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# A HOLE IN THE PLASTIC BAG: IDENTIFYING AND CLOSING THE LOOPHOLE IN THE CALIFORNIA ENVIRONMENTAL QUALITY ACT

*Scott Menger\**

## I. INTRODUCTION

As of 2012, plastics was the third largest sector of manufacturing in the United States, shipping goods valued at more than 373 billion dollars.<sup>1</sup> Plastic bags are a key contributor, with an estimated 100 billion to one trillion bags used around the world every year.<sup>2</sup> In recent times, however, the plastic bag has come under fire, and cities across the country have banned them from stores.<sup>3</sup>

While Washington, D.C., was the first city in the United States to ban plastic bags in 2010,<sup>4</sup> California has quickly become the newest battleground for bans on plastic bags, with various municipalities and counties adopting over seventy ordinances.<sup>5</sup> Inevitably, an industry as large as plastics would fight back.<sup>6</sup> The Save the Plastic Bag Coalition (the “Coalition”) was formed in June 2008 with the sole purpose “to inform decision-makers and the public about the environmental impacts of plastic bags, paper bags,

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\* J.D. 2015, Loyola Law School, Los Angeles; B.S., Kinesiology, University of Southern California, 2011. I'd like to thank my family and friends for their continual support, and the editors and staff of the *Loyola of Los Angeles Law Review* for all their hard work on this Article.

1. William R. Carteaux, *The State of the U.S. Plastics Industry*, SPI: THE PLASTICS INDUSTRY TRADE ASSOCIATION 1, 5 (Oct. 17, 2013), [http://plasticsindustry.org/files/2013Events/KShowPressKit/SPI\\_WRC\\_US%20Press%20Conf%20at%20KShow\\_10%2017%2013.pdf](http://plasticsindustry.org/files/2013Events/KShowPressKit/SPI_WRC_US%20Press%20Conf%20at%20KShow_10%2017%2013.pdf).

2. Chris Conway, *Taking Aim at All Those Plastic Bags*, N.Y. TIMES, Apr. 1, 2007, [http://www.nytimes.com/2007/04/01/weekinreview/01basics.html?\\_r=0](http://www.nytimes.com/2007/04/01/weekinreview/01basics.html?_r=0).

3. *See State & Local Laws*, PLASTICBAGLAWS.ORG, <http://plasticbaglaws.org/legislation/state-laws> (last visited Sept. 15, 2014).

4. *Skip the Bag, Save the River*, DIST. DEP'T OF THE ENV'T, <http://ddoe.dc.gov/bags> (last visited Sept. 15, 2014).

5. *See Plastic Bags: Local Ordinances*, CALIFORNIANS AGAINST WASTE, [http://www.cawrecycles.org/issues/plastic\\_campaign/plastic\\_bags/local](http://www.cawrecycles.org/issues/plastic_campaign/plastic_bags/local) (last updated Sept. 18, 2014).

6. *See* Carteaux, *supra* note 1, at 8.

and reusable bags.”<sup>7</sup> Founded by Elkay Plastics and Command Packaging, the unincorporated association includes plastic bag manufacturers, plastic bag distributors, retailers, and concerned citizens.<sup>8</sup> The Coalition’s goal has focused on requiring municipalities to produce Environmental Impact Reports to help fully explain the ramifications of switching from plastic bags to paper and reusable bags.<sup>9</sup>

The Coalition has brought this fight to California courts.<sup>10</sup> A recent development in this bout of litigation against California municipalities is the Coalition’s fight against Marin County.<sup>11</sup> Like the California Supreme Court’s holding in the Coalition’s litigation against the city of Manhattan Beach,<sup>12</sup> a California Court of Appeals has upheld Marin County’s ban on single-use plastic bags.<sup>13</sup> The strength of these cases, combined with the ban of plastic bags in Los Angeles<sup>14</sup> and proposed legislation to ban plastic bags in the state of California,<sup>15</sup> signals the likely death knell for plastic bags in the state.

California courts have played a key role in emboldening municipalities to ban plastic bags without the need for conducting Environmental Impact Reports.<sup>16</sup> This Comment examines how California courts are correctly applying applicable law in reaching this determination as evidenced by *Save the Plastic Bag Coalition v. County of Marin*<sup>17</sup> in Sections II through IV. Section V concludes that, although properly applying the law, California promulgates a

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7. *About Us: The Coalition*, SAVE THE PLASTIC BAG COALITION, <http://savetheplasticbag.com/ReadContent522.aspx#Blog722> (last visited Sept. 15, 2014).

8. Stephen L. Joseph, *Supplemental Objections*, PLASTICBAGLAWS.ORG 1, 1 (July 1, 2008), [http://plasticbaglaws.org/wordpress/wp-content/uploads/2010/04/lit\\_Manhattan-Beach\\_STPB-supplemental-objections-to-Manhattan-Beach.pdf](http://plasticbaglaws.org/wordpress/wp-content/uploads/2010/04/lit_Manhattan-Beach_STPB-supplemental-objections-to-Manhattan-Beach.pdf).

9. *See About Us: The Coalition*, *supra* note 7.

10. *See Save the Plastic Bag Coal. v. City of Manhattan Beach*, 254 P.3d 1005 (Cal. 2011); *Save the Plastic Bag Coal. v. City and Cnty. of S.F.*, 166 Cal. Rptr. 3d 253 (Ct. App. 2013).

11. *Save the Plastic Bag Coal. v. Cnty. of Marin*, 159 Cal. Rptr. 3d 763 (Ct. App. 2013).

12. *City of Manhattan Beach*, 254 P.3d at 1008.

13. *Cnty. of Marin*, 159 Cal. Rptr. 3d at 779.

14. Dakota Smith, *LA’s New Plastic Bag Ban Implemented with Some Success, Some Confusion*, HUFF POST L.A. (Mar. 5, 2014), [http://www.huffingtonpost.com/2014/01/03/la-plastic-bag-ban-implemented\\_n\\_4536852.html](http://www.huffingtonpost.com/2014/01/03/la-plastic-bag-ban-implemented_n_4536852.html).

15. Patrick McGreevy, *Compromise Bill Would Ban Plastic Bags Throughout California*, L.A. TIMES, Jan. 23, 2014, <http://www.latimes.com/local/political/la-me-pc-agreement-reached-on-banning-plastic-carryout-grocery-bags-20140123-story.html>.

16. *City of Manhattan Beach*, 254 P.3d at 1016–17; *Cnty. of Marin*, 159 Cal. Rptr. 3d at 775.

17. 159 Cal. Rptr. 3d 763 (Ct. App. 2013).

loophole in the California Environmental Quality Act (CEQA) and sets potentially dangerous precedent in ignoring the global ramifications of making local environmental changes. Finally, this Comment proposes that the solution lies in amending CEQA to at least require municipalities to conduct a primary report before declaring a project categorically exempt from a mandatory Environmental Impact Report.

## II. STATEMENT OF THE CASE

### *A. Facts*

In 2007, a Marin County task force “identified plastic bags as a major solid waste issue,” reporting that single-use plastic bags have “no recycling markets, take 500 years to decompose, and pose a hazardous threat to the environment.”<sup>18</sup> Between 2007 and 2010, the county held multiple meetings in an effort to resolve the issue of single-use bags.<sup>19</sup> Beginning in 2009, the “Marin Bag Ban Working Group,” comprised of government representatives, environmental organizations, retail stores, and bag suppliers, convened to draft a local ordinance.<sup>20</sup>

In December 2010, Marin County’s agricultural commissioner sent to the Marin County Board of Supervisors (the “Board”) an analysis of the proposed ordinance that would regulate the use of single-use bags.<sup>21</sup> The report stated that county residents used “up to 138 million single-use bags each year” that ended up in streets, sidewalks, storm water systems, and waterways (including the San Francisco Bay), as well as foreign lands, where they were burned or buried.<sup>22</sup> The report stated that an ordinance would incentivize residents to switch to reusable bags, which would consequently conserve resources; reduce greenhouse gas emissions associated with single-use bags, waste, and maritime pollution; and enhance the quality of life for county residents, visitors, and wildlife.<sup>23</sup>

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18. *Id.* at 767.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

While the ordinance was being considered, California state law prohibited charging a fee for single-use plastic bags.<sup>24</sup> To encourage the switch to reusable bags, and to prevent a simple switch to single-use paper bags, the county proposed charging a nominal fee for paper bags.<sup>25</sup> The agricultural commissioner's report noted that, while paper bags are recycled more than plastic bags, paper bags nonetheless produce "significantly larger [greenhouse gas] emissions and result in greater atmospheric acidification, water consumption and ozone production than plastic bags."<sup>26</sup> Nevertheless, the report relied on a master environmental assessment produced by Green Cities California, which reported that a ban on single-use plastic bags, combined with a nominal charge for single-use paper bags, provided a large enough deterrent in the District of Columbia (D.C.) to shift consumer behavior to using reusable bags.<sup>27</sup> Finally, the agricultural commissioner suggested that modeling the ordinance after the D.C. plan would allow the county to claim a categorical exemption under CEQA "by demonstrating and achieving a result that is environmentally superior: moving people to reusable bags and reducing waste from all single-use products."<sup>28</sup>

In January 2011, the Board enacted Ordinance No. 3553,<sup>29</sup> which prohibited certain retail establishments in Marin County from using single-use plastic bags and required that they charge no less than five cents for single-use, recycled-content paper bags.<sup>30</sup> While the ordinance only applies to unincorporated portions of the county,<sup>31</sup> the ordinance covers grocery stores, pharmacies, convenience food stores, and others stores that sell food or perishable items.<sup>32</sup>

### *B. Procedural History*

Following an initial reading of the ordinance in a public meeting in December 2010, the Board set a date for a second reading of the

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24. *Id.*

25. *Id.* at 767–68.

26. *Id.* at 768.

27. *Id.* (citing ICF Int'l, *Master Environmental Assessment on Single-Use and Reusable Bags*, PLASTICBAGLAWS.ORG 1, 1–2 (Mar. 2010), [http://plasticbaglaws.org/wordpress/wp-content/uploads/2010/04/MEA\\_green-cities-CA.pdf](http://plasticbaglaws.org/wordpress/wp-content/uploads/2010/04/MEA_green-cities-CA.pdf)).

28. *Id.* at 768.

29. MARIN COUNTY CODE tit. 5, § 5.46.020 (2014).

30. *Id.*

31. *Id.* § 5.46.010(f).

32. *Id.*

ordinance, as well as a formal hearing on the merits of the ordinance.<sup>33</sup> Plaintiff, Coalition, filed objections with more than ninety accompanying documents in support of its position.<sup>34</sup> The Coalition objected to the adoption of the proposed ordinance on the grounds that no Environmental Impact Report (EIR) had been prepared or adopted.<sup>35</sup> The Coalition argued that the alternatives, both single-use paper bags and reusable bags, are potentially worse for the environment than plastic bags.<sup>36</sup>

Specifically, the Coalition argued that “life cycle” assessments (which analyze local and global environmental impacts of a product from the extraction of raw materials to produce the product to the disposal of that product) demonstrated that single-use paper bags are much worse for the environment than their plastic bag counterparts.<sup>37</sup> In addition, the Coalition cited to an EIR completed by Los Angeles County that suggested that even a ten-cent charge for single-use paper bags would be insufficient to curtail the use of paper bags, and thus would be insufficient to prevent significant environmental impacts.<sup>38</sup>

Marin County, on the advice of its counsel, continued with the ordinance on the belief that the ordinance was not required to prepare an EIR because it fit a categorical exemption under CEQA guidelines.<sup>39</sup> After the ordinance was adopted, the Coalition filed a petition for a writ of mandate in Marin County Superior Court to set aside the ordinance for a failure to comply with CEQA, and sought a declaration that state law preempted the ordinance.<sup>40</sup> The trial court denied the writ of mandate and request for declaratory relief, finding substantial evidence to support Marin County’s reliance on the categorical exemptions of CEQA.<sup>41</sup> The Coalition then appealed the decision denying the writ of mandate.<sup>42</sup>

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33. *Cnty. of Marin*, 159 Cal. Rptr. 3d at 768.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* at 769.

38. *Id.*

39. *Id.* at 769–70.

40. *Id.* at 770.

41. *Id.*

42. *Id.*

## III. REASONING OF THE COURT

The court first examined the procedure for complying with CEQA's three-step process: the public agency must "(1) . . . determine whether the proposed development is a project;<sup>43</sup> (2) determine whether the project is exempt from compliance with CEQA under either a statutory exemption or categorical exemption set forth in the regulations; and (3) prepar[e] . . . an EIR before approval of the project."<sup>44</sup> If, however, the proponent of the project can show that the project is exempt under a statute or through a categorical approach, the third step is unnecessary.<sup>45</sup>

The standard of review that governed the Coalition's appeal was whether the municipality prejudicially abused its discretion; the standard of review applies only to the agency's action, not the trial court's decision.<sup>46</sup> The County found that the ordinance fit a categorical exemption, implying that the project was found to have no significant effect on the environment.<sup>47</sup> Therefore, the court affirmed the exemption determination, provided that substantial evidence supported that the project fell within one of the exempt categories.<sup>48</sup>

The court explained that there is a split in authority when applying the standard of review.<sup>49</sup> Some courts have found that a "finding of categorical exemption cannot be sustained if there is a 'fair argument' based on substantial evidence that the project will have significant environmental impacts," while other courts apply the traditional substantial evidence test, deferring to the agency's findings of categorical exemption.<sup>50</sup> For reasons stated later, the court refused to elect one standard over the other.<sup>51</sup>

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43. Project being defined as "an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, or a reasonably foreseeable indirect physical change in the environment undertaken, supported, or approved by a public agency." *Tomlinson v. Cnty. of Alameda*, 278 P.3d 803, 805 (Cal. 2012) (quoting CAL. PUB. RES. CODE § 21065 (West 2014) (internal quotation marks omitted)).

44. *Cnty. of Marin*, 159 Cal. Rptr. 3d at 771 (citing *Tomlinson*, 278 P.3d at 805).

45. *Id.*

46. *Id.*

47. *Id.* at 771; *Davidon Homes v. City of San Jose*, 62 Cal. Rptr. 2d 612, 617 (Ct. App. 1997) (citing CAL. PUB. RES. CODE §§ 21083–84).

48. *Cnty. of Marin*, 159 Cal. Rptr. 3d at 771.

49. *Id.* at 772.

50. *Id.*

51. *Id.*

The Coalition relied heavily on the California Supreme Court decision, *Save the Plastic Bag Coalition v. City of Manhattan Beach*,<sup>52</sup> in which the Coalition was a party (and lost).<sup>53</sup> In that case, the California Supreme Court held that Manhattan Beach did not have to prepare an EIR because when looking at the “environmental impacts that might follow from increased paper bag use in Manhattan Beach, instead of . . . the global impacts of paper and plastic bags, it is plain the city acted within its discretion when it determined that its ban on plastic bags would have no significant effect on the environment.”<sup>54</sup> The *City of Manhattan Beach* court relied upon the fact that “a ban on plastic bags in Manhattan Beach would have only a minuscule contributive effect on the broader environmental impacts detailed in the paper bag ‘life cycle’ studies relied on by [the Coalition],” given the small size of Manhattan Beach—less than forty thousand people—and the fact that the ordinance only affected roughly 220 retail stores.<sup>55</sup>

The Coalition relied on two statements found in *City of Manhattan Beach*: (1) that the analysis would be different for a ban on plastic bags by a larger governmental body, and (2) that cumulative impacts of a series of small-scale projects should not be allowed to escape review.<sup>56</sup> The Coalition took these statements to mean that any larger governmental body would need to conduct an EIR.<sup>57</sup> The court rejected this argument, because the Marin County ordinance would affect fewer retail stores than the ban in Manhattan Beach, and because Marin County attempted to alleviate the use of paper bags by charging five cents for each bag.<sup>58</sup>

The Coalition next argued that the ordinance did not fit any of CEQA’s exemption categories, stating that “exemption categories are not to be expanded beyond the reasonable scope of their statutory language.”<sup>59</sup> Specifically, the Coalition contended that neither Class

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52. 254 P.3d 1005 (Cal. 2011).

53. *Cnty. of Marin*, 159 Cal. Rptr. 3d at 774.

54. *City of Manhattan Beach*, 254 P.3d at 1016.

55. *Id.* at 1017.

56. *Cnty. of Marin*, 159 Cal. Rptr. 3d at 774. The court noted that the second statement was contained in a footnote in *City of Manhattan Beach. Id.*

57. *Id.*

58. *Id.* at 775.

59. *Id.* at 777 (quoting *Mountain Lion Found. v. Fish and Game Comm’n*, 939 P.2d 1280 (Cal. 1997)).



7 exemptions,<sup>60</sup> nor Class 8 exemptions,<sup>61</sup> applied to the plastic bag ban.<sup>62</sup> However, the court found that the Coalition had not met its burden of demonstrating that the county failed to “satisf[y] its initial burden to establish that the claimed exemptions are supported by substantial evidence in the record.”<sup>63</sup> As such, the court considered the argument forfeited (though had the argument been adjudicated, the court would have found substantial evidence to support Marin County’s findings).<sup>64</sup>

#### IV. HISTORICAL BACKGROUND

CEQA’s foremost principle is that the California Legislature intended the act “to be interpreted in such a manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language.”<sup>65</sup> CEQA intends, among other stated legislative goals, to “require governmental agencies at all levels to develop standards and procedures necessary to protect environmental quality” and to ensure that “the long-term protection of the environment . . . shall be the guiding criterion in public decisions.”<sup>66</sup>

EIRs are the “heart of CEQA.”<sup>67</sup> In addition, they have been described “as an environmental alarm bell, whose purpose is to inform the public and its responsible officials of the environmental consequences of their decisions before those decisions are made.”<sup>68</sup> CEQA requires an EIR whenever a public agency proposes a project that might have a substantial adverse change on the environment.<sup>69</sup> An EIR is an informational document that “provide[s] public

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60. CAL. CODE REGS. tit. 14, § 15307 (2014) (exempting “actions taken by regulatory agencies as authorized by state law or local ordinance to assure the maintenance, restoration, or enhancement of a natural resource”).

61. *Id.* § 15308 (exempting “actions taken by regulatory agencies, as authorized by state or local ordinance, to assure the maintenance, restoration, enhancement, or protection of the environment”).

62. *Cnty. of Marin*, 159 Cal. Rptr. 3d at 777.

63. *Id.* at 778.

64. *Id.* at 778–79.

65. *Laurel Heights Improvement Ass’n v. Regents of Univ. of Cal.*, 764 P.2d 278, 281 (Cal. 1988) (quoting *Friends of Mammoth v. Bd. of Supervisors*, 502 P.2d 1049 (Cal. 1972)).

66. CAL. PUB. RES. CODE § 21001(d), (f) (West 2014).

67. *Marin Mun. Water Dist. v. KG Land Cal. Corp.*, 1 Cal. Rptr. 2d 767, 772 (Ct. App. 1991) (citing other sources).

68. *Id.*

69. *Laurel Heights Improvement Ass’n*, 764 P.2d at 281.

agencies and the public in general with detailed information about the effect which a proposed project is likely to have on the environment; . . . list[s] ways in which the significant effects of such a project might be minimized; and . . . indicate[s] alternatives to such a project.”<sup>70</sup>

When an EIR is prepared, the initial draft is first evaluated in light of the comments received from the public concerning the project.<sup>71</sup> The agency then prepares a final EIR draft, incorporating the public’s comments into the draft and addressing significant environmental points raised during the review process.<sup>72</sup> The final EIR must be completed in compliance with CEQA.<sup>73</sup> Finally, before approving the project, the agency must find either that: (1) the project’s significant environmental effects identified by the EIR have been avoided or mitigated; or (2) the benefits of the project outweigh its unmitigated effects.<sup>74</sup> Ultimately, an EIR should “demonstrate to an apprehensive citizenry that the agency has, in fact, analyzed and considered the ecological implications of its action.”<sup>75</sup>

A public agency can avoid drafting an EIR if the proposed project falls within one of two types of exemptions: statutory or categorical.<sup>76</sup> There are currently thirty-three categorical exemption classes.<sup>77</sup> For purposes of this discussion, Class 7 and Class 8 categorical exemptions are relevant.<sup>78</sup> Class 7 exemptions concern actions that “assure the maintenance, restoration, or enhancement of a natural resource where the regulatory process involves procedures for protection of the environment.”<sup>79</sup> Class 8 exemptions concern actions that “assure the maintenance, restoration, enhancement, or

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70. CAL. PUB. RES. CODE § 21061.

71. CAL. CODE REGS. tit. 14, § 15088 (2014).

72. *Id.* § 15132.

73. *Id.* § 15090.

74. CAL. PUB. RES. CODE §§ 21002–21002.1, 21081.

75. *Laurel Heights Improvement Ass’n v. Regents of Univ. of Cal.*, 764 P.2d 278, 282 (Cal. 1988) (quoting *No Oil, Inc. v. City of L.A.*, 529 P.2d 66 (Cal. 1974)).

76. *Tomlinson v. Cnty. of Alameda*, 278 P.3d 803, 805 (Cal. 2012). Statutory exemptions are not of concern here, as the plastic bag ordinances do not have a statutory exemption under CEQA. Statutory exemptions include a wide range of topics, from the building of prison facilities in certain counties to emergency repair projects to repair state highways. *See* CAL. PUB. RES. CODE §§ 21080.01, 21080.33.

77. CAL. CODE REGS. tit. 14, §§ 15301–32.

78. *Save the Plastic Bag Coal. v. Cnty. of Marin*, 159 Cal. Rptr. 3d 763, 776–77 (Ct. App. 2013).

79. CAL. CODE REGS. tit. 14, § 15307.

protection of the environment where the regulatory process involves procedures for protection of the environment.”<sup>80</sup>

## V. ANALYSIS

This part is divided into three sections. Section A examines how California courts are severely limited when reviewing the decisions of municipalities when the municipality finds a categorical exemption under CEQA. Section B analyzes the loophole created in CEQA and its relationship to plastic bag ordinances, discussing how this loophole could be used to approve a project that would actually have hazardous impacts on both the local and global environment. Section C proposes that, to close this loophole, CEQA should be amended to require local municipalities to conduct initial reports and to commit to examining the local and global environmental impacts of projects.

### A. California’s Hand-Tied Courts

Under current California law, there is little doubt that the California Court of Appeals properly affirmed the lower court’s decision in *County of Marin*. CEQA does not require municipalities to conduct an EIR, or even an initial report, provided that the municipality—in its sole discretion—determines that the project is categorically exempt.<sup>81</sup> When this occurs, as it did in this case, California courts merely review the decision of the agency in question to determine whether there is substantial evidence to show that the project fell within one of the exemptions.<sup>82</sup>

Currently, compliance with CEQA does not require an exhaustive analysis of “all conceivable impacts a project may have in areas outside its geographical boundaries.”<sup>83</sup> This severely limits the ability of courts to overturn any municipality’s determination that a project is exempt, because municipal projects are typically *local* in nature. The California Supreme Court only strengthened this sentiment by focusing on the local scale of the plastic bag ban in Manhattan Beach, as “a ban on plastic bags in Manhattan Beach

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80. *Id.* § 15308.

81. *Cnty. of Marin*, 159 Cal. Rptr. 3d at 770–73.

82. *Davidon Homes v. City of San Jose*, 62 Cal. Rptr. 2d 612, 617 (Ct. App. 1997) (citing *Dehene v. Cnty. of Santa Clara*, 171 Cal. Rptr. 753 (Ct. App. 1981)).

83. *Save the Plastic Bag Coal. v. City of Manhattan Beach*, 254 P.3d 1005, 1017 (Cal. 2011).

would only have a minuscule contributive effect on the broader environmental impacts . . . [g]iven the size of the city’s population . . . the increase in paper bag production following a local change from plastic to paper bags can only be described as insubstantial.”<sup>84</sup>

Thus, the *County of Marin* court had little choice in affirming the ruling that the county was not required to produce an EIR.<sup>85</sup> Although the California Supreme Court in *City of Manhattan Beach* found that “it is undisputed that the manufacture, transportation, recycling, and landfill disposal of paper bags entail more negative environmental consequences than do the same aspects of the plastic bag,”<sup>86</sup> the locality and scale of the Marin County ban could not require an EIR under CEQA.<sup>87</sup> Further, because Marin County’s goal was to reduce plastic and paper bag waste, the project would have met a CEQA exemption to an EIR because the ordinance was designed to “maintain, enhance, and protect natural resources as well as the environment generally.”<sup>88</sup>

### B. Creating a Loophole in CEQA

The Coalition contended that, if Marin County was allowed to avoid conducting an EIR by deeming the plastic bag ban ordinance as “green,” the court would thereby allow municipalities to create a loophole in CEQA.<sup>89</sup> The *County of Marin* court disagreed, citing that substantial evidence must be found in order for a project to fit an exemption under CEQA, and the project would still be subject to exceptions to the exemptions.<sup>90</sup>

While the court deflected the Coalition’s concern, the loophole remains. Because the court failed to address what a city or county must do in order to show its claim satisfies an exemption, the court left the door open for a city’s or county’s poorly researched statements to also satisfy an exemption.<sup>91</sup> This conclusion is

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84. *Id.*

85. *Cnty. of Marin*, 159 Cal. Rptr. 3d at 779.

86. *City of Manhattan Beach*, 254 P.3d at 1016.

87. *See Cnty. of Marin*, 159 Cal. Rptr. 3d at 775.

88. *Id.* at 779.

89. *Id.* at 778.

90. *Id.* (citing *Davidon Homes v. City of San Jose*, 62 Cal. Rptr. 2d 612 (Ct. App. 1997)).

91. *Id.* The *County of Marin* court argues that public agencies still have to defend “against claims that the exemption is subject to an exception,” and therefore the Coalition’s concern of a loophole is unfounded. *Id.* However, in cases like *County of Marin* where no exceptions are met,

troubling in light of the substantial evidence that paper bags have “more negative environmental consequences” than plastic bags.<sup>92</sup>

The plastic bag ban is a unique situation, in which there are two alternatives: paper bags and reusable bags. While paper bags may be worse for the environment than their plastic counterparts when considering the total environmental impact in certain locales, the simple fact remains that both create hazards to the environment.<sup>93</sup> On one hand, paper bag production uses fourteen million trees for paper, and creates up to 70 percent more air pollution than plastic bags.<sup>94</sup> But, plastic bag production uses twelve million barrels of oil, and plastic bags create up to four times more solid waste.<sup>95</sup> There are many difficulties in deciding whether plastic or paper bags are worse for the environment, mainly because the two choices negatively impact the environment in different ways. This is especially true in light of the fact that a third alternative, reusable bags, exists. While “[n]ot all reusable bags are created equal,”<sup>96</sup> there is general consensus that a switch to reusable bags would be environmentally superior.<sup>97</sup> Ultimately, the plastic bag bans do not represent a situation where the loophole in California law can be used to pass a local ordinance with potentially dire environmental effects.

Under current California law, however, it is not difficult to imagine a situation in which one product is banned in favor of another with potentially dire environmental consequences. For example, as governments and consumers make more commitments to electric cars,<sup>98</sup> the need for rechargeable batteries is increasing.<sup>99</sup>

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the practical effect of a municipality “characterizing its ordinances as environmentally friendly and therefore exempt” remains. *Id.*

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

93. Anne Thompson, *Paper or Plastic—What’s the Greener Choice?*, NBC NEWS (May 7, 2007, 7:37 PM), <http://www.nbcnews.com/id/18538484/>.

94. *Id.*

95. *Id.*

96. Tovia Smith, *How Green Are Reusable Bags?*, NPR (Aug. 7, 2009, 4:00 PM), <http://www.npr.org/templates/story/story.php?storyID=111672574>.

97. CITY OF L.A. BUREAU OF SANITATION, ENVIRONMENTAL IMPACT REPORT: SINGLE-USE CARRYOUT BAG ORDINANCE iii–viii (2013).

98. See Peter Lehner, Op-Ed., *Electric Vehicles Approach Popularity Tipping Point*, LIVESCIENCE (Nov. 15, 2013), <http://www.livescience.com/41267-electric-vehicles-grow-popular.html>.

99. See *Technology Developments in Battery Chemistry Drives Demand for Rechargeable Batteries*, According to New Global Report by Global Industry Analysts, Inc., PRWEB (Feb. 4, 2014), [http://www.prweb.com/releases/rechargeable\\_batteries/lithium-ion\\_batteries/prweb](http://www.prweb.com/releases/rechargeable_batteries/lithium-ion_batteries/prweb)

With rechargeable batteries in such growing demand, savvy companies and research labs have made great strides in creating a better battery.<sup>100</sup> Of course, batteries contain heavy metals that can contaminate the environment when improperly disposed.<sup>101</sup> But suppose a battery-manufacturing company develops a new rechargeable battery and proclaims it is better for the environment than its older counterparts. Under current California law, it would be relatively easy for older rechargeable batteries to be banned or taxed in a way comparable to paper bags—even if the new battery type is potentially much worse for the global environment. Because CEQA does not require municipalities to consider environmental impacts outside the municipality’s borders, and because California courts solely focus on locality and scale, a ban similar to that of plastic bags could easily occur. Hypotheticals like a ban on car batteries could become the norm as California continues to ignore the global environmental impact of local decisions.

### C. *Repairing the Loophole in CEQA*

It is apparent that California courts have hamstrung their ability to review the decisions of local ordinances concerning the preparation of EIRs for local projects.<sup>102</sup> While the plastic bag ban is not the best example of the manipulation of the loophole under CEQA,<sup>103</sup> it is quite possible that use of this loophole could lead to unsound and grave environmental decisions. California courts are likely unable to do anything to avert this potential manipulation of the CEQA loophole, and therefore it is up to the legislature to amend CEQA to address this concern.

Amending CEQA is certainly a challenge. CEQA has been described as “the third rail” of California politics—“never to be touched without electrocution.”<sup>104</sup> Despite calls to reform CEQA

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11552096.htm (citing to a report that rechargeable batteries market is projected to reach \$26.2 billion by 2020).

100. See Katie Fehrenbacher, *Battery Innovation Is Alive and Well in the U.S.*, GIGAOM (Feb. 29, 2012), <http://gigaom.com/2012/02/29/battery-innovation-is-alive-and-well-in-the-u-s/>.

101. *Batteries*, ENVTL. PROT. AGENCY, <http://www.epa.gov/osw/conserve/materials/battery.htm> (last updated Nov. 19, 2012).

102. See *supra* Part V.A.

103. See *supra* Part V.B.

104. Sarah E. Owsowitz, *CEQA Reform: The Third Rail of California Politics*, PUB. CEO (Sept. 24, 2013), <http://www.publicceo.com/2013/09/ceqa-reform-the-third-rail-of-california-politics>.

from advocates who “have seen the law devolve into an increasingly byzantine set of rules that are regularly invoked for reasons *other* than environmental concerns by those who see CEQA as a convenient way to hold a project hostage or kill it,”<sup>105</sup> very little progress has been made.<sup>106</sup> The most recent attempt at expansive reform of CEQA is SB 731,<sup>107</sup> which in its current state does not include any amendments to sections 15307 or 15308, the exceptions used in Marin County’s plastic ban ordinance.<sup>108</sup>

The California legislature could amend CEQA to eliminate the exemptions that relieve municipalities from the requirement of conducting an EIR. However, this would likely be far too drastic a measure. The purposes of the categorical exceptions were for projects that “do not have a significant effect on the environment.”<sup>109</sup> It is obvious that a project that truly maintains, restores, or enhances natural resources<sup>110</sup> or the environment<sup>111</sup> should be able to avoid the costs and time of preparing an EIR.

A better solution is to at least require an initial report as seen in *City of Manhattan Beach*.<sup>112</sup> While Manhattan Beach then determined that their plastic bag ban suggested no substantial evidence of a significant effect on the environment in adopting a negative declaration,<sup>113</sup> the preparation of an initial report at least gave the city some information upon which to make an informed decision. Unlike Manhattan Beach, Marin County simply concluded that its project was exempt under CEQA.<sup>114</sup> Requiring local municipalities to prepare an initial report could eliminate the manipulation of this potentially hazardous loophole in CEQA, because it would at least give local municipalities an idea of the actual environmental ramifications of their projects.

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105. *Id.*

106. *See id.*

107. S.B. 731, 2013–2014 Leg., Reg. Sess. (Cal. 2013), available at [http://leginfo.ca.gov/faces/billNavClient.xhtml?bill\\_id=201320140SB731](http://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=201320140SB731).

108. *Id.*; *Save the Plastic Bag Coal. v. Cnty. of Marin*, 159 Cal. Rptr. 3d 763, 777 (Ct. App. 2013).

109. CAL. CODE REGS. tit. 14, § 15300 (2014).

110. *Id.* § 15307.

111. *Id.* § 15308.

112. *Save the Plastic Bag Coal. v. City of Manhattan Beach*, 254 P.3d 1005, 1008–09 (Cal. 2011).

113. *Id.* at 1015–16.

114. *Save the Plastic Bag Coal. v. Cnty. of Marin*, 159 Cal. Rptr. 3d 763, 772 (Ct. App. 2013).

Additionally, CEQA could be updated to focus more on the global environmental impacts of local projects. In line with requiring an initial report, this change would provide local municipalities with more information upon which to make informed decisions. While more information is not always a guarantee that the correct decision for both the local and global environment will be made, it will at least stand as a deterrent for the manipulation of CEQA. In addition, requiring local municipalities to conduct an initial report will give California courts more information at their disposal to actually determine if the proposed projects have substantial evidence to avoid the preparation of an EIR under CEQA. These changes would hopefully be a start in the right direction to close the CEQA loophole and ultimately enable local municipalities to make decisions that positively impact the environment on both the local and global scale.

#### V. CONCLUSION

The *County of Marin* court correctly applied California law as it currently stands when it determined that Marin County did not have to conduct an EIR. In doing so, however, the court further promoted a loophole in CEQA that, though not fully realized in plastic bag ordinances, could potentially be used to approve a project greatly detrimental to the environment. In order to close this loophole, the California legislature should amend CEQA to require local municipalities to conduct at least an initial report on proposed projects to determine if any significant environmental impacts will occur on both a local and global scale. While this will not guarantee the right decision gets made on every project, it will at least provide more information to municipalities to further promote CEQA's goal that "the long-term protection of the environment . . . shall be the guiding criterion in public decisions."<sup>115</sup>

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115. CAL. PUB. RES. CODE § 21001 (West 2014).



