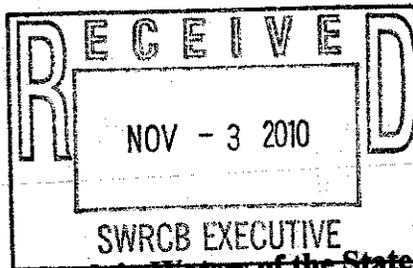




November 3, 2010

*Via Electronic Submission*

Jeanine Townsend  
Clerk to the Board  
California State Water Resources Control Board  
1001 I Street, 24<sup>th</sup> Floor  
Sacramento, CA 95814  
[commentletters@waterboards.ca.gov](mailto:commentletters@waterboards.ca.gov)



Re: Comment Letter — Policy for Controlling Trash in Waters of the State

Dear Ms. Townsend:

This letter sets forth the comments of the American Chemistry Council ("ACC") regarding the scope and content of environmental information that should be considered by the California State Water Resources Control Board (the "SWRCB") in developing a Statewide Policy for Controlling Trash in Waters of the State (the "Proposed Trash Policy"). These comments are submitted in response to the October 6, 2010 SWRCB Notice regarding the scoping meetings that the SWRCB is conducting pursuant to the California Environmental Quality Act ("CEQA"). These comments also discuss the SWRCB's September 2010 Informational Document (the "Scoping Document") regarding the Proposed Trash Policy.

We appreciate this opportunity to comment on the scope and content of environmental information that should be considered with respect to the proposed statewide policy.

**I. THE PROPOSED DEVELOPMENT OF A STATEWIDE TRASH POLICY REQUIRES AN EIR.**

As the Scoping Document recognizes, a statewide trash policy can only be promulgated after a full environmental review. The ACC therefore welcomes the SWRCB's commitment to undertake this scoping process and to seek early stakeholder input to identify relevant issues that must be addressed in the environmental review process under CEQA. As discussed more fully below, the proposed statewide Trash Policy clearly will have many significant impacts upon the environment. The Scoping Document indicates that the SWRCB is cognizant of this, as it states that the SWRCB will prepare a "draft staff report, [a] substitute environmental document, and [a] draft water quality control policy . . . to fulfill the [SWRCB's] formal water quality planning obligations under CEQA. Scoping Document at 2.

The SWRCB's environmental document must be a substitute for an Environmental Impact Report ("EIR") and not for a negative declaration. CEQA requires the preparation of an EIR when considering approval of a proposed project — including a statewide policy such as this — that may have a significant impact on the environment. As the discussion below makes





clear, there can be no question it can be fairly argued that the proposed statewide Trash Policy will have significant impacts on the environment. While the court in *City of Arcadia et al. v. State Water Resources Control Board et al.*, 135 Cal. App. 4th 1392 (2006), was considering a proposed basin plan amendment by a Regional Board to adopt a total maximum daily load ("TMDL") for trash, the Court's analysis makes clear that the environmental impacts of a statewide policy for development of Trash TMDLs are sufficiently significant to require that an EIR or its functional equivalent be prepared to support the adoption of such a policy. *See id.* at 1420-1426.

The ACC recognizes that a tiered approach to the EIR is appropriate here. A tiered environmental review is encouraged by CEQA, *see* Pub. Res. Code § 21093, and is used to conduct the analysis of "general matters" in a broader EIR "such as one prepared for a general plan or policy statement." Section 15152(a) of the Cal. Code of Regulations, Sections 15000-15387 (the "CEQA Guidelines"). The Proposed Trash Policy is such a policy statement. Indeed, "Tiering is appropriate when the sequence of EIRs is . . . [f]rom a general plan, policy, or program EIR to a program, plan, or policy EIR of lesser scope or to a site-specific EIR. CEQA Guidelines § 15385(a). The later, more focused and specific EIRs may "incorporat[e] by reference the general discussions from the broader EIR" in Tier 1. CEQA Guidelines § 15152(a).

A core principle of CEQA is that environmental review take place *before* a discretionary decision is made that commits an agency to a course of action that may have significant environmental consequences. Pub. Res. Code § 21080(a); CEQA Guidelines § 15357. Thus, while a Tier 1 EIR can defer consideration of information that may not be feasibly reviewed at the programmatic level, the tiering approach "does not excuse the lead agency from adequately analyzing reasonably foreseeable significant environmental effects of the project and does not justify deferring such analysis to a later tier . . ." CEQA Guidelines § 15152(b); *see also* § 15152(c) (deferral must "not prevent adequate identification of significant effects of the planning approval at hand").

As noted, CEQA Guidelines Section 15152(b) requires analysis in Tier 1 of "reasonably foreseeable significant environmental effects." In addition, CEQA Guidelines Section 15187 requires the SWRCB to "perform an environmental analysis of the reasonably foreseeable methods" of compliance when adopting a rule or regulation requiring the installation of pollution control equipment or establishment of a performance standard or treatment requirement. Because the SWRCB is considering adoption of a zero numeric water quality criterion for trash via a statewide trash policy that may require installation of pollution control equipment, the SWRCB must perform this required foreseeability analysis. Under Section 15187(c), the required analysis must include: "(1) an analysis of reasonably foreseeable environmental impacts of the methods of compliance; (2) an analysis of reasonably foreseeable mitigation measures relating to those impacts; and (3) an analysis of reasonably foreseeable alternative means of compliance with the rule or regulation, which would avoid or eliminate the identified impacts." In addition, Section 15187(d) requires that the environmental analysis "take into





account a reasonable range of environmental, economic, and technical factors, population and geographic areas, and specific sites."

Finally, CEQA Guidelines Section 15130(a) mandates that the Tier 1 EIR "shall discuss cumulative impacts of a project when the project's incremental effect is cumulatively considerable." "Cumulative impacts can result from individually minor but collectively significant projects taking place over a period of time." CEQA Guidelines Section 15355(b). As the Proposed Trash Policy will apply to waterbodies throughout the state, there can be no question that the cumulative impacts of all the many, separate individual impacts will be significant indeed and therefore must be analyzed in the Tier 1 EIR.

For these reasons, in accordance with CEQA, the ACC urges the SWRCB to prepare an EIR or its functional equivalent for the Proposed Trash Policy. Further, if the SWRCB opts for a tiered approach to the EIR, the Tier 1 EIR must address all reasonably foreseeable significant impacts on the environment, including cumulative impacts.

## II. POTENTIAL ENVIRONMENTAL IMPACTS OF A STATEWIDE TRASH POLICY.

The Scoping Document clearly reflects the need for the SWRCB to evaluate certain issues in its Tier 1 EIR. These Tier 1 issues either are expressly identified by the Scoping Document as issues that a Trash Policy will address, positions it is expected to embrace, or issues fundamentally inseparable from the development of a trash policy at the statewide level. We discuss several of these Tier 1 issues below.

### A. Issues and Potential Impacts that Must be Addressed in the Tier 1 EIR.

#### 1. The Definition of "Trash."

The content of the Proposed Trash Policy, much less its significant environmental impacts, cannot be evaluated without a consistent and meaningful definition of the term "trash."

For the purposes of the scoping process, the Scoping Document defines "trash" as material "of anthropogenic origin, with the main source of trash being litter." Scoping Document at 2 (citing Government Code Section 68055.1(g) for the definition of litter). "Trash" also is defined to include the terms "floating debris," "floatable waste," and "settleable waste." *Id.* This definition is neither internally consistent nor likely satisfactory for the Proposed Trash Policy, including as it does anthropogenic organic floatable solids in domestic sewage, floatable debris that is not anthropomorphic, and Total Suspended Solids.

The SWRCB appears to recognize the deficiencies of this working definition, as the Scoping Document includes as the fourth numbered item under its "Element 1" a potential action item to provide a new and comprehensive definition of this central term. Whether this action ultimately is included as an element in any Proposed Trash Policy or is performed solely within the confines of the CEQA analysis to define the subject matter of the agency action under





evaluation, development of a meaningful working definition of "trash" is a necessary first step to enable the SWRCB to perform the analyses required under CEQA. When developing this definition the SWRCB must consider full range of discarded and abandoned material in its definition unless there is a sound, sustainable reason to do otherwise.

## 2. Collection and Analysis of Trash Stream Data.

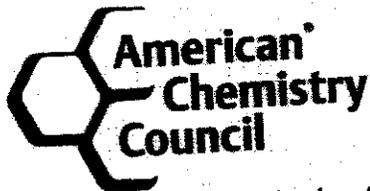
While the Scoping Document identifies certain significant categories of trash, it does not provide any data or citations to support these statements. Scoping Document at 2. Nor does the Scoping Document provide any data or citations to support the identified potential impacts from trash to state waterbodies. Scoping Document at 2-3. These conclusory statements do not provide adequate information for a meaningful CEQA analysis of the Proposed Trash Policy. The SWRCB must develop and analyze data reflecting trash produced and trash found to be present in State waterbodies in order to provide a basis for Regional Boards and municipalities to assess the need for and the efficacy of Basin Plan amendments and other measures to implement the Proposed Trash Policy. Specifically, the SWRCB should characterize the quantity of trash present in the waters of the State and develop a meaningful metric by which its presence, and reduction, can reliably be measured. Without robust data regarding the extent that beneficial uses of waterbodies throughout the state may be impaired by trash, there is no meaningful way to assess whether the Proposed Trash Policy is appropriate and the extent of the significant environmental impacts it may have.

Moreover, the SWRCB must address the variability in the composition of the trash stream (used here to denote the overall set of material that, when present in waters of the State, will be the subject matter of the Proposed Trash Policy) between areas with different land uses. Because trash produced in one area of the State may differ materially from that generated in another, any Policy must be capable of identifying and competently addressing those differences. Similarly, the definition should be capable of distinguishing the raw trash stream (trash generated) from the fraction of that stream that enters the State's waters. Because different elements of the trash stream will have different fate and transport characteristics, and owing to region-specific differences in infrastructure that determine how much and which trash enters State waters, there likely are material differences in the capacity of generated trash to result in trash in State waters. Finally, the composition of the trash that does reach State waters has to be correlated to the designated beneficial uses of each of waterbody in order to assess whether the Proposed Trash Policy will actually result in attainment of the designated beneficial uses. Without this type of analysis, there is no way to meaningfully assess whether the Proposed Trash Policy is appropriate and the extent of the significant environmental impacts it may have.

## 3. "Zero Trash" Water Quality Criterion.

The Scoping Document states that development of a water quality criterion of "zero trash" will be considered during development of the Proposed Trash Policy. Scoping Document at 6. Creation of a "zero trash" water quality criterion will require a number of analyses in order to assess the significant environmental impacts of the Proposed Trash Policy.





First, any new "zero-tolerance" water quality criterion for trash will require justification that there is no minimum presence of trash in any State water that does not impair that water's designated beneficial use(s). Without the analysis of the statewide trash stream data referenced above, it will be difficult for the SWRCB to adequately support adoption of a "zero trash" criterion because there will be no reasonable way to assess whether such a criterion will actually result in attainment of beneficial uses of a particular waterbody. In addition, Use Attainability Analyses ("UAAs") or their equivalents should be performed for those waterbodies which may be subject to any new "zero-tolerance" criterion under the Proposed Trash Policy to determine if attainment of a zero trash criterion is feasible for those waterbodies' designated uses pursuant to 40 C.F.R. § 131.10(g)(1)-(6). Similarly, a Tier 1 CEQA evaluation should discuss the need to reevaluate existing beneficial use designations of state waterbodies in light of any "zero trash" water quality criterion if one is to be generated as a part of the statewide Proposed Trash Policy. Importantly, any UAA or similar reevaluation of the appropriateness of existing designated uses requires analysis of well-defined feasibility and economic factors that should also be evaluated as a part of the CEQA review of the Proposed Policy. *Id.*

**4. Required Economic Evaluation of Proposed Maximum Extent Practicable and Best Available Technology Clean Water Act Standards.**

Element 1 of the Scoping Document describes the development of a statewide policy defining "MEP" (Maximum Extent Practicable) and "BAT" (Best Available Technology) as elements of a statewide Proposed Trash Policy. Scoping Document at 4. Both of these standards require an economic evaluation under the Clean Water Act. For example, application of a MEP standard requires a determination that the model technology is economically "practicable." Similarly, if a BAT standard is adopted, a determination must be made that the standard is consistent with the economic evaluation required by the federal Clean Water Act, 33 U.S.C. § 1314(b)(2)(B), in particular the cost of achieving the reductions using a BAT standard. Because these economic assessments are statutorily required predicates to any definition of MEP and BAT, economic impacts are thus necessary elements of any CEQA evaluation of these standards.

**5. Ban on Certain Products that Generate Trash.**

The Scoping Document identifies plastics, wood, cardboard, and metal as significant categories of trash. Scoping Document at 2. Although not specifically identified in the Proposed Trash Policy, one reasonable foreseeable compliance measure that jurisdictions may employ to comply with the policy, particularly if a "zero trash" criterion is adopted, is to ban certain types of products that generate significant types of trash in impaired state waterbodies. Pursuant to the CEQA requirements for the analysis of foreseeable impacts, *see* CEQA Guidelines Section 15187, the SWRCB must consider the reasonably foreseeable environmental impacts of banning





certain products such as plastic bags or polystyrene food service packaging.<sup>1</sup> Because a ban on these type of products would likely increase usage of paper or bioplastic products, an environmental analysis must consider the impacts to the environment of both the reduction in plastics and the increase in paper or bioplastic use, including impacts to air quality, plant life, fish and wildlife, energy usage, greenhouse gas emissions, utilities and service systems and the need for additional composting facilities. CEQA Guidelines Section 15187(c) also requires analysis of the reasonably foreseeable mitigation measures that would avoid or reduce these impacts.

## 6. Greenhouse Gas Emissions.

The greenhouse gas ("GHG") emissions from the implementation of a statewide Trash Policy must be calculated and analyzed under CEQA. The SWRCB "may analyze and mitigate the significant effects of greenhouse gas emissions at a programmatic level" in a Tier 1 EIR. CEQA Guidelines Section 15183.5(a). The programmatic level analysis must be robust, however, including an analysis of cumulative impacts. CEQA Guidelines Section 15064.4(a) requires that the impacts of GHG emissions from a proposed project be carefully considered and recommends that such emissions be calculated or estimated using scientific and factual data to the extent possible. Section 15064.4(b) recommends that certain factors be considered when determining the significance of GHG emissions, including the extent a project may increase or reduce such emissions when compared to the environmental setting and the extent the project complies with other regulations or requirements adopted to implement statewide, regional, or local plans for the reduction or mitigation of greenhouse gas emissions. When complying with these requirements, the SWRCB must calculate and consider potential GHG emissions for each proposed element of the Trash Policy, including reasonably foreseeable and indirect impacts. For example, as discussed above, one reasonably foreseeable method jurisdictions may employ to comply with the Trash Policy is to ban the use of certain types of items like plastic bags. The impacts to GHG emissions from the reduction in plastic bag use as well as the increase in paper bag use (as a likely substitute for plastic bags) must be analyzed. In addition, the impacts to compliance with the Global Warming Solutions Act of 2006 ("AB 32"), which requires that state GHG emissions be capped at 1990 levels by 2020, also must be analyzed.

### B. Issues and Impacts Appropriate for Consideration in the Tier 2 EIR.

As discussed above, under a tiered CEQA analysis, the analyses at later tiers must focus "on the actual issues ripe for decision" at that time. Thus, when Regional Boards adopt specific Trash TMDLs and chose from the range of compliance methods identified in the Proposed Trash Policy, the environmental impacts from those specific TMDLs must be examined at a much more detailed level. Several of the issues and potential environmental impacts that must be addressed in the Tier 1 EIR (*see supra*) also must be addressed in the more focused Tier 2 EIR,

<sup>1</sup> Several local California jurisdictions have adopted a ban on the use of plastic bags at grocery stores, pharmacies, and other similar stores. This year the California Legislature also debated but did not adopt AB 1998, which would have imposed a similar ban statewide.





as their impacts upon particular waterbodies is considered. These impacts include analysis of the composition of the trash stream in the particular region of the waterbody at issue, and any bans on certain products that generate trash.

In addition, there are certain issues and potential environmental impacts specific to a particular waterbody that may not be necessary in a programmatic level EIR, but must be considered in a focused Tier 2 EIR. For example, if a jurisdiction is considering banning certain products that generate significant amounts of trash in an impaired waterbody, then a detailed analysis of the impacts from that ban also must be prepared. Some types of impacts such as human health or environmental justice impacts may only be reasonably identified at the later Tier 2 CEQA analyses since those types of impacts are usually tied to specific populations and/or locations. We therefore reserve comments on those sorts of impacts for later steps in the process.

\* \* \*

Thank you for the opportunity to participate in this CEQA scoping process. We look forward to participating in any subsequent formal proceedings regarding the development of the Proposed Trash Policy in accordance with CEQA, the Porter-Cologne Water Quality Control Act, and the federal Clean Water Act.

Sincerely yours,

A handwritten signature in cursive script that reads "Ashley Carlson".

Ashley Carlson  
Director of Packaging, Plastics Division  
American Chemistry Council

