



DART CONTAINER CORPORATION OF CALIFORNIA

QUALITY PLASTIC PRODUCTS

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March 20, 2012

VIA EMAIL TO
DBOWYER@WATERBOARDS.CA.GOV

San Francisco Bay Regional Water Quality Control Board
Attn: Dale Bowyer
1515 Clay Street, Suite 1400
Oakland, California 94612

Re: Comments on trash load reduction tracking method, baseline trash loads report, and short-term trash loading reduction plans

Dear Board Members of the San Francisco Bay Regional Water Quality Control Board,

Dart Container Corporation of California (“Dart”) is submitting these comments to express concerns regarding the trash load reduction credit for banning single-use foam food service ware proposed by the Bay Area Stormwater Management Agencies Association (“BASMAA”) in its Trash Load Reduction Tracking Method report and the permittees’ individual trash load reduction plans (“Individual Plans”) as required by the Municipal Regional Stormwater Permit (the “MRP”). Dart asks the San Francisco Bay Regional Water Quality Control Board (“Regional Board”) to hold a hearing, after public notice, and reject BASMAA’s submittals and the permittees’ Individual Plans as violating the MRP, the Clean Water Act, and the California Environmental Quality Act by relying on the improper and unsound automatic trash load reduction credit.

Dart is a leading manufacturer of a broad range of quality single-use food service products and is nationally recognized as an industry leader in promoting and understanding the facts about polystyrene products and associated environmental issues. Dart employs 600 full-time employees in California plants, located in Lodi and Corona. Our foam food service ware products are sold and used in the Bay Area. Our products are affordable, recyclable and offer many benefits over alternative products and materials.

Dart is committed to environmental stewardship. We strive to produce high-quality, cost-effective products in a manner that is sensitive to environmental concerns. From the lighting fixtures in our offices to the technologies on our factory floors, we scrutinize every element of our business for ways to reduce energy consumption, air emissions, and solid wastes. Dart encourages polystyrene recycling by offering free public drop-off recycling sites at Dart facilities, where we accept foam food service and packaging containers from members of the public, regardless of the origin of that foam. Dart also helps our customers recycle foam through our CARE program, which enables customers to separate foam for recycling more easily, and our Recycla-Pak program, which helps businesses recycle foam cups. As a result of Dart’s

efforts to promote recycling, we were recognized in 2010 and 2011 with the prestigious CalRecycle WRAP (Waste Reduction Award Program).

We understand that trash reduction in the Bay Area's waterways is an important priority of the Regional Board, and we are committed to doing our part to keep trash out of water. We believe, however, that municipal bans of polystyrene foam are not an effective solution to reducing trash—a viewpoint shared by the California Integrated Waste Management Board (now CalRecycle), as stated in its 2004 comprehensive report, "Use and Disposal of Polystyrene in California, A Report to the California Legislature." Numerous cities in the Bay Area seek to claim an eight percent credit towards the 2014 trash reduction goal of forty percent just for enacting an ordinance banning single-use foam food service ware. This foam ban credit is improper and impermissible for the reasons stated herein, and for the reasons specified in the comment letter submitted by the American Chemistry Council ("ACC"). We agree with the ACC comment letter, and incorporate its content into the additional comments we present herein and attached.

Our comments are supported by the enclosed expert reports prepared by Michael Harding and The Brattle Group, and a matrix outlining permittees' reliance on the polystyrene foam food service ware ban. We thank you for considering our comments and supporting materials. If you have questions, you may reach me at (949) 262-3255 or Jonathan.Choi@dart.biz.

Sincerely yours,

/s/ Jonathan R. Choi

Jonathan R. Choi
Regional Manager, Western Region
Government Affairs & Environment

Enclosure
Attachments



QUALITY PLASTIC PRODUCTS

**COMMENTS ON BAY AREA STORMWATER
MANAGEMENT AGENCIES ASSOCIATION'S
PRELIMINARY BASELINE TRASH GENERATION RATES
FOR SAN FRANCISCO BAY AREA MS4S,
TRASH LOAD REDUCTION TRACKING METHOD
AND
PERMITTEES'
SHORT-TERM TRASH LOAD REDUCTION PLANS**

Submitted by

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I. INTRODUCTION

Dart Container Corporation of California (“Dart”) submits these comments in response to the Bay Area Stormwater Management Agencies Association’s (“BASMAA”) Preliminary Baseline Trash Generation Rates for San Francisco Bay Area MS4s (“Baseline Report”), the Trash Load Reduction Tracking Method (“Credit Report”), and the San Francisco Bay Regional Water Quality Control Board (“Regional Board”) Municipal Regional Stormwater Permit (the “MRP”) permittees’ Short-Term Trash Load Reduction Plans (“Individual Plans”).² Dart agrees with and hereby incorporates by reference the comment letter submitted by the American Chemistry Council (“ACC”). Dart submits these comments separately to address additional concerns with the automatic trash reduction credit for banning polystyrene foam food service ware.

The foam ban credit is not supported by credible scientific evidence or common sense, is arbitrary and capricious, is procedurally improper, violates the Clean Water Act’s Maximum Extent Practicable (“MEP”) standard, and is impermissible for the reasons specified in the ACC comment letter. Further, it appears that the cities are committing to this ban without first properly reviewing it under the California Environmental Quality Act (“CEQA”). Permittees’ use of the ban in their Individual Plans is not consistent with the Regional Board’s intent to require permittees “to reduce trash loads...in an *accountable* manner.”³ Nor is it consistent with the Regional Board’s intent that permittees count actions toward the load reduction requirement only “[a]s long as the actions *can be tied to an amount of trash prevented or removed from impacted waters*, and the action is appropriately maintained.”⁴ The Regional Board must hold a hearing, after public notice, and should reject the BASMAA submittals and Individual Plans that rely on the foam ban credit.

II. EXPANDED POLYSTYRENE FOAM FOOD SERVICE WARE OFFERS ENVIRONMENTAL AND ECONOMIC BENEFITS

The BASMAA reports and the Individual Plans reflect no awareness of polystyrene foam’s many positive environmental attributes, and no awareness of the potential adverse environmental impacts that may be caused by forcing use of alternative materials. Dr. Berkman, an expert in applied microeconomics, and Dr. Sunding, an economist and professor in the College of Natural Resources at the University of California, Berkeley, conducted an economic

² These comments are specifically directed at the Individual Plans that take a trash reduction credit for banning polystyrene foam food service ware.

³ Regional Board, BOARD MEETING AGENDA PACKET, APPENDIX F – Response to Comments on the February 11, 2009 Revised Tentative Order (Oct. 7, 2009), response to comment # 45 of L. Kolb and R. James, p. 38 of 163 (emphasis added), available at < http://www.swrcb.ca.gov/rwqcb2/board_info/agendas/2009/october/7/F_Response_Comments_2009.pdf>.

⁴ Regional Board Oct. 14, 2009 Board Meeting Agenda Packet, Appendix D – Staff Report: Significant Issues Associated with the Final Tentative Order for the Municipal Regional Stormwater Permit (Oct. 7, 2009) p. 6 (emphasis added), available at < http://www.swrcb.ca.gov/rwqcb2/board_info/agendas/2009/october/7/D_Staff_Report.pdf>.

analysis of a proposed California statewide ban of polystyrene.⁵ They concluded that “available evidence does not provide justification for significant environmental and economic costs” a polystyrene foam food ware ban would entail.⁶ Polystyrene foam products are environmentally superior to alternative products in many respects. Banning the products would have negative environmental impacts, and the costs of such a ban are likely to be substantial:

- Polystyrene foam containers consume less energy than paper containers, have lower atmospheric emissions, and contribute less to waterborne wastes than bleached paper products.⁷
- Substitute products would result in higher energy and water consumption.⁸
- Polystyrene represents a significant opportunity for source reduction because it can be as much as 95-99 percent air.⁹
- Polystyrene foam food service ware is readily recyclable. Over forty cities and counties in California currently have curbside recycling for polystyrene containers, including polystyrene food containers.¹⁰ The recycling process for polystyrene, including foam food containers, is simple and uses minimal resources.¹¹
- Substitute products are significantly more expensive than foam products.¹² The costs of banning foam food ware in statewide could be over \$240M per year and result in the loss of hundreds of jobs in California.¹³
- Banning foam would entail significant costs to school districts, hospitals, colleges and public entities.¹⁴ Statewide, annual costs of such a ban to already cash-strapped public schools could exceed \$42M, costs to public colleges could exceed

⁵ The Brattle Group, ECONOMIC ANALYSIS OF SB568’S PROPOSED POLYSTYRENE BAN (Aug. 15, 2011) (hereinafter The Brattle Report).

⁶ *Id.* at p. 1.

⁷ California Integrated Waste Management Board (“CIWMB”), USE AND DISPOSAL OF POLYSTYRENE IN CALIFORNIA, A REPORT TO THE CALIFORNIA LEGISLATURE (Dec. 2004) p. 19.

⁸ The Brattle Report, *supra* at p. 6.

⁹ CIWMB, *supra* at p. 12.

¹⁰ Dart, CALIFORNIA RECYCLING INFORMATION, available at <<http://www.dart.biz/recycleca>>.

¹¹ Dart, ENVIRONMENTAL QUESTIONS AND ANSWERS, available at <<http://www.dart.biz/web/environ.nsf/pages/enfacts.html#q8>>.

¹² The Brattle Report, *supra* at p. 1.

¹³ *Id.*

¹⁴ *Id.* at pp. 3-6.

\$7.7M, and costs to the health care industry for substituting polystyrene cups alone could be over \$3M.¹⁵

The California Integrated Waste Management Board (now CalRecycle) conducted a study for the California Legislature specifically to address issues pertaining to use and disposal of polystyrene in California.¹⁶ The report recognizes many favorable environmental attributes of polystyrene foam.¹⁷ The California Integrated Waste Management Board concluded that a separate initiative addressing polystyrene foam was not necessary, and that a ban should be implemented only as a “last resort.”¹⁸ Rather, the report recommended the State increase litter education efforts, conduct a statewide litter study, consider making littering a civil offense, study compostable and biodegradable plastics, and promote product stewardship of polystyrene.¹⁹

III. THE BASELINE REPORT, THE CREDIT REPORT, AND THE INDIVIDUAL PLANS MUST BE SET FOR A HEARING BEFORE THE REGIONAL BOARD

The Baseline Report, the Credit Report, and the Individual Plans define the standard in the MRP that will govern the cities’ trash reduction efforts. As the ACC letter states, to avoid creating an “impermissible self-regulatory system” the Regional Board must review and either approve or reject the Baseline Report, the Credit Report, and the Individual Plans.²⁰ These permitting actions must be taken by the board of the Regional Board, and are not actions that can be delegated to staff.²¹ Staff certainly may prepare a staff report and make a recommendation to the board. But these actions must be taken by the board of the Regional Board at a properly noticed public hearing, and only after an appropriate period for public comment on these submittals.²²

¹⁵ *Id.* at pp. 3-4.

¹⁶ CIWMB, *supra* at p. 5; SB 1127, Karmette, Ch. 406, Statutes of 2001.

¹⁷ *Id.* at p. 19 (finding that “[w]hen compared to many alternatives, the lifecycle impacts of [polystyrene] products that are properly disposed or recycled are positive and should be recognized”).

¹⁸ *Id.* at p. 6.

¹⁹ *Id.* at p. 22.

²⁰ *See, e.g., Waterkeeper Alliance, Inc. v. Environmental Protection Agency*, 399 F.3d 486, 499 (2nd Cir. 2005) (permitting authority must review and approve or deny nutrient management plans to comply with rules for Concentrated Animal Feeding Operations (CAFO) to “ensure ... that each [permittee] will comply with all effluent limits and standards.”).

²¹ Cal Water Code, § 13223, subd. (a) (regional boards may not delegate “the issuance, modification, or revocation of any ... waste discharge requirement”).

²² Cal. Water Code, § 13384 (“The state board or the regional boards shall ensure that the public, and that any other state, the waters of which may be affected by any discharge of pollutants or dredged or fill material to navigable waters within this state, shall receive notice of each application for requirements or report of waste discharge or application for a dredged or fill material permit or report of dredged or fill material discharge and are provided an opportunity for public hearing before adoption of such requirements or permit.”).

Dart hereby requests such a hearing, to be governed by Chapter 4.5 of the Administrative Procedure Act (except those specific sections that the State Board has made inapplicable by regulation).²³

IV. THE FOAM BAN CREDIT VIOLATES THE CLEAN WATER ACT

BASMAA proposes to allow permittees that ban polystyrene foam food containers to take a credit of 8% toward meeting MRP trash reduction requirements. Permittees' Individual Plans propose the actions each permittee will undertake to reduce trash in waterways 40% by July 1, 2014, as required by the MRP.²⁴ Over thirty jurisdictions in the region propose to ban polystyrene foam food service ware and take the credit.²⁵ Many of the permittees propose that a material percentage of their trash reduction—as high as 21%—will come from banning polystyrene foam food service ware. As shown below, and in the ACC letter, this ban will not be effective. In other words, many jurisdictions are relying on paper credits—an accounting fiction—rather than proven trash reduction methods for a material portion of their trash reduction.

The proposed automatic foam ban credit is illegal because BASMAA has made no showing that banning foam food service ware will reduce trash in the storm drains at all. Because there is no evidence that the ban will be effective, and effective alternate trash reduction methods to enable the permittees to achieve a 40% trash reduction are feasible, cities relying on the ban are violating the Clean Water Act's requirement that discharge of pollutants be reduced to the maximum extent practicable. Moreover, the foam ban credit violates the MRP, which explicitly requires the permittees to design Individual Plans to achieve a 40% trash reduction.

A. BASMAA has provided no evidence that the proposed foam ban would reduce trash discharge

The practicability of various structural Best Management Practices ("BMPs") such as full-capture treatment devices and curb inlet screens has been demonstrated.²⁶ Certain soft litter controls, such as education and litter management, also have been shown to be effective. For example, paid advertising programs have been found to be very cost-effective litter control programs, with 70% reductions in litter in six years at a cost of \$0.02 per item.²⁷ Advertising programs may be especially effective for reducing takeout food service ware litter, which is usually deliberately littered.²⁸ Strong anti-litter slogans combined with support from

²³ State Water Resources Control Board, Office of Chief Counsel, *Summary of Regulations Governing Adjudicative Proceedings Before the California Water Boards* (Aug. 2, 2006) p. 2; Cal. Code Regs., tit. 23, § 648.

²⁴ Regional Board, Order R2-2009-0074 ("MRP"), section C.10.a.i.

²⁵ Many of these jurisdictions and additional jurisdictions propose to take a 2% credit for prohibiting the distribution of polystyrene foam food ware at permittee-sponsored events or on permittee-owned property.

²⁶ For example, the MRP itself requires some use of full capture systems. MRP section C.10.a.iii.

²⁷ Gershman, Brickner & Bratton, Inc., *NEW JERSEY LITTER SURVEY: 2004* (Jan. 28, 2005) p. 3, available at <<http://www.njclean.org/2004-New-Jersey-Litter-Report.pdf>>.

²⁸ *Id.* at p. 7, table 1.

enforcement officers and the courts have been successful in reducing litter.²⁹ Litter receptacles also have proved effective in rural and urban areas, achieving an average litter reduction of more than 40%.³⁰ Enhanced street sweeping has also proven very effective in reducing litter reaching the drainage system.³¹

In contrast, no nexus has been demonstrated between polystyrene foam food service ware bans and litter reduction. Michael Harding, a leading technical expert in the stormwater industry with experience in areas such as resource management and nonpoint source pollution control, analyzed the BASMAA submittals. He determined that the BASMAA reports offer no support that banning polystyrene foam would result in any reduction of trash/litter contribution to storm drains, and that the BASMAA reports have failed to account for “substitution effect” of banned foam products being replaced by other materials.³²

Similarly, the Integrated Waste Management Board (now CalRecycle) found that bans are “generally not an effective long-term solution” and should be used “only as a last resort.”³³ As the Integrated Waste Management Board noted, “[l]itter is a pervasive problem involving diffuse sources and human behavior with no easy solutions. Specific materials such as [expanded polystyrene] and [polystyrene] do not cause the litter problem; rather, it is caused by human behavior.”³⁴ Indeed, as Mr. Harding opined, “[t]he source of all categories of trash and litter is anthropogenic, meaning that if one particular type of container...is banned... whatever material takes its place will in all likelihood be discarded and introduced into the storm drain unless public education programs, improved collection management, anti-littering enforcement programs are proportionately increased.”³⁵

As the ACC discusses, regulatory action not supported by any scientific evidence is arbitrary and capricious. The Regional Board may not approve the proposed trash load reduction credits where there is no evidence of effectiveness of the proposed foam ban.

B. The foam ban credit violates the Clean Water Act’s requirement to reduce discharge of pollutants to the MEP

Under the Clean Water Act, permits for discharges from municipal storm sewers—such as the MRP—must “require controls to reduce the discharge of pollutants to the *maximum extent*

²⁹ Keep America Beautiful, Literature Review – Litter: A Review of Litter Studies, Attitude Surveys and Other Litter-related Literature (July 2007) p. 7-6, available at <http://www.kab.org/site/DocServer/Litter_Literature_Review.pdf?docID=481>.

³⁰ Gershman, Brickner & Bratton, Inc., *supra* at p. 19.

³¹ N. Armitage, The Removal of Urban Solid Waste from Stormwater Drains, p. 6, available at <<http://unix.eng.ua.edu/~rpitt/Class/International%20urban%20water%20systems/module3/Microsoft%20Word%20-%20M3%20The%20removal%20of%20urban%20solid%20waste%20from%20stormwater%20drains.pdf>>.

³² M. Harding, REVIEW OF DOCUMENTS AND COMMENTARY (Mar. 2012), enclosed herewith.

³³ CIWMB, *supra* at p. 6.

³⁴ *Id.* at p. 21.

³⁵ M. Harding, *supra*.

practicable.”³⁶ The plain language of this provision “expresses unambiguously Congress’s intent that EPA issue no permits to discharge from municipal storm sewers unless those permits ‘require controls to reduce the discharge of pollutants to the maximum extent practicable.’”³⁷ The Regional Board must issue permits which ensure that the discharge of pollutants will be reduced to the MEP.³⁸

The State Water Resources Control Board analyzed the term “maximum extent practicable,” and found that “the relevant factors, to determine whether [the MEP standard] is met in choosing solutions and treatment technologies, include technical feasibility, cost, and state and public acceptance.”³⁹ Effectiveness is also a factor to consider.⁴⁰ The State Board explained that “[t]here must be a *serious attempt to comply*, and practical solutions may not be lightly rejected.”⁴¹

The State Board’s analysis is instructive in determining whether the standard is met:

If, from the list of BMPs, a permittee chooses only a few of the least expensive methods, it is likely that MEP has not been met. On the other hand, if a permittee employs all applicable BMPs except those where it can show that they are not technically feasible in the locality, or whose cost would exceed any benefit to be derived, it would have met the standard. MEP requires permittees to choose effective BMPs, and to reject applicable BMPs only where other effective BMPs will serve the same purpose, the BMPs would not be technically feasible, or the cost would be prohibitive.⁴²

The foam ban has not been shown to be an “effective” BMP. As stated above, other BMPs to reduce litter have been shown to be technically feasible and effective. The permittees have not shown that these other BMPs are technically infeasible, or that the cost would be prohibitive. Thus, in relying on the automatic credit for the foam ban, permittees do not meet the MEP standard as interpreted by the State Board.

The ban does not meet the MEP standard—for the simple reason that BASMAA has shown no nexus between the foam ban and trash reductions in the storm drains. Furthermore, in taking trash load reduction credit for the foam ban, permittees purport to be reducing the amount of other feasible and effective BMPs they must implement. In other words, taking credit for the foam ban undermines effective trash load reduction in two ways: (1) the ban itself is ineffective;

³⁶ Clean Water Act § 402(p)(3)(B)(iii), 33 U.S.C. 1342(p)(3)(B)(iii) (emphasis added).

³⁷ *Environmental Defense Center v. Environmental Protection Agency*, 344 F.3d 832, 854 (9th Cir. 2003).

³⁸ Water Code § 13377 (California waste discharge requirements must “ensure compliance with all applicable provisions of the [Clean Water Act]”).

³⁹ State Water Resources Control Board, Order WQ 2000-11, p. 20 (citations omitted).

⁴⁰ See *Building Industry Ass’n of San Diego County v. State Water Resources Control Bd.* (2004) 124 Cal. App. 4th 866, 876 fn. 7 [describing factors identified in a general permit as being “useful” in determining whether the maximum extent practicable standard is met].

⁴¹ State Water Resources Control Board, Order WQ 2000-11, p. 20 (emphasis added).

⁴² *Id.*

and (2) in taking credits for the ban, the permittees are reducing their use of other effective and feasible BMPs—such as increased education and anti-litter enforcement—that would reduce trash in the storm drains. The foam ban credit therefore violates the Clean Water Act’s MEP standard.

V. THE FOAM BAN CREDIT VIOLATES THE MRP REQUIREMENTS

The MRP requires permittees to design their Individual Plans to “attain a 40% trash load reduction from its MS4 by July 1, 2014.”⁴³ In other words, the permittees’ Individual Plans must actually reduce trash, and must be “designed” to reach a 40% reduction by 2014. BASMAA’s determination—without evidentiary support—that banning foam will reduce trash by 8% is not “designing” a plan to yield real trash reductions. Rather, it is relying on illusory reductions that will occur only in the ledgers of the accounting scheme BASMAA proposes, but not actual storm drains. “Designing” Individual Plans to meet the 40% reduction by 2014 would require basing them on sound science and empirical data, which is entirely lacking for the proposed credit for the foam ban.

BASMAA acknowledges that the credit system was not designed to yield real trash reductions in the amount claimed—rather it appears to have arbitrarily selected a credit, based on no evidence whatsoever, for banning foam. BASMAA states that load reduction credit percentages “are based on *discussions among BASMAA Trash Committee members.*”⁴⁴ BASMAA acknowledges that it has “prioritize[d] the implementation of control measures that stakeholders *generally feel* are the most effective in reducing trash.”⁴⁵ BASMAA admits further that it created these load reduction credits “where effectiveness data are lacking or load reductions are difficult to quantify” as infeasible or impractical.⁴⁶ In effect, BASMAA admits that its proposed credit lacks evidentiary support. BASMAA appears to be unaware of the California Integrated Waste Management Board study which analyzed polystyrene use and disposal and recommended litter management measures other than a product ban.⁴⁷ This report provides a better basis for regulatory decision-making than what “stakeholders generally feel.”

Permittees have not connected the dots between the foam ban and any trash load reduction whatsoever—let alone the 8% credit BASMAA proposes. Permittees relying on the foam ban have not “designed” their Individual Plans to reduce trash as the MRP requires. The Regional Board should thus reject these plans.

⁴³ MRP, section C.10.a.i (“The [Short-Term Trash Loading Reduction] Plan shall describe control measures and best management practices, including any trash reduction ordinances, that are currently being implemented and the current level of implementation and additional control measures and best management practices that will be implemented, and/or an increased level of implementation *designed to attain a 40% trash load reduction from its MS4 by July 1, 2014*” (emphasis added)).

⁴⁴ BASMAA, TRASH LOAD REDUCTION TRACKING METHOD (Feb. 1, 2012) p. 4 (emphasis added).

⁴⁵ *Id.* (emphasis added).

⁴⁶ *Id.*

⁴⁷ CIWMB, *supra*.

VI. THE BASELINE REPORT, THE CREDIT REPORT, AND THE INDIVIDUAL PLANS ARE NOT CONSISTENT WITH THE BASIN PLAN

The ACC letter includes an expert critique, by Steve Stein, of the Baseline Report and the Credit Report. As identified by Stein’s critique, BASMAA’s methodology is scientifically flawed. BASMAA’s methodology failed to use relevant and scientifically valid evidence, as required by the basin plan. The basin plan is clear that in evaluating compliance with water quality objectives, the Regional Board considers only “*relevant and scientifically valid evidence*, including relevant and scientifically valid numerical criteria and guidelines developed and/or published by other agencies and organizations”⁴⁸

The use of uncompressed trash to measure trash amounts—and other faulty methodologies the ACC letter and the Stein study identify in the Baseline Report, the Credit Report, and the Individual Plans—are contrary to the basin plan’s directive to use relevant and scientifically valid evidence. The Regional Board must therefore reject the use of those methodologies and the Baseline Report, the Credit Report, and the Individual Plans.

VII. BASMAA AND THE CITIES MUST PREPARE AN ENVIRONMENTAL IMPACT REPORT BEFORE SUBMITTING PLANS THAT RELY ON A FOAM BAN TO THE REGIONAL BOARD

Dart agrees with the ACC letter that banning polystyrene foam food ware will have significant environmental impacts that must be analyzed in an environmental impact report (“EIR”). As already described, the Integrated Waste Management Board (now CalRecycle) found in a 2004 study after reviewing life cycle analyses of foam and other products: “In many cases, PS [polystyrene] is superior in a variety of ways to several alternative products.”⁴⁹ Other analyses have similarly found that substitutes for polystyrene foam food ware use more energy and water.⁵⁰ The proposed foam ban thus may have significant adverse environmental impacts, and must be analyzed under CEQA.

By submitting their Individual Plans, the cities are committing that the measures in those plans “will be implemented.”⁵¹ This commitment triggers the need for the cities to conduct a CEQA review of the measures in their Individual Plans that may have significant environmental impacts—such as banning foam food ware. As explained by the California Supreme Court, “before conducting CEQA review, agencies must not ‘take any action’ that significantly furthers a project ‘in a manner that forecloses alternatives or mitigation measures that would ordinarily be part of CEQA review of that public project.’”⁵²

⁴⁸ San Francisco Regional Water Quality Control Board, Water Quality Control Plan (Basin Plan) (Dec. 31, 2010) p. 3-9 (emphasis added).

⁴⁹ CIWMB, *supra* at p. 19; see section II, *supra*.

⁵⁰ The Brattle Report, *supra* at p. 6.

⁵¹ MRP, section C.10.a.i.

⁵² *Save Tara v. City of West Hollywood* (2008) 45 Cal. 4th 116, 138.

Until the cities and BASMAA conduct an adequate CEQA review of the environmental impacts of banning polystyrene foam food service ware, they are without power to adopt such a ban. The Regional Board should reject any documents—including the Individual Plans and the Credit Report—that rely on such a ban until an adequate EIR has analyzed its impacts.

* * *

Dart respectfully requests that, at a properly noticed permit hearing, the board of the Regional Board reject BASMAA's Preliminary Baseline Trash Generation Rates for San Francisco Bay Area MS4s, BASMAA's Trash Load Reduction Tracking Method, and the permittees' Individual Plans that rely on the foam ban as violating the MRP, the Clean Water Act, and the California Environmental Quality Act. Dart also requests that staff recommend to the board that it take such action.