⁸

14 80. The crisis of homelessness also threatens public health. It is reported that
15 “Service providers and state officials say the finger-pointing, the punting of responsibility and
16 resulting inaction has reminded them of the bureaucratic stumbling over hepatitis A last year.”⁸⁹

17 81. In 2017, the City of San Diego had a hepatitis A outbreak that infected more than
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20 ⁸³ *Id.* at 53.

21 ⁸⁴ *Id.* at 3.

22 ⁸⁵ John Wilkens, *City’s Shelters Falling Short of Goals in Finding Permanent Housing for*
the Homeless, San Diego Union Tribune, June 17, 2018,
23 [https://www.sandiegouniontribune.com/news/homelessness/sd-me-homeless-tents-20180613-](https://www.sandiegouniontribune.com/news/homelessness/sd-me-homeless-tents-20180613-story.html)
[story.html](https://www.sandiegouniontribune.com/news/homelessness/sd-me-homeless-tents-20180613-story.html).

24 ⁸⁶ Maya Srikrishnan and Lisa Halverstadt, *Politicians Point Fingers as Migrant Shelter and*
Public Health Crisis Looms in San Diego, Voice of San Diego, Dec. 20, 2018,
25 [https://www.voiceofsandiego.org/topics/government/politicians-point-fingers-as-migrant-shelter-](https://www.voiceofsandiego.org/topics/government/politicians-point-fingers-as-migrant-shelter-and-public-health-crisis-looms-in-san-diego/)
26 [and-public-health-crisis-looms-in-san-diego/](https://www.voiceofsandiego.org/topics/government/politicians-point-fingers-as-migrant-shelter-and-public-health-crisis-looms-in-san-diego/).

27 ⁸⁷ *Id.*

28 ⁸⁸ *Id.*

⁸⁹ *Id.*

1 500 people and killed 20.⁹⁰ In a report regarding the hepatitis A outbreak, the County of San
2 Diego notes that hepatitis A is commonly spread through contaminated food:⁹¹

3 HAV [hepatitis A] can be spread two ways: person-to-person via the
4 fecal-oral route or through exposure to contaminated food or water.
5 Person-to-person transmission via the fecal-oral route occurs when
6 an uninfected person takes in the virus by mouth due to contact with
7 objects (such as drug paraphernalia or cigarettes), food, or drinks
8 that have been contaminated with feces from an infected person.

7 82. Numerous people, including public health workers and homeless people
8 themselves, concluded that one reason for the City’s hepatitis A outbreak was the City’s ban of
9 plastic bags.⁹² Homeless people are known to use plastic bags to dispose of human waste, and
10 by banning plastic bags, the City eliminated an important tool for homeless people to protect
11 their health.⁹³ Said one homeless man: “The plastic bag ban is the main reason for the hepatitis
12 outbreak. The hepatitis outbreak was completely predictable—it’s why I left San Diego.”⁹⁴

13 83. Similarly, the polystyrene foam food containers that the City banned are a safe,
14 hygienic way of keeping food clean and healthy. The Acheson Group—nationally recognized
15 experts in food safety—authored a report warning of the consequence of banning foam:⁹⁵

16 Paper-based single-use food-service materials are more porous than
17 foam. As a result, bacteria are more likely to become trapped and to
18 grow in paper-based food-service materials than in foam food-
19 service materials. In addition, foam has superior insulating
20 properties, which can retard the growth of bacteria by keeping food

20 ⁹⁰ Associated Press and NBC Staff, *Grand Jury Faults Response to San Diego’s Hepatitis A*
21 *Outbreak*, NBC San Diego, (May 17, 2018), [https://www.nbcsandiego.com/news/local/Grand-](https://www.nbcsandiego.com/news/local/Grand-Jury-Faults-Response-to-San-Diegos-Hepatitis-A-Outbreak-482972091.html)
22 [Jury-Faults-Response-to-San-Diegos-Hepatitis-A-Outbreak-482972091.html](https://www.nbcsandiego.com/news/local/Grand-Jury-Faults-Response-to-San-Diegos-Hepatitis-A-Outbreak-482972091.html).

22 ⁹¹ Cty. of San Diego, *Hepatitis A Outbreak After Action Report 8* (May 2018),
23 [https://www.sandiegocounty.gov/content/dam/sdc/cosd/SanDiegoHepatitisAOutbreak-2017-18-](https://www.sandiegocounty.gov/content/dam/sdc/cosd/SanDiegoHepatitisAOutbreak-2017-18-AfterActionReport.pdf)
24 [AfterActionReport.pdf](https://www.sandiegocounty.gov/content/dam/sdc/cosd/SanDiegoHepatitisAOutbreak-2017-18-AfterActionReport.pdf).

24 ⁹² Usha Lee McFarling, STAT, *An outbreak waiting to happen: hepatitis A marches*
25 *through San Diego’s homeless community*, PBS NewsHour (Oct. 8, 2017, 10:18 AM),
26 [https://www.pbs.org/newshour/health/outbreak-waiting-happen-hepatitis-marches-san-diegos-](https://www.pbs.org/newshour/health/outbreak-waiting-happen-hepatitis-marches-san-diegos-homeless-community)
27 [homeless-community](https://www.pbs.org/newshour/health/outbreak-waiting-happen-hepatitis-marches-san-diegos-homeless-community).

26 ⁹³ Marty Graham, *Plastic-bag ban led to hep A health crisis?*, San Diego Reader, Sept. 8,
27 2017, [https://www.sandiegoreader.com/news/2017/sep/08/stringers-plastic-bag-ban-led-hep-](https://www.sandiegoreader.com/news/2017/sep/08/stringers-plastic-bag-ban-led-hep-health-crisis/)
28 [health-crisis/](https://www.sandiegoreader.com/news/2017/sep/08/stringers-plastic-bag-ban-led-hep-health-crisis/).

27 ⁹⁴ *Id.*

28 ⁹⁵ The Acheson Grp., *Expanded Polystyrene Report 4* (Feb. 2018).

1 appropriately hot or cold. Because of foam’s lesser porousness and
2 better insulating qualities, it offers greater protection against
3 foodborne illness and communicable diseases than alternative
4 single-use food-service products.

5 84. Ramboll, another nationally recognized scientific and environmental consultant
6 concluded that the superior safety of foam for storing food is particularly important for homeless
7 people, and for avoiding foodborne illness.⁹⁶

8 An EPS ban could also have significant impacts regarding public
9 health.... This is important to consider for homeless individuals,
10 who use (and often reuse) disposable containers for food storage.
11 For those without reliable access to a refrigerator, longer-term
12 storage in containers better suited for controlling bacterial growth is
13 safer from a public health standpoint as it may result in reduced
14 instances of foodborne illness.

15 85. The City’s ban of polystyrene foam directly harms our most vulnerable—
16 including homeless children, homeless veterans, and homeless immigrants and asylum seekers in
17 at least two ways.

18 86. First, the ban will deprive vulnerable populations of a safe, sanitary means of
19 handling food. As Ramboll, the nationally recognized scientific and environmental expert,
20 cautioned the City, “An EPS ban could also have significant impacts regarding public health.”⁹⁷
21 The Ordinance deprives homeless people of an important tool for hygiene and to keep
22 themselves free of foodborne disease. But the Ordinance did not make any provision for
23 mitigating the potential public health effects on the homeless. For example, the Ordinance did
24 not study potentially providing homeless people with food-storage facilities, since the ban is
25 depriving them of one option for safe storage of food. In fact, the City simply ignored the public
26 comments pointing out that it is potentially endangering public health by enacting the ban.

27 87. Second, the ban forces non-profits that work with these vulnerable populations to
28 purchase more expensive alternatives to foam. Resources for our most vulnerable populations
are short, and every penny counts. The Ordinance does not have a provision to reimburse
nonprofits for the added cost of purchasing more expensive substitutes for polystyrene foam. So

⁹⁶ 2019 Ramboll Report, *supra* note 12, at 7-8.

⁹⁷ *Id.* at 7.

1 by forcing them to purchase more expensive products, the ban takes money from nonprofits
2 helping homeless veterans, homeless children, homeless immigrants, and other vulnerable
3 populations. This is not a theoretical concern—there are shelters in the City that will have fewer
4 resources to serve homeless veterans, homeless children, impoverished asylum seekers, and other
5 vulnerable populations as a direct result of the Ordinance. During the administrative proceedings
6 on the Ordinance, the commenters made the City aware that passing the Ordinance would result
7 in fewer meals served to the homeless. As one report submitted to the City stated:⁹⁸

8 Based on interviews with local homeless shelters in San Diego made
9 by Ramboll in late 2018, some shelters utilize disposable food
10 containers made from EPS. One representative in charge of
11 coordinating meals at a local shelter revealed that they rely on EPS
12 foodware items to serve thousands of meals per week. The
13 representative indicated that if EPS were banned, this shelter’s costs
14 would increase significantly due to the need to purchase foodware
15 items made from alternative materials other than EPS. According to
16 the representative, these substitute items likely cost twice as much
17 as EPS, if not more. Thus, the Proposed Ban would likely result in
18 a diversion of funds from food served at this shelter to the containers
19 used to store it, which would likely result in fewer meals served,
20 based on the same available funding.

21 88. Despite this plea, the City approved the ban without any mechanism to reimburse
22 nonprofits for their increased costs or any other mechanism to mitigate the ban’s harm to
23 homeless children, veterans, immigrants, and other vulnerable populations.

24 89. In sum, the ban may have significant impacts on public health in general and on
25 the health of San Diego’s most vulnerable populations specifically—including homeless
26 veterans, homeless children, and homeless immigrants. The City must analyze these impacts in
27 an environmental impact report under CEQA before considering the ban.

28 **F. Polystyrene foam is recyclable but many substitute products are not, so the
 ban will undermine San Diego’s recycling goals.**

 90. Ample evidence was submitted to the City showing that foam is recyclable, and
 that many substitutes for foam are not recyclable. But the City simply ignored the evidence that
 the ban may have significant environmental impacts regarding undermining recycling—

⁹⁸ *Id.* at 8.

1 including the State of California’s recycling goals and the City’s own recycling goals.

2 91. Recycling is a statewide priority for California. CalRecycle’s website explains:
3 “Through landmark initiatives like the Integrated Waste Management Act and Beverage
4 Container Recycling and Litter Reduction Act, California works toward a society that uses less,
5 recycles more, and takes resource conservation to higher and higher levels. Our state leads the
6 nation with an approximate 65 percent diversion rate for all materials, and today recycling
7 supports more than 140,000 green jobs in California.”⁹⁹

8 92. In 2011, the California Legislature adopted Assembly Bill 341, which set a policy
9 goal for the state that not less than 75 percent of solid waste generated be source reduced,
10 recycled, or composted by the year 2020.¹⁰⁰ CalRecycle’s 2015 report to the Legislature on
11 Assembly Bill 341 makes clear that recycling has been at the center of California’s success in
12 reducing waste.¹⁰¹

13 In moving away from its historically disposal-dominated approach
14 to waste management, California developed an infrastructure for
15 collection, sorting, and preliminary processing of recyclable
16 materials in order to meet the state’s statutory recycling and
17 diversion directives. This was accomplished with the hard work and
dedication of all of our partners including local jurisdictions, the
waste and recycling industry, and an enlightened public that
embraced the new programs and changed its behavior.

18 The report also states that California has a long way to go to reach the 75% goal—as a state we
19 need to increase source reduction, composting, and recycling from about 37 million tons to about
20 60 million tons per year.¹⁰² One of the key strategies CalRecycle identifies in its 2015 report to
21 the Legislature on Assembly Bill 341 is expanding California’s current recycling and
22 manufacturing infrastructure.¹⁰³ Notably, nowhere does the report recommend banning
23

24 ⁹⁹ CalRecycle, About CalRecycle, <https://www.calrecycle.ca.gov/AboutUs/> (last visited
25 March 1, 2019).

26 ¹⁰⁰ CalRecycle, *AB 341 Report to the Legislature 1* (Aug. 2015),
<https://www2.calrecycle.ca.gov/Publications/Documents/1538/20151538.pdf>.

27 ¹⁰¹ *Id.*

28 ¹⁰² *Id.*

¹⁰³ *Id.* at 7.

1 recyclable material like polystyrene foam to increase California’s recycling rate.

2 93. The City of San Diego has adopted an aggressive Zero Waste Plan, which calls
3 for increased recycling and ultimately for the City to reach zero waste.¹⁰⁴ The Zero Waste Plan
4 explains the principle of using discarded materials as a valuable commodity:¹⁰⁵

5 Zero Waste is a principle that calls for handling discarded materials
6 as commodities for reuse rather than for disposal, and conserving
7 those commodities through waste prevention, recycling,
8 composting, and other technologies. This “discards” management
9 system emphasizes commodities can flow full circle focusing on
conservation during the total life cycle of materials from product
design, collection, and processing to the marketing of new products
made from the material.

10 94. The City’s Zero Waste Plan sets a goal of 75% diversion of waste from landfills
11 by 2020, 90% diversion by 2035, and 100% diversion (zero waste) by 2040.¹⁰⁶ The City
12 acknowledges that it has a long way to go to achieve these goals, and that even to “increase the
13 City’s waste diversion rate to 75% will require an estimated additional 332,000 tons per year to
14 be diverted from landfill disposal.”¹⁰⁷ Nowhere does the City’s Zero Waste Plan recommend
15 banning recyclable material like polystyrene foam to increase San Diego’s recycling rate.

16 95. Polystyrene foam is recyclable.¹⁰⁸ And polystyrene foam used for food service
17 specifically is recyclable. As the City is well aware, recycling foam is feasible, and the City is
18 already recycling foam, including foam used for foodservice. An expert report submitted to the
19 City explains that newer technology in materials recovery facilities has enabled increased
20 recycling of foam:¹⁰⁹

21 EPS is a recyclable material and has many characteristics that make
22 it an ideal product for foodware (and other) applications. In fact, the

23 ¹⁰⁴ City of San Diego, Zero Waste Plan (June 2015),
24 <https://www.sandiego.gov/sites/default/files/legacy/mayor/pdf/2015/ZeroWastePlan.pdf> (last
visited March 1, 2019).

25 ¹⁰⁵ *Id.* at 2.

26 ¹⁰⁶ *Id.*

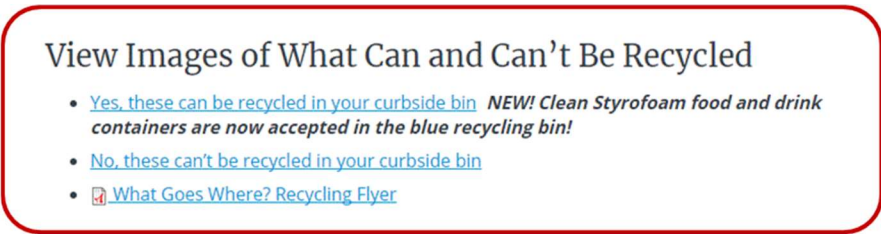
27 ¹⁰⁷ *Id.*

28 ¹⁰⁸ *2019 Brattle Report, supra* note 11, at 8 (noting that there are multiple recycling sites or
curbside recycling programs for polystyrene foam in California and Southern California).

¹⁰⁹ *2018 Ramboll Report, supra* note 5, at 4.

1 City of San Diego has permitted the recycling of certain EPS
2 materials such as packaging material for years and in mid-2017, the
3 City Council voted to expand recycling capabilities to include all
4 EPS foodware products. This ability to recycle a wider range of EPS
5 products is partially attributable to the emergence of new secondary
6 Material Recovery Facilities (MRFs), which make the process more
7 economically viable. These secondary processing facilities accept
8 baled materials that typical MRFs would otherwise landfill and
9 further sort out mixed plastics, polystyrene, and other high-value
10 recyclables that may have escaped the initial MRF sort. By using
11 technological advances in material sorting, such as optical scanners
12 that can accurately identify plastic resins, these secondary MRFs are
13 able to bale solid polystyrene with EPS to achieve an ideal density
14 for the commodity.

9 96. As of the drafting of this Petition, the City’s website still shows that foam is
10 recyclable in the City of San Diego.¹¹⁰ Below is a screen shot of the City’s website clearly
11 identifying that polystyrene food and drink containers can be recycled.



16 97. Not only is it technically feasible to recycle foam, but also there is a market for
17 recycled foam, with both buyers and sellers. As two leading natural resources economists put
18 it:¹¹¹

19 One key sign that recycling of polystyrene is economically feasible
20 is the existence of a market for recycled PS, with both buyers and
21 sellers. Buyers exist because recycled polystyrene can be used as an
22 input in manufacturing processes. Companies are currently using
23 recycled PS to produce products such as picture frames, crown
24 molding, baseboards, and flower pots. Regarding sellers, the
25 California Ocean Science Trust report cites several examples. One
26 of the companies mentioned in the report, FP International, is able
27 to recycle about 4 million pounds of polystyrene per year, while
28 another saves \$80,000 per year by recycling EPS.

24 98. In contrast to polystyrene foam, which is recyclable, many products that would
25 replace foam after it is banned cannot be recycled. For example, paper cups have a plastic liner

27 ¹¹⁰ City of San Diego, What Can Be Recycled?, <https://www.sandiego.gov/environmental-services/recycling/residential/curbside/list> (last visited March 1, 2019).

28 ¹¹¹ 2014 Brattle Report, *supra* note 14, at 23.

1 that makes them difficult to recycle. “Most waste management facilities will treat the cups as
2 trash.”¹¹²

3 99. Compostable food products are not recyclable in the City of San Diego. In fact,
4 the Environmental Services Department published a pamphlet advising citizens to stop using
5 compostable products, noting that they “do not biodegrade into compost and eventually end up
6 creating methane gas in the Miramar Landfill” and “...if they are mixed with other recyclables in
7 the blue bin, they can contaminate the quality of plastics when they are made into new
8 products.”¹¹³ An excerpt of this City publication is below.



19 100. A more recent pamphlet included a reminder that compostable foodware products
20 must still be disposed of in the regular trash bin.¹¹⁴ Thus, there is currently no feasible way to
21 recycle or compost these products in San Diego, some of the very products that will be
22 substituted for recyclable polystyrene foam food containers.

23 101. Because polystyrene foam food containers are recyclable and in fact are recycled

24
25 ¹¹² Livia Albeck-Ripka, *6 Things You're Recycling Wrong*, N.Y. Times, May 29, 2018,
<https://www.nytimes.com/2018/05/29/climate/recycling-wrong-mistakes.html>.

26 ¹¹³ City of San Diego, *The Curbsider* (Winter 2014),
<https://www.sandiego.gov/sites/default/files/legacy/environmental-services/pdf/recycling/2014curbsider.pdf>.

27
28 ¹¹⁴ City of San Diego, *The Curbsider* (Winter 2018-2019),
https://www.sandiego.gov/sites/default/files/curbsider_2018-19_-_3_pages.pdf.

1 in numerous jurisdictions in California, but replacement products often are not, banning foam
2 will undermine recycling in the City. This potentially conflicts with Assembly Bill 341 and with
3 the City’s own Zero Waste Plan, and the City failed to analyze this potential conflict. By
4 banning a recyclable material, the Ordinance will cause more waste to be diverted to the land fill,
5 and it will undermine the City’s recycling goals. The City must analyze these potentially
6 significant impacts in an environmental impact report. Instead, in adopting the Ordinance, the
7 City showed no awareness that products that are likely substitutions for banned foam are not
8 recyclable.

9 102. As jurisdictions ban foam, especially large cities like San Diego, “it will become
10 more difficult and expensive to collect sufficient amounts of used EPS to recycle
11 economically.”¹¹⁵ In other words, by banning foam instead of recycling it, the City is not just
12 undermining its own recycling efforts—it is potentially making it more difficult for other
13 jurisdictions to recycle foam, because the City’s ban undermines the whole industry. This is a
14 potential cumulative impact that was pointed out to the City in the administrative proceedings,
15 but the City failed to analyze it or even acknowledge it. The City must analyze these potentially
16 significant impacts in an environmental impact report.

17 **G. By undermining the City’s zero waste goals, the City’s ban also undermines**
18 **the City’s Climate Action Plan.**

19 103. The City’s polystyrene foam ban may also interfere with the City’s ability to
20 attain its lauded greenhouse gas emission reduction goals.¹¹⁶ The City of San Diego CAP calls
21 for eliminating half of all greenhouse gas emissions in the City.¹¹⁷ In order to achieve this goal,
22 the CAP outlines a strategy for greenhouse gas reductions and specifies particular action items
23 and steps that must be implemented to achieve state-mandated reduction targets.

24 104. According to the City’s CAP, one of the five key components necessary for
25

26 ¹¹⁵ 2019 Brattle Report, *supra* note 11, at 8.

27 ¹¹⁶ City of San Diego, *supra* note 23.

28 ¹¹⁷ City of San Diego, City of San Diego’s Climate Action Plan,
<https://www.sandiego.gov/sustainability/climate-action-plan> (last visited March 1, 2019).

1 achieving these greenhouse gas reductions is “zero waste.”¹¹⁸

2 105. In the CAP, the City explains that implementation of the City’s Zero Waste Plan
3 is key to achieving necessary greenhouse gas reductions.¹¹⁹ One goal in the CAP is to “divert
4 solid waste and capture landfill methane gas emissions.”¹²⁰ In order to achieve this goal, the
5 City’s CAP sets stringent targets for solid waste diversion. Specifically, “the goal for the City is
6 to achieve a 75 percent waste diversion rate by 2020. The City also has a goal to strive for Zero
7 Waste disposal by 2040.”¹²¹

8 106. According to the City’s own 2018 CAP Annual Report, the City has achieved a
9 solid waste diversion rate of only 66 percent.¹²² This rate is far below the 75 percent goal that
10 must be achieved by next year in order for the City to stay on track to achieve state-mandated
11 greenhouse gas reductions.

12 107. Once again, expert evidence of this potential impact was submitted to the City,
13 but the City simply ignored it. The City must prepare an environmental impact report that
14 analyzes this potential impact.

15 **H. The ban will increase use of local landfills, which are already capacity**
16 **constrained.**

17 108. The City of San Diego has limited landfill and composting space and availability.
18 The ban may cause a significant impact regarding increased use of landfills. While evidence of
19 this impact was submitted to the City during the administrative proceedings, the City simply
20 ignored this potential impact.

21 109. The West Miramar Landfill is the City’s only municipally-operated landfill and is
22
23

24 ¹¹⁸ City of San Diego, *supra* note 23, at 25.

25 ¹¹⁹ *Id.* at 40.

26 ¹²⁰ *Id.*

27 ¹²¹ *Id.* at 25.

28 ¹²² City of San Diego, *Climate Action Plan 2018 Annual Report 5*,
https://www.sandiego.gov/sites/default/files/city_of_san_diego_2018_cap_annual_report.pdf.

1 currently projected to reach capacity and close by 2022.¹²³ One recent report commissioned by
2 the City of San Diego concluded that:¹²⁴

3 The City faces running out of landfill capacity at the [West Miramar
4 Landfill] by 2021. The region is projected to have capacity only
5 until 2025 if the Sycamore Landfill expansion is not approved.
6 These projected dates include the capacity gained from the City’s
7 recycling and [construction and demolition] ordinance
8 implementation. If the Sycamore Landfill expansion is approved
9 and diversion continues from implementing the City’s recycling and
10 [construction and demolition] ordinances, as well as continued
11 implementation of existing zero waste programs, the region is
12 projected to have capacity until 2037 at the Sycamore Landfill.

9 110. The City of San Diego continues to go to great lengths to research and analyze
10 how to extend the life of and maximize the capacity of the Miramar Landfill,¹²⁵ including
11 through implementation of the City’s Zero Waste Plan discussed above.

12 111. Despite the City’s constrained landfill capacity, the City adopted a ban in the face
13 of evidence in the Ramboll Report that it could generate more waste that would need to be
14 landfilled.

15 112. Specifically, as the report stated, “[o]ften when a hot beverage is served inside a
16 paper cup, an additional layer of insulation such as a sleeve or another cup is used to make the
17 beverage safe or comfortable to hold. This generates more waste compared to simply using one
18 EPS [foam] cup. Given the size of the San Diego market, this could cause a significant increase
19 in trash and litter in San Diego.”

20 113. In addition, analyses in the record found that substitutes for polystyrene foam
21 food service ware increases the amount of material sent to recycling and landfilling facilities—
22 polystyrene foam is almost 95 percent air; it generates less solid waste both in weight and
23 volume than other comparable substitute products.¹²⁶

24 ¹²³ City of San Diego, Long-Term Resource Management Strategic Plan,
25 <https://www.sandiego.gov/environmental-services/geninfo/lwmo> (last visited March 1, 2019).

26 ¹²⁴ City of San Diego, *Long-Term Resource Management Strategic Plan Phase II Report 2-*
27 *9*, [https://www.sandiego.gov/sites/default/files/legacy/environmental-](https://www.sandiego.gov/sites/default/files/legacy/environmental-services/geninfo/pdf/LTRMOFinalReport.pdf)
28 [services/geninfo/pdf/LTRMOFinalReport.pdf](https://www.sandiego.gov/sites/default/files/legacy/environmental-services/geninfo/pdf/LTRMOFinalReport.pdf).

¹²⁵ City of San Diego, *supra* note 124.

¹²⁶ *2018 Ramboll Report*, *supra* note 5, at 2.

1 114. As the City’s Ordinance forces consumers to purchase, use, and dispose of
2 substitute products, the City is placing increased pressure on its already constrained landfills.
3 Replacement products that are not 95% air will not compress down in a landfill the way
4 polystyrene products will. These replacement products, therefore, have the potential to take up
5 more space in the City’s already dwindling landfill capacity.

6 115. The City has spent a tremendous amount of time and government resources
7 attempting to solve its landfill capacity problem. And yet, the City is carelessly undermining its
8 own zero waste goals and landfill planning processes by increasing the amount of waste that will
9 be disposed of and the amount of space that waste will take up in a landfill. This is a potential
10 environmental impact that was raised with the City during its administrative proceedings and it
11 has not been addressed. The City must analyze this potentially significant impact in an
12 environmental impact report.

13 **I. The ban may cause significant impacts on the marine environment; the City**
14 **must analyze this potential impact in an environmental impact report.**

15 116. Evidence submitted to the City showed that the ban may have significant impacts
16 on the marine environment. But as with evidence of other impacts, the City simply ignored
17 evidence of potential impacts to the marine environment. The City must study potential impacts
18 to the ocean and to the marine environment in an environmental impact report.

19 117. Polystyrene foam is not a hazard for marine animals. “[N]o available studies have
20 specifically shown polystyrene foam to be either an entanglement or ingestion hazard in the
21 marine environment.”¹²⁷

22 118. As discussed above, the ban will not reduce litter or trash, and it is likely even to
23 increase litter and trash. And the substitute products will have greater impacts related to
24 greenhouse gas emissions, energy use, water quality, air emissions, deforestation, and other
25 impacts. Thus, a ban will not help the marine environment, but it will hurt the marine
26 environment by forcing substitution of products with greater impacts. Dr. Angelique White,

27 _____
28 ¹²⁷ White, *supra* note 74, at 3.

1 Associate Professor of Ocean Ecology and Biogeochemistry at Oregon State University, puts this
2 unfortunate result of bans as follows:¹²⁸ “In the case of polystyrene foam, there is little to no
3 existing data for deleterious impacts of this specific product on marine organisms; there is the
4 likelihood that substituted products may have similar litter rates and more significantly, product
5 substitutions may lead to enhanced greenhouse gas production that continue to threaten our
6 ocean resources.”

7 119. Instead of analyzing the ban’s potential impacts on the marine environment, the
8 City failed to analyze, or even acknowledge, potential impacts of the ban on these resources.
9 The City must analyze these potential impacts in an environmental impact report.

10 **J. The City needs to evaluate mitigation measures and alternatives in an**
11 **environmental impact report.**

12 120. The City failed to propose and analyze mitigation measures for the significant
13 impacts caused by an expanded polystyrene ban. Dart Container Corporation’s October 15, 2018
14 letter includes recommended mitigation measures that are both feasible and enforceable,
15 including the following: (i) requiring the City to offset the increased carbon emissions due to the
16 ban; (ii) requiring the City to purchase renewable energy credits for the increased energy use that
17 ban will cause; and (iii) requiring the City to conduct restoration projects to compensate for the
18 increased water use and pollutant discharges that a ban will cause.

19 121. The City failed to propose and analyze alternatives that would avoid or reduce the
20 environmental impacts of the ban. The opportunity costs of a polystyrene ban are high due to the
21 fact that “[p]olystyrene bans are expensive.”¹²⁹ A polystyrene ban requires funds that could
22 otherwise be used by the City for trash reduction methods that are demonstrably effective,
23 including structural best management practices, the use of full capture devices, education, litter
24 cleanup programs, street and storm drain cleanups, and river and shoreline cleanups.¹³⁰ Since

26 ¹²⁸ *Id.* at 2.

27 ¹²⁹ *2014 Brattle Report, supra* note 14, at 4.

28 ¹³⁰ *Grey, supra* note 15, at 2, 10-11.

1 polystyrene can be recycled, promoting recycling is likely to be far more effective than a ban.¹³¹

2 122. One alternative that the City should analyze in a full environmental impact report
3 is a public-private partnership to upgrade and further develop the City’s recycling program.
4 ACC offered to enter into such a public-private partnership with the City.

5 123. ACC made its offer of a public-private partnership to the City in writing on
6 October 11, 2018.¹³² ACC’s proposal is designed to meet the following goals: “establish a
7 sustained, efficient and economical polystyrene recycling program for the City of San Diego that
8 a) utilizes best available recovery technology, likely predicated upon proactive optical sorting,
9 b) accesses developed and developing markets, and c) is well supported technically and
10 administratively by its industry partners to achieve ongoing effectiveness.”¹³³

11 124. ACC’s proposal had four key elements to ensure the further expansion of
12 polystyrene foam recycling:

- 13 • Bridge support funding. ACC’s proposal included funding intended to defray the
14 City’s cost of polystyrene recycling while the program is implemented.
- 15 • Technical support. ACC’s proposal included funding of technical resources to
16 support the strongest possible implementation of the polystyrene recycling
17 system.
- 18 • Funding for best available technology. ACC’s proposal included funding for
19 technology to help processing polystyrene foam for recycling.
- 20 • Ongoing market development support. ACC’s proposal included a commitment
21 to help the City find, evaluate, and support markets for the recycled polystyrene
22 material.

23 ACC proposed to invest \$1,970,000 in this public-private partnership to support polystyrene
24

25 ¹³¹ 2014 Brattle Report, *supra* note 14, at 4.

26 ¹³² Letter from Mike Levy, Senior Director, American Chemistry Council, to Ken Prue,
27 Recycling Program Manager, City of San Diego (“ACC’s Recycling Partnership Offer”)
(Oct. 11, 2018).

28 ¹³³ *Id.*

1 foam recycling.¹³⁴

2 125. Instead of working with stakeholders to further expand recycling of polystyrene
3 foam, the City chose to adopt the Ordinance, which bans this recyclable product and will have
4 the impacts described above. The City did not analyze or study whether increasing recycling
5 would be better for the environment than adopting a ban of polystyrene foam that may have
6 significant environmental impacts. The Court should require the City to prepare a full
7 environmental impact report before considering a ban. And the alternatives analysis should
8 include the alternative of expanding recycling, including via a public-private partnership.

9 **V. CAUSES OF ACTION**

10 126. Based on the allegations herein, the following causes of action are alleged.

11 **FIRST CAUSE OF ACTION**

12 **(Violations of CEQA)**

13 127. The foregoing allegations are incorporated by reference.

14 128. The Legislature enacted CEQA to ensure that government agencies incorporate
15 the goal of long-term protection of the environment into their decisions that may affect the
16 environment. CEQA applies to any discretionary action taken by an agency that may cause a
17 reasonably foreseeable change in the environment.

18 129. Because categorical exemptions like the Class 8 exemption and the common
19 sense exemption excuse environmental review under CEQA, they are narrowly construed. The
20 burden of showing an exemption applies is on the agency—in this case, the City.

21 130. The City violated CEQA by relying on exemptions to adopt the Ordinance. The
22 City failed to meet its burden of showing that the Class 8 exemption or the common sense
23 exemption apply. Evidence submitted by Petitioner Dart and others showed that the Ordinance
24 may have significant environmental impacts.

25 131. The Class 8 exemption does not apply to the Ordinance, because even though the
26 Ordinance is intended to address one set of environmental issues, the evidence in the record

27
28

134 *Id.*

1 shows the Ordinance may cause other environmental impacts. In other words, even a “new
2 regulation that strengthens some environmental requirements may not be entitled to an
3 exemption if the new requirements could result in other potentially significant effects.”
4 *California Unions for Reliable Energy v. Mojave Desert Air Quality Management Dist.* (2009)
5 178 Cal. App. 4th 1225, 1240-1247 [rejecting use of Class 8 exemption for air district rule where
6 there was evidence that rule could lead to increased paving]. Here, the evidence in the record, at
7 a minimum, shows the Ordinance will not improve environmental conditions across the board;
8 rather, it will cause people to use more substitute products that have greater environmental
9 impacts. Thus, the Class 8 exemption does not apply.

10 132. The common sense exemption also does not apply. That exemption applies only
11 if “it can be seen with certainty that there is no possibility that the activity in question may have
12 a significant effect on the environment...” 14 Cal. Code Regs., § 15061(b)(3). Here, mountains
13 of uncontroverted evidence in the record shows that the Ordinance may have significant
14 environmental impacts.

15 133. Even if the City had shown that the Ordinance fits within the Class 8 categorical
16 exemption or the common sense exemption (which it did not), there is substantial evidence in the
17 record showing that exceptions to the exemptions apply. There is substantial evidence in the
18 record showing that “there is a reasonable possibility” that the Ordinance “will have a significant
19 effect on the environment due to unusual circumstances.” Cal. Code Regs., § 15300.2(c). Those
20 unusual circumstances include the fact that an agency would typically ban a product only when
21 alternative products have fewer impacts. The Ordinance is unusual in that the City has chosen to
22 ban a product—polystyrene foam—that has superior environmental attributes to alternative
23 products. It is also an unusual circumstance for the City to adopt a ban in the face of findings by
24 the state agencies with primary jurisdiction over water quality, recycling, and waste that bans are
25 ineffective or bad public policy.

26 134. Independently, the cumulative impact exception applies here such that the City
27 may not rely on a Class 8 exemption. The CEQA Guidelines provide that exemptions “are
28 inapplicable when the cumulative impact of successive projects of the same type in the same

1 place, over time is significant.” Cal. Code Regs., § 15300.2(b). The evidence in the record
2 shows that polystyrene foam bans will have a significant cumulative effect on the environment.
3 Approximately 117 jurisdictions in California have banned the distribution and sale of
4 polystyrene. When analyzed together, substituting polystyrene foam for its alternatives due to
5 this ban in conjunction with others results in significantly increased energy consumption, greater
6 GHG emissions, decreased water quality, increased marine litter, increased water use, increased
7 particulate emissions, increased VOC emissions, increased criteria air pollutant emissions,
8 increased forest products consumption, and increased material sent to recycling and landfilling
9 facilities.

10 135. As a result of the foregoing defects, the City prejudicially abused its discretion by
11 relying on exemptions for CEQA compliance for the Ordinance. As such, the Ordinance must be
12 set aside until the City complies with CEQA and prepares an environmental impact report.

13 **SECOND CAUSE OF ACTION**

14 **(Declaratory Relief)**

15 136. The foregoing allegations are incorporated by reference.

16 137. An actual controversy exists between Petitioners and Plaintiffs on the one hand,
17 and the City on the other, involving substantial questions regarding the City’s compliance with
18 CEQA.

19 138. Accordingly, Petitioners and Plaintiffs seek a declaration of the rights of the
20 public and the obligations of the City under CEQA.

21 139. Such a declaration is a necessary and proper exercise of the Court’s power at this
22 time and, under the circumstances, in order to prevent further actions by the City in violation of
23 law.

24 **PRAYER FOR RELIEF**

25 A. A declaration of the rights and duties of the respective parties stating that the
26 Ordinance violates CEQA as alleged herein;

27 B. For alternative and peremptory writs of mandate directing the City to set aside the
28 Ordinance for violations of CEQA, as alleged herein;

1 C. For alternative and peremptory writs of mandate directing the City to comply with
2 CEQA and the CEQA Guidelines, and to take any other action as required by Public Resources
3 Code section 21168.9;

4 D. For a temporary stay, temporary restraining order, and preliminary and permanent
5 injunctions restraining the City and its agents, servants, and employees, and all others acting in
6 concert with the City on its behalf, from taking any action to implement the Ordinance, pending
7 full compliance with the requirements of CEQA, the CEQA Guidelines, and all other applicable
8 laws and regulations as alleged herein;

9 E. An order directing the recovery of reasonable attorneys' fees incurred in this
10 matter from the defendants, respondents, and/or real parties in interest, jointly and severally,
11 pursuant to Code of Civil Procedure section 1021.5 or other applicable law;

12 F. An order directing the recovery of costs of suit incurred herein from defendants,
13 respondents, and/or real parties in interest, jointly and severally; and

14 G. Such other and further relief as the Court deems just, proper, or appropriate.

15 Dated: March 12, 2019

LATHAM & WATKINS LLP

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By /s/Christopher W. Garrett
Christopher W. Garrett
Attorneys for Petitioners
Jose Gameros, Reinaldo Gatica, Javier
Rodriguez, California Restaurant
Association, and Dart Container Corporation
of California

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VERIFICATION

I, Francis X. Liesman II, am the General Counsel, for Petitioner and Dart Container Corporation of California, one of the Petitioners in this action, and I am authorized to make this verification. I have read the foregoing VERIFIED PETITION FOR WRIT OF MANDATE AND COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF and am familiar with its contents. All facts alleged in the VERIFIED PETITION FOR WRIT OF MANDATE AND COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF are either true of my own knowledge or I am informed and believe them to be true and on that basis allege them to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 12th day of March, 2019, at Mason, Michigan.



Francis X. Liesman II