

William & Mary Environmental Law and Policy Review

Volume 37 (2012-2013)
Issue 2

Article 7

March 2013

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Gary D. Godman, *Countering Single-Use Bag Consumption with State Legislation: The Old Dominion Considers a New Trend*, 37 Wm. & Mary Envtl. L. & Pol'y Rev. 569 (2013), <https://scholarship.law.wm.edu/wmelpr/vol37/iss2/7>

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COUNTERING SINGLE-USE BAG CONSUMPTION WITH STATE LEGISLATION: THE OLD DOMINION CONSIDERS A NEW TREND

GARY D. GODMAN*

If we deal with [plastic waste] here or not, it is an issue; it's going to impact the environment. It's not going to go away.

—Virginia House Delegate Onzlee Ware¹

INTRODUCTION

For the last half century, people have used thin plastic shopping bags to carry home groceries, clothes, and other goods, only to discard them after a single use. After initial development in the early 1960s,² plastic bags multiplied exponentially to a yearly production estimated in the billions, if not trillions, during the 2000s.³ Because these bags are readily available at check-out in most retail businesses in the United States, the average customer likely does not give much thought to the timeless question of “paper or plastic?” The convenience of taking home

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¹ Catherine Leth, *House Panel Sacks Plastic Bag Ban*, RVANEWS, <http://rvanews.com/news/house-panel-sacks-plastic-bag-ban/36322> (last visited Jan. 29, 2013).

² See *Polyethylene “T-Shirt” Carrier Bag (1965)*, EUROPEAN PLASTICS NEWS (Sept. 26, 2008), <http://www.europeanplasticsnews.com/subscriber/newscat2.html?cat=&channel=500&id=1222446525> (crediting Swedish engineer Sten Gustaf Thulin with the idea for the “simple one-piece” plastic bag).

³ Estimates vary widely. See, e.g., Jessica Root, *60,000 Plastic Bags Are Being Used This Second: Help Slow It Down*, TLC, <http://tlc.howstuffworks.com/home/plastic-bag-facts.htm> (last visited Jan. 29, 2013) (estimating 500 billion to 1 trillion bags are used worldwide per year, with 100 billion in the United States alone); *New Bans on Plastic Bags May Help Protect Marine Life*, WORLDWATCH INSTITUTE, <http://www.worldwatch.org/node/5565> (last visited Jan. 29, 2013) (stating 4 to 5 trillion plastic bags of all types were produced worldwide in 2002 (drawing from ERIK ASSADOURIAN ET AL., WORLDWATCH INSTITUTE, STATE OF THE WORLD 2004 22 (2004), which notes that this figure includes trash bags and durable shopping bags)).

purchases in free, one-use plastic bags has created a consumer culture that views the automatic receipt of plastic bags as a right, not a privilege.⁴

The result of this convenience is a plague of littered plastic bags in beaches, fields, and oceans around the world,⁵ which local, state, and national governments are just beginning to attempt to counteract. In January 2011, three separate bills were introduced to the Virginia General Assembly that proposed to deal with the matter through either consumer taxes or an outright ban on single-use plastic bags.⁶ While none of the bills left their respective committees, the mere introduction of such bills demonstrates that Virginians are considering the effects and consequences of continued plastic bag consumption.⁷

In order to lessen plastic bag use and litter, the Commonwealth should enact a version of one of the 2011 bills. While a bag ban would be the most effective method, a per-bag tax on consumers would be easier to implement and would be less hassling for consumers. In order to demonstrate the need for action, this Note will review the effects of plastic bag litter in Virginia, evaluate the status of current Virginia laws on recycling, analyze each of the 2011 bills, measure their strengths and weaknesses in light of other plastic bag legislation in the United States and abroad, and briefly address arguments against such legislation.

I. ON THE BEACHES, IN THE FIELDS, IN THE STREETS: PLASTIC BAG LITTER IN VIRGINIA AND BEYOND

The convenience and subsequent omnipresence of single-use plastic bags are marred by their status as a source of litter and pollution. During

⁴ See Bridget M. Warner, Note, *Sacking the Culture of Convenience: Regulating Plastic Shopping Bags to Prevent Further Environmental Harm*, 40 U. MEM. L. REV. 645, 646 (2010). Ms. Warner also found authorities stating that the average American uses eleven to twenty-three plastic bags per week. *Id.* at 646 n.2. In searching for legal writing on this topic, the author noticed that the majority of material is produced by students. One might muse that the sparse professorial legal research on this subject is indicative of a shift in priorities of the up-and-coming generation.

⁵ See *infra* Part I.

⁶ See *Virginia Proposing Statewide Plastic Bag Ban in 2011*, CAMPAIGN FOR RECYCLING, http://www.campaignforrecycling.org/whats_new/recycling_news/jan_5_virginia_bag_ban (last visited Jan. 29, 2013).

⁷ Take note that 2011 was not the first year to see proposed regulations of plastic bags in Virginia. The last several years have seen multiple (failed) attempts. See, e.g., H.B. 1534, 2008 Sess. (Va. 2008), available at <http://leg1.state.va.us/cgi-bin/legp504.exe?081+ful+HB1534+pdf> (proposing that localities be allowed to ban merchants from providing certain plastic bags via ordinance).

their 2010 International Coastal Cleanup, the not-for-profit Ocean Conservancy found that plastic bag waste was the third most collected item picked up during coastal and inland volunteer cleanups, constituting a full ten percent of all waste collected.⁸ While specific numbers for Virginia were not provided in the 2010 report, local sources provide insight into the state's situation. For example, a group in the Hampton Roads area held a "Plastic Bag Forgiveness Day" in 2011, where approximately 600 visitors at two locations brought in a staggering 23,100 bags for recycling.⁹

Had these Virginians not recycled these plastic bags, they could have ended up as litter not only at the beach, but also inland. This migration is one of the key problems inherent in the use of plastic bags. Because their very structure is lightweight and aerodynamic, single-use plastic bags tend to blow away easily, even after they are properly thrown away.¹⁰ One activist complained that the problem was not the fact that plastic bags do not degrade in landfills, but that a bag "becomes litter *after* it has been properly disposed of. The plastic bags blow out of garbage cans, they blow out of the back of garbage trucks, off transfer stations and off the face of landfills."¹¹ This phenomenon directly affects farmers in Virginia, who must contend with plastic bags floating into their fields and potentially killing livestock or damaging crop production.¹²

Another factor of the prevalence problem of plastic bag litter is the low recycling rate. Nationwide, the United States recycled about thirty-four percent of all municipal waste in 2010.¹³ In spite of that number, a mere twelve percent of plastic bag waste was recycled.¹⁴ According to the Virginia Department of Environmental Quality ("DEQ") report for

⁸ OCEAN CONSERVANCY, TRACKING TRASH: 25 YEARS OF ACTION FOR THE OCEAN 34 (2011), available at http://act.oceanconservancy.org/pdf/Marine_Debris_2011_Report_OC.pdf. Cigarette butts (nineteen percent) and plastic beverage bottles (eleven percent) were the top two items collected. *Id.*

⁹ Lisa Hardy, *Over 23,100 Plastic Bags Collected!*, ASKHRGREEN.ORG (July 22, 2011), <http://askhrgreen.org/over-23100-plastic-bags-collected/>.

¹⁰ See SUSAN FREINKEL, PLASTIC: A TOXIC LOVE STORY 147 (2011).

¹¹ *Id.* (emphasis in original).

¹² *Committee Works to Solve Plastic Bag Issue for Farmers*, VA. FARM BUREAU (July 24, 2008), http://www.vafbarchive.org/news/2008/july/072408_2.htm.

¹³ ENVTL. PROTECTION AGENCY, MUNICIPAL SOLID WASTE GENERATION, RECYCLING, AND DISPOSAL IN THE UNITED STATES: FACTS AND FIGURES FOR 2010 1 (Dec. 2011), available at http://www.epa.gov/osw/nonhaz/municipal/pubs/msw_2010_rev_factsheet.pdf.

¹⁴ *Plastics*, EPA.GOV, <http://www.epa.gov/osw/conservation/materials/plastics.htm> (last updated Nov. 19, 2012) (describing the recycling rate of "the category of plastics which includes bags, sacks, and wraps").

2010, the Commonwealth recycled total municipal waste at about forty percent, a much higher rate than the national average.¹⁵ Although 27,922 tons of plastic were reportedly recycled in Virginia in 2010,¹⁶ the DEQ report does not break down the plastics category into bags, bottles, or other plastic products.¹⁷ Nor does it give insight into how much plastic was disposed in landfills or other methods,¹⁸ providing no simple way to determine the recycling rate for plastic products only.

The aerodynamic nature of plastic bags and the low recycling rate have spawned larger problems beyond beach litter and livestock suffocation. In the northern expanse of the Pacific Ocean, currents and winds have carried a massive amount of plastic bags and other products under the water, creating a Texas-sized area known as the "Pacific Garbage Patch."¹⁹ The effect is a mixture of plastic and water that forms a "slowly churning bowl of plastic soup," which can entrap, choke, or suffocate marine life.²⁰ In order to contain these global effects of plastic litter as well as state and local concerns, governments need to take more aggressive action in promoting the reduction of plastic use. As described below, the Commonwealth of Virginia has the potential to counter plastic bag waste and must capitalize on the growing recycling and reduction trend by enacting plastic bag legislation.

II. THE STATE OF VIRGINIA LAW

Currently, Virginia law is generally pro-recycling, but it does not provide enough detail to deal with plastics or plastic bags specifically. Localities²¹ are authorized to create facilities and operations for collecting recyclable materials as part of their general power to create solid waste

¹⁵ VA. DEP'T OF ENVTL. QUALITY, THE VIRGINIA ANNUAL RECYCLING RATE REPORT: CALENDAR YEAR 2010 SUMMARY 1 (Nov. 2011), available at <http://www.deq.virginia.gov/Portals/0/DEQ/Land/RecyclingPrograms/Reports/AnnualReportRRR2010Final.pdf>.

¹⁶ *Id.* at 9.

¹⁷ *Id.* (listing "plastic" in the graphical breakdown of recycled materials but no subsets of plastics).

¹⁸ *Id.* (breaking down non-recycled waste into only "household," "commercial," "institutional," or "other" categories of waste).

¹⁹ Jessica R. Coulter, Note, *A Sea Change to Change the Sea: Stopping the Spread of the Pacific Garbage Patch with Small-Scale Environmental Legislation*, 51 WM. & MARY L. REV. 1959, 1960 (2010).

²⁰ *Ocean Trash Plaguing Our Sea*, SMITHSONIAN INSTITUTION OCEAN PORTAL, <http://ocean.si.edu/ocean-news/ocean-trash-plaguing-our-sea> (last visited Jan. 29, 2013).

²¹ The term "locality" can refer to either counties, cities, or towns. VA. CODE ANN. § 15.2-102 (2012).

management plans.²² Every solid waste unit is required to maintain a minimum recycling rate of twenty-five percent.²³ State agencies and universities are also under a “duty” to collect all recyclable materials they generate, but only under the fuzzy mandate of “to the extent feasible.”²⁴ The agency recycling statute provides a minimum list of products to be recycled, but plastics or plastic bags are not included.²⁵

In addition to regulating state entities, Virginia law also involves businesses in the cleanup process by charging litter taxes on manufacturers, wholesalers, distributors, and retailers that deal in a broad list of items,²⁶ such as groceries, tobacco products, and many items that can be recycled after they are used.²⁷ Monies raised from the litter tax are directed to a Litter Control and Recycling Fund,²⁸ which is then used by DEQ to make grants to localities for the purpose of litter prevention and recycling.²⁹

The numbers show that the grants are popular. For fiscal year 2011, DEQ paid \$1,522,627 in grants to 197 locality applicants.³⁰ A grant received by Isle of Wight County in the eastern part of the state is one of the most successful. Dubbed “Isle Be Green,” this program aimed to place public collection containers for plastic bags throughout the county.³¹ Over

²² VA. CODE ANN. § 15.2-928 (2012).

²³ VA. CODE ANN. § 10.1-1411(D)(1) (2012). Units encompassing an area with a population density of less than 100 people per square mile or with unusually high unemployment rates must only maintain a fifteen percent recycling rate. *Id.* § (D)(2).

²⁴ VA. CODE ANN. § 10.1-1425.6 (2012).

²⁵ The minimum list includes “used motor oil, glass, aluminum, office paper and corrugated paper.” *Id.*

²⁶ VA. CODE ANN. § 58.1-1707 (2012).

²⁷ VA. CODE ANN. § 58.1-1708 (2012). The list is quite inclusive, making it difficult for a retailer to not fall within the purview of the litter tax. It would appear that pharmacies selling nothing but prescription and non-prescription drugs would not be subject to the tax. *See id.* (including “[n]ondrug drugstore sundry products” but not actual pharmaceuticals). Hotels and motels may also evade the tax if they do not have a restaurant included on the premises or if any listed items are “completely incidental to the overall service provided.” *See Rulings of the Tax Comm’r PD 88-332, 1988 WL 248926* (Va. Dep’t. of Taxation Dec. 16, 1988), available at <http://www.policylibrary.tax.virginia.gov/OTP/Policy.nsf> (click on “Rulings of the Tax Commissioner” and proceed to search by date).

²⁸ VA. CODE ANN. § 58.1-1710 (2012).

²⁹ VA. CODE ANN. § 10.1-1422.01 (2012).

³⁰ *Litter Prevention and Recycling Grant Programs*, VA. DEP’T OF ENVTL. QUALITY, <http://www.deq.virginia.gov/Programs/LandProtectionRevitalization/RecyclingandLitterPreventionPrograms/LitterPreventionandRecyclingGrantPrograms.aspx> (last visited Jan. 29, 2013).

³¹ *Isle Be Green Program*, ISLE BE GREEN, <http://islebegreen.com/isle-be-green-program/> (last visited Jan. 29, 2013).

the course of less than a year, the program's centers and collection events reportedly brought in just under one million plastic bags.³²

The recycling statutes, grants, and programs appear to be useful in fighting litter and promoting a cleaner environment.³³ However, the problem inherent in litter cleanup programs is that they merely treat the symptom, not the disease. The best way to counteract plastic bag litter would be to reduce consumption by the purchasing public instead of attempting to collect the litter from the environment after it has been discarded.³⁴ The two main ways governments have attempted to reduce consumption are by either enacting bans or fees on one-use bags at the point of sale.³⁵ The Virginia bills proposed in 2011 contained both of these options, which this Note will now analyze and compare with successfully enacted programs from other jurisdictions.

III. THE BAN OPTION

A. *H.B. 1498*

House Bill ("H.B.") 1498 provided the staunchest measures of any of the proposed legislation for countering plastic bag use and pollution. Presented by its patron, Delegate Onzlee Ware,³⁶ H.B. 1498 proposed the following ban: "No retailer . . . shall provide customers with plastic carryout bags at the point of sale unless such bags are (i) durable plastic bags with handles, (ii) at least 2.25 mils thick, and (iii) specifically designed and manufactured for multiple reuse."³⁷ While a ban would be the most effective way to control the plastic bag problem, this bill faced strong

³² ISLE BE GREEN PLASTIC BAG RECYCLING PROGRAM, FINAL REPORT TO VA DEPARTMENT OF ENVIRONMENTAL QUALITY 3 (2010), available at <http://islebegreen.com/wp-content/uploads/2010/06/Final-Grant-Report-DEQ-May-2010.pdf>.

³³ *Id.* at 2.

³⁴ See S. ASIA NETWORK FOR DEV. & ENVTL. ECON., POLICY BRIEF: IS A BAN THE BEST WAY TO REDUCE PLASTIC BAG USE? A CASE STUDY FROM DELHI 1–2 (2011).

³⁵ See *infra* Parts III and IV.

³⁶ H.B. 1498, 2011 Sess. (Va. 2011), <http://leg1.state.va.us/cgi-bin/legp504.exe?ses=111&typ=bil&val=hb1498>. Mr. Ware, a Democrat, is currently the delegate for the 11th District, which includes part of the city of Roanoke. *Contact Info for Delegate Onzlee Ware*, VA. HOUSE OF DELEGATES, <http://dela.state.va.us/dela/MemBios.nsf/a7b082ef6ed01eac85256c0d00515644/89942eae900b385257535005773b0?OpenDocument> (last visited Jan. 29, 2013).

³⁷ H.B. 1498.

opposition,³⁸ and it would be fairly easy for retailers and consumers to evade its mandate.

Because of H.B. 1498's overbroad wording, it would not be difficult for retailers and consumers to defeat the spirit while following the letter of the law. The bill would require no plastic bags be provided to customers "at the point of sale."³⁹ However, the bill does not define what the point of sale is or when it occurs.⁴⁰ If "point of sale" simply means "at the register when money is exchanged," then retailers could merely place plastic bags at other locations throughout the store. This would allow patrons to pick up as many bags as they pleased at the entrance to the store, among the aisles and various sections (as customers already do with fresh produce), or even as the customer leaves the store after they have completed their purchase. This may seem inane and a flagrant offense to the spirit of the proposed bill, but a lack of direction within the wording hands retailers a reasonable interpretation that is compatible with their goals and the letter of the law.

The three-part test in H.B. 1498 is equally ambiguous and leaves too many loopholes to be effective. To be allowable for distribution at the point of sale under the bill, plastic bags must be (i) "durable" with "handles," (ii) at least 2.25 mils in thickness, and (iii) "specifically designed and manufactured for multiple reuse."⁴¹ Points (i) and (iii) provide the greatest opportunities for evading the spirit of the bill through liberal interpretation. Without further legislative guidance, the durability requirement in point (i) is too vague to be helpful, and the average consumer will surely notice that the majority of plastic bags provided by stores have "handles." This point is ambiguous and should be dropped because point (ii) addresses bag durability more directly by setting a thickness requirement.⁴² Requiring handles does little to further the purpose of the bill.

³⁸ The Virginia Retail Federation ("VRF") denounced the burden on sellers in H.B. 1498 as a "huge operational issue." Leth, *supra* note 1. VRF is the advocacy arm of the Retail Merchants Association and the Retail Alliance. See *About the VRF*, VA. RETAIL FED'N, <http://virginiaretailfederation.com/about-us.html> (last visited Jan. 29, 2013). VRF did not respond to the author's request for more information on their position, which was submitted via the "Contact Us" portion of their website in October 2011.

³⁹ H.B. 1498.

⁴⁰ See *id.* (containing no guidelines for defining "point-of-sale").

⁴¹ *Id.*

⁴² *Id.*

The language of point (iii)—“specifically designed and manufactured for multiple reuse”⁴³—is equally nebulous. Absent further instruction from the bill, it appears that the manufacturers themselves would be responsible for determining whether their plastic bags are so designed and manufactured. Theoretically, a clever producer could simply place a notice on the side of the bag declaring, “This bag is specifically designed and manufactured for multiple reuse,” without actually changing their production methods.

The penalties for violating H.B. 1498’s proposed restrictions would certainly be a burden on small and big business. Per current litter control statutes, the penalty for any infraction of the bill would be no more than fifty dollars for each violation.⁴⁴ Assuming a violation occurred at every instance a customer received plastic bags at check-out, a retailer who serves five hundred customers in such a manner for one day could be responsible for up to \$25,000 in fines. However, the flimsy nature of the law would be burdensome on any authority attempting to enforce or interpret the bill.

Two unappealing options for enforcement would be adding mundane stops in retail stores to the already busy schedules of police officers or appointing new officials to specifically enforce the ban. Both options would be a waste of manpower and resources. Another option would be to rely on retailers to self-police the enforcement of the ban, but stores may refuse to comply if they are united in opposition. Interpreting the law would be equally difficult, as magistrates would be forced to decide whether bags are “durable” or made for “multiple reuse” on a case-by-case basis. This would involve fact-finding into manufacturing standards in order to merely impose a minimal fine on a retailer. A look into successful programs in other jurisdictions will shed light on more effective methods of enacting and enforcing bag bans.

B. Examples of Effective Bag Bans

For a successful example of a plastic bag ban, Virginians can look to their southern neighbors in North Carolina. Since October 2010, the Outer Banks area has been subject to a near-total ban on plastic bags given out by retailers.⁴⁵ These steps were taken because the North Carolina

⁴³ *Id.*

⁴⁴ VA. CODE ANN. § 10.1-1418 (2012).

⁴⁵ Erin James, *Ban on Plastic Bags Goes into Effect on Outer Banks*, VIRGINIAN-PILOT (Oct. 1, 2010), <http://hamptonroads.com/2010/09/ban-plastic-bags-goes-effect-outer-banks>.

General Assembly found that plastic bag litter and waste were a burden on landfills, a threat to animal life on land and in the ocean, and a degrading agent of beaches and the landscape.⁴⁶ The North Carolina ban is an excellent example of good policy because it is both narrowly tailored and straightforward in its mandate. The statutes simply prohibit retailers from providing plastic bags with only minimal technical reference to bag measurements.⁴⁷ Only a handful of exceptions are provided, allowing plastic bags to continue to be used for wrapping unpackaged fish, meat, poultry, or produce.⁴⁸ As an additional waste-preventing measure, retailers are only allowed to replace the plastic bags with paper substitutes if (1) the paper bags are made from recycled paper and (2) that retailer offers a rebate to customers using their own reusable bags.⁴⁹ Finally, the ban only affects a limited area, namely those islands or peninsulas that have more than 200 permanent inhabitants, contain a National Wildlife Refuge or National Seashore, and are bordered by the Atlantic on the east and a coastal sound on the west.⁵⁰

While little information appears to be available at this time as to the numerical effect the North Carolina ban has created (perhaps due to a temporary suspension of the ban in 2011 following the destruction of a grocery distribution center⁵¹), the ban is still going strong. Many Outer Banks stores did not even seem to know the ban was suspended and continued using paper bags during the 2011 hiatus.⁵² The ban has also weathered repeal attempts.⁵³ This evidence shows that there is continued support for the plastic bag ban and is a testament to the fact that its simplicity has made it workable.

⁴⁶ N.C. GEN. STAT. § 130A-309.120 (2012).

⁴⁷ N.C. GEN. STAT. § 130A-309.121 to 122 (2012). Instead of focusing on the thickness of the bag, this statute refers instead to weight, allowing only reusable plastic bags with a minimum weight of eighty grams per square meter. *Id.* at .121.

⁴⁸ *Id.* at .122.

⁴⁹ N.C. GEN. STAT. § 130A-309.123 (2012). The rebate amount is set at the retailer's cost of providing one recycled paper bag multiplied by the number of reusable bags provided by the customer. *Id.*

⁵⁰ N.C. GEN. STAT. § 130A-309.125 (2012).

⁵¹ See *Ban on Plastic Bags to Resume in Outer Banks*, WNCT 9 ON YOUR SIDE (June 25, 2011), <http://www2.wnct.com/news/2011/jun/25/ban-plastic-bags-resume-outer-banks-ar-1154404/>.

⁵² *Id.*

⁵³ See Rob Morris, *Plastic Bag Ban Repeal Decomposing in Committee*, OUTER BANKS VOICE (June 28, 2011), <http://outerbanksvoice.com/2011/06/28/plastic-bag-ban-repeal-decomposing-in-committee/>.

Another excellent example of an effective bag ban requires looking at the opposite end of the country. San Francisco, California, was the first city in the United States to effectively ban single-use bags on a municipal level.⁵⁴ The San Francisco ban is not a total ban on all bags; retailers are simply limited to recyclable paper bags, compostable plastic bags, or reusable cloth or fabric bags.⁵⁵ Not all retailers are affected, for the statute only hampers bag distribution by certain supermarkets with over two million dollars of gross annual sales.⁵⁶ Pharmacies with five or more locations within city limits and under the same ownership are also included in the ban.⁵⁷ Administrative or civil fines for violations range from \$100 to \$600 depending on the number of infractions and the means the city follows to extract the fines.⁵⁸

San Francisco's ban appears to be a success. One city official estimated that over 100 million fewer plastic bags were provided by stores in 2010 than in 2009.⁵⁹ Part of this feat should be attributed to the well-written statute, as it provides clarity in its drafting and fairness to small business. The longest section of the chapter is devoted to definitions which clarify each type of bag to be allowed and which stores must adhere to these rules.⁶⁰ As an apparent concession to the concerns of small businesses, the ordinance alleviates pressure by only triggering the ban when a store hits the gross sales mark of two million dollars per year.⁶¹

The ordinance is also bolstered by its ability to evolve without further legislation. Several parts allow the regulation to be modified over time to fit industrial and commercial changes by alluding to extrinsic sources. For example, it sets the requirements for compostable plastic bags to conform with the American Society for Testing and Materials standards, which, as the statute explicitly recognizes and allows, "may be amended from time to time."⁶² Furthermore, in order to determine which stores are

⁵⁴ Charlie Goodyear, *S.F. First City to Ban Plastic Shopping Bags*, S.F. CHRONICLE (Mar. 28, 2007), <http://www.sfgate.com/green/article/S-F-FIRST-CITY-TO-BAN-PLASTIC-SHOPPING-BAGS-2606833.php>. See also S.F., CAL., ENV'T CODE ch. 17 (2007).

⁵⁵ S.F., CAL., ENV'T CODE ch. 17, § 1703(a) (2007).

⁵⁶ *Id.* § 1702(1)(1).

⁵⁷ *Id.* § 1702(1)(2).

⁵⁸ *Id.* § 1705.

⁵⁹ Nate Berg, *The Math Behind Sacking Disposable Bags*, ATLANTIC CITIES (Sept. 26, 2011), <http://www.theatlanticcities.com/politics/2011/09/bags-get-sacked/141/>. Exact numbers are unavailable because of state legislation from 2006 requiring stores to collect recyclable plastic bags but protecting them from further reporting requirements. *Id.*

⁶⁰ S.F., CAL., ENV'T CODE ch. 17, § 1702 (2007).

⁶¹ *Id.* § 1702(1)(1).

⁶² *Id.* § 1702(a)–(b).

“full-line, self-service supermarket[s],”⁶³ the law defers to annual updates of the Progressive Grocer Marketing Guidebook.⁶⁴ The Director of the Department of the Environment is also empowered to create and amend separate guidelines to aid in the implementation of the ordinance.⁶⁵ Allusion to outside sources and creating a fast-track for the Director to update the ordinance through future guidelines allows the San Francisco plastic bag ordinance to remain relevant and effective, even when technological and economic changes occur.

C. *H.B. 1498 Revised*

By drawing from the North Carolina and San Francisco examples, the proposed Virginia bag ban can be fine-tuned and made more palatable to all parties involved. H.B. 1498, while noble in its intention, casts its net too wide by banning all retailers from providing plastic bags.⁶⁶ Any proposed bag ban in Virginia should emulate the San Francisco ban by only affecting businesses with gross annual sales over a certain limit;⁶⁷ however, any numbers should be tailored to fit the Virginia economy. Furthermore, the ban need not be limited to solely supermarkets; a model statute should impose the ban on all retailers that surpass the annual sales limit. This eliminates the need to refer to an outside source to determine who is and is not a supermarket, as the San Francisco ordinance requires.⁶⁸

Instead of providing exceptions allowing entire businesses to evade the ban, a model statute should provide limited exceptions for which products can be carried home in plastic bags. Fresh meats and

⁶³ *Id.* § 1702(l)(1).

⁶⁴ *Id.* The Marketing Guidebook is published annually by Trade Dimensions International, Inc. and covers a variety of topics. Wal-Mart, Safeway, Whole Foods, Trader Joe’s, and Target stores, among many others, can be considered supermarkets. *See* 2009 MARKETING GUIDEBOOK 1057–70 (Thomas Donato et al. eds., 2009).

⁶⁵ S.F., CAL., ENV’T CODE ch. 17, § 1704 (2007). Such guidelines are first subject to a public hearing. *Id.*

⁶⁶ H.B. 1498, 2011 Sess. (Va. 2011), <http://leg1.state.va.us/cgi-bin/legp504.exe?ses=111&typ=bil&val+hb1498>. The bill takes its definition from the tax section of the Virginia Code, causing “retailer” to broadly mean “every person engaged in the business of making sales at retail, or for distribution, use, consumption, or storage to be used or consumed in the Commonwealth.” VA. CODE ANN. § 58.1-602 (2012).

⁶⁷ *See supra* note 56 and accompanying text.

⁶⁸ *See supra* notes 63–64 and accompanying text. However, if the Virginia bill *were* to be imposed only upon supermarkets, reference to a source like the Progressive Grocer Marketing Guidebook would be simpler than having the legislature attempt to define what is and is not a supermarket from year to year.

delivered newspapers should be allowed to continue to be provided in plastic bags, but most other products should be confined to either paper bags, reusable bags, or simple carrying-out by the consumer (in the case of one or two items).⁶⁹ The majority of other items are either not likely to leak unsanitary fluids or be destroyed in the rain and could thus be safely taken home in paper or reusable bags.

A Virginia statute could also start small in an attempt to gauge the possible success and public acceptance of a bag ban by limiting the affected area to certain counties, as North Carolina has done.⁷⁰ If beach litter is the main concern, then the statute could start by creating a ban in cities and counties with Atlantic coastlines. On the other hand, if concern for farmers affected by plastic bag pollution is paramount, a ban could begin in those areas with a certain amount of arable farmland, perhaps based on data collected by the Virginia Department of Agriculture and Consumer Services ("VDACS").⁷¹ In either case, the general public may be more accepting of a bag ban that starts by only affecting a limited area.

Referring to an extrinsic source such as the VDACS summary would allow the ban to expand or contract as circumstances warrant without the need for amending the law itself, a characteristic that aids the San Francisco ban in its success.⁷² In addition (and also like San Francisco⁷³), a model Virginia statute would also allocate the authority to produce further regulations of an operational nature to some actor that could implement them more easily than the General Assembly, such as the DEQ director. In order to aid enforcement, the director could delegate inspection power to local authorities, who in turn could decide what manner of enforcement would be best for each locality.

In order for a plastic bag ban to succeed in Virginia, the mandate must provide clear-cut language which is easy to understand, implement, and enforce. Restricting when and for what reasons single-use plastic bags are banned without providing a laundry list of exceptions would

⁶⁹ See *infra* notes 88–90 and accompanying text.

⁷⁰ N.C. GEN. STAT. § 130A-309.125 (2012).

⁷¹ See *Summary Report of Virginia Agricultural and Forestal Districts*, VA. DEP'T OF AGRIC. & CONSUMER SERVS. (Sept. 24, 2012), http://www.vdacs.virginia.gov/preservation/pdf/ag_forestal_summary.pdf (listing thirty cities and counties that each contain between 650 and 80,000 acres of registered farmland or forests). Of course, it is possible that a locality would begin to underreport the amount of farmland if it truly wanted to evade the ban. Doing so, however, could limit some protections that such farmland receives by being designated as a registered district. See VA. CODE ANN. § 15.2-4312 (2012) (describing effects of being an agricultural district).

⁷² See *supra* notes 62–64 and accompanying text.

⁷³ See *supra* note 65 and accompanying text.

provide fewer loopholes and make it simpler for businesses and consumers to understand how to participate in the ban. A simple yet thorough law would be the best way to engage the public and help to achieve the main goal of the ban: plastic bag litter reduction.

IV. THE FEE OPTION

A. *H.B. 2047*

Outside of plastic bag bans, another possible method of reducing plastic bag use is a per-bag tax. H.B. 2047, offered chiefly by Adam Ebbin⁷⁴ and dubbed the “Virginia Waterways Clean Up and Consumer Choice Act,” aimed to impose a \$0.05 fee on consumers for each disposable plastic and paper bag provided to them by grocers, convenience stores, and drug-stores.⁷⁵ The fee would be charged to customers at checkout when other taxes are usually charged, and retailers would be required to post “highly visible signs” reminding and encouraging customers to recycle the bags.⁷⁶ H.B. 2047 provided exceptions for the still-troublesome “durable plastic bags, with handles, . . . specifically designed and manufactured for multiple reuse.”⁷⁷ Plastic bags used to carry certain perishable or easily damaged goods—ice cream, meats, restaurant leftovers, newspapers, dry cleaning, and prescription drugs—would also not be subject to the fee, and pre-packaged plastic bags for collecting waste were also exempt.⁷⁸

Under this Act, retailers would have kept \$0.01 from every \$0.05 collected (\$0.02 if that retailer has a customer bag credit program⁷⁹), and the remaining \$0.03 or \$0.04 would have been submitted to the state at

⁷⁴ H.B. 2047, 2011 Sess. (Va. 2011), <http://leg1.state.va.us/cgi-bin/legp504.exe?ses=111&typ=bil&val=hb2047>. Mr. Ebbin was the Democratic Delegate for the 49th District, which includes parts of Arlington and Fairfax Counties and part of the City of Alexandria. *Contact Info for Delegate Adam P. Ebbin*, VA. HOUSE OF DELEGATES, <http://dela.state.va.us/dela/MemBios.nsf/a7b082ef6ed01eac85256c0d00515644/038750f3b92c43498525738a0052b615?OpenDocument> (last visited Jan. 29, 2013). He was elected to the Virginia Senate and took office in January 2012. *Contact Info for Senator Adam P. Ebbin*, VA. SENATE, <http://apps.lis.virginia.gov/sfb1/Senate/senatorwebprofile.aspx?id=247> (last visited Jan. 29, 2013).

⁷⁵ H.B. 2047.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ A bag credit program is one where retailers pay customers a small credit for each bag the customer provides on his or her own. DEPT OF TAXATION, 2011 FISCAL IMPACT STATEMENT: H.B. 2047 3 (2011), available at <http://leg1.state.va.us/cgi-bin/legp504.exe?111+oth+HB2047F161+PDF>.

the same time as regular sales and use taxes,⁸⁰ to be funneled into the Virginia Water Quality Improvement Fund (“WQIF”).⁸¹

The Act envisioned by H.B. 2047 contains many well-founded points. The process is spelled out clearly; there is a set fee, a set time for collecting the fee and turning it over to the State, and a set purpose for monies received.⁸² It also requires the fee for both paper and plastic bags,⁸³ stretching farther than the plastic-only ban envisioned in H.B. 1498.⁸⁴ However, the mandate could be stronger. This approach could be expanded to tax disposable bags provided from all retailers, not just grocery, convenience, and drugstores. Because of this construction, the bill apparently would not apply to big retail chains, especially those not in the business of selling food.⁸⁵

Several of H.B. 2047’s exemptions are also misguided. Allowing “durable plastic bags, with handles, that are at least 2.25 mils thick and are specifically designed and manufactured for multiple reuse”⁸⁶ to evade the fee is too vague to be practical, as was the case for H.B. 1498.⁸⁷ The list of items allowed to be carried out in plastic bags without fees should also be tweaked. Allowing fresh meats to be taken in plastic is sensible for health reasons so that raw juices do not leak as easily.⁸⁸ It also makes sense to allow newspapers to continue to be wrapped in plastic, as a newspaper wrapped in a paper bag would obviously be ruined if delivered in the rain. However, exempting bags to carry ice cream does not seem as

⁸⁰ H.B. 2047; *see also* VA. CODE ANN. § 58.1-615 (2012) (describing when and how certain retailers must submit sales and use taxes).

⁸¹ H.B. 2047. WQIF is used by DEQ to provide grants to finance technology to reduce excessive loads of nutrients into the Chesapeake Bay. *Water Quality Improvement Fund*, VA. DEP’T OF ENVTL. QUALITY, <http://www.deq.virginia.gov/Programs/Water/CleanWaterFinancingAssistance/WaterQualityImprovementFund.aspx> (last visited Jan. 29, 2013).

⁸² *See* H.B. 2047.

⁸³ *Id.*

⁸⁴ H.B. 1498, 2011 Sess. (Va. 2011), <http://leg1.state.va.us/cgi-bin/legp504.exe?ses=111&typ=bil&val+hb1498>.

⁸⁵ Wal-Mart, for example, would not consider their normal operations to be “convenience stores” as they have only recently decided to open separate, small-scale “Wal-Mart Express” stores based on convenience store models. *See* Barbara Thau, *Walmart Gets into the Convenience Store Business*, NBCNEWS.COM (Mar. 17, 2011, 7:46 AM), http://www.msnbc.msn.com/id/42116806/ns/business-us_business/t/walmart-gets-convenience-store-business/#.Tskf1sOBq0s.

⁸⁶ H.B. 2047.

⁸⁷ *See supra* notes 41–43 and accompanying text.

⁸⁸ *See Safe Handling*, MEAT SAFETY, <http://www.meatsafety.org/ht/d/sp/i/26023/pid/26023> (last visited Jan. 29, 2013) (advising that fresh meat and poultry products be carried in plastic bags to prevent leakage onto other items).

helpful. Perhaps the drafters believed condensation from ice cream containers would ruin a paper bag, but why not then exempt plastic bags used for all frozen goods? There also seems to be little justification for preferring plastic over paper bags for carrying out restaurant leftovers. Not taxing plastic bags for dry cleaning appears arbitrary as well.⁸⁹ Finally, exempting those plastic bags used to carry prescription drugs is contradictory to the bill's plan to include drugstores in those retailers that are subject to collecting the per-bag fees and would actually encourage the use of plastic bags over the paper ones generally used by pharmacies.⁹⁰

The penalty mechanism provided in H.B. 2047 is much easier to enforce than the one proposed in the bag ban bill. It places a fine of \$250 for the first offense on any retailer that fails to collect and remit the bag fee.⁹¹ As the retailer must present the bag fees when it remits to the state the other sales and use taxes it has gathered, reporting is only a matter of the retailer adding another column on its accounting sheet, and enforcement only requires checking to see that the additional tax revenue has been remitted. This method of enforcement is excellent and leaves little room for improvement.

*B. H.B. 2341*⁹²

The other proposed per-bag tax from 2011 was presented by Delegate Joseph D. Morrissey.⁹³ H.B. 2341 is similar to the other proposed bag tax from H.B. 2047 but contains a few notable differences. H.B. 2341 would charge a higher fee of \$0.20 per bag, again to be paid by the consumer upon checkout at grocery stores, convenience stores, and

⁸⁹ Dry cleaners face other scrutiny because of pollution concerns due to cleaning methods. See generally *Fact Sheet on Perchloroethylene, Also Known as Tetrachloroethylene*, EPA, http://www.epa.gov/oppt/existingchemicals/pubs/perchloroethylene_fact_sheet.html (last updated July 17, 2012) (reviewing questions about environmental risks from dry cleaning chemicals).

⁹⁰ Based on personal observations, the author has never received prescriptions in plastic bags from any of the number of pharmacies encountered.

⁹¹ H.B. 2047, 2011 Sess. (Va. 2011), <http://leg1.state.va.us/cgi-bin/legp504.exe?111+ful+HB2047+pdf>.

⁹² H.B. 2341 was reintroduced in nearly its entirety in 2012 as H.B. 124. See H.B. 124, 2012 Sess. (Va. 2012), <http://leg1.state.va.us/cgi-bin/legp504.exe?121+ful+HB124+pdf>.

⁹³ H.B. 2341, 2011 Sess. (Va. 2011), <http://leg1.state.va.us/cgi-bin/legp504.exe?ses=111&typ=bil&val=hb2341>. Mr. Morrissey is the Democratic Delegate for the 74th District, which includes Charles City County and parts of Henrico and Prince George Counties, as well as parts of the Cities of Hopewell and Richmond. *Contact Info for Joseph D. Morrissey*, VA. HOUSE OF DELEGATES, <http://dela.state.va.us/dela/MemBios.nsf/0/918691da1c4f901e8525794b005cbfdc?OpenDocument> (last visited Jan. 29, 2013).

drugstores.⁹⁴ This plan, however, would only apply to plastic bags and not paper ones.⁹⁵ It also contains the exact same set of exemptions provided in its counterpart, H.B. 2047: “durable plastic bags, with handles”; plastic bags for ice cream, meats, restaurant leftovers, newspapers, dry cleaning, and prescription drugs; and packaged plastic trash and other waste bags.⁹⁶ Retailers would be allowed to keep a larger portion of the fee—\$0.05 per bag, \$0.07 if the retailer has a customer bag credit program—before remitting the remainder to the State.⁹⁷

Aside from facing many of the same dilemmas as H.B. 2047,⁹⁸ the unique issue with this bill is that it does not direct the collected bag tax to any specific funds or grant programs.⁹⁹ Without a specific destination, it appears that such funds would be divided between the localities where the tax was collected and the state.¹⁰⁰ While funding state and local governments is not at all a bad thing, it would seem more appropriate to use monies garnered via a bag tax to fund litter cleanup projects, recycling initiatives, or even a subsidy to encourage buying (and remembering to use) reusable cloth bags. As before, a look to successful bans both near and far will illuminate a better path for Virginia to take toward a per-bag fee.

C. *Examples of Effective Bag Fee Programs*

Since the beginning of 2010, the Commonwealth’s northern neighbor, Washington, D.C., has charged a \$0.05 per bag tax on most paper and plastic bags provided by certain retailers.¹⁰¹ Fees collected from the “District Bag Law” are used to fuel the Anacostia River Clean Up and Protection Fund,¹⁰² which was a direct response to a 2008 study finding that plastic bags composed just over twenty percent of trash in the main Anacostia River and over forty-five percent of trash in smaller tributaries.¹⁰³

⁹⁴ H.B. 2341.

⁹⁵ *Id.*

⁹⁶ Compare *id.*, with H.B. 2047.

⁹⁷ H.B. 2341.

⁹⁸ See *supra* notes 85–90 and accompanying text.

⁹⁹ See H.B. 2341 (negating to provide any destination for funds collected from the bag tax).

¹⁰⁰ See VA. CODE ANN. § 58.1-638 (2012) (divvying part of sales and use taxes among several transportation-oriented trusts created by the State and part to the cities and counties).

¹⁰¹ *Skip the Bag, Save the River*, DIST. DEP’T OF THE ENV’T, <http://green.dc.gov/bags> (last visited Jan. 29, 2013).

¹⁰² *Id.*; see also D.C. CODE § 8-102.05 (2012).

¹⁰³ ANACOSTIA WATERSHED SOC’Y, ANACOSTIA WATERSHED TRASH REDUCTION PLAN, at v–vi, xv (2008), available at <http://green.dc.gov/publication/anacostia-river-trash-reduction-plan>.

The fee program was created in the D.C. Code and is implemented and interpreted by the D.C. Municipal Regulations.¹⁰⁴ It has been successful in curbing bag use, with the Washington Post reporting in 2010 that 3.3 million bags were used in January of that year—a startling drop from the estimated 22.5 million used per month in 2009.¹⁰⁵

The D.C. law takes a narrow attack plan on single-use bags. While the law subjects both paper and plastic bags to the nickel fee, it limits when the fee will be applied by what is carried in the bag.¹⁰⁶ The statute exempts those bags used to carry out unpackaged bulk items, frozen foods, fresh meats, flowers, unwrapped foods, or “other items where dampness may be a problem.”¹⁰⁷ Bags holding newspapers, dry cleaning bags, door-hanger bags (presumably used in door-to-door advertising), and garbage bags are allowable, as are paper bags for leftovers at a restaurant or any bag provided to carry prescription drugs or open wine bottles.¹⁰⁸ As with the Virginia proposals, “reusable” plastic bags—those made of durable plastic with a thickness of at least 2.25 millimeters—are not included in the tax.¹⁰⁹

The tax is limited further by only applying to retailers that are required to obtain “Public Health: Food Establishment” licenses or certain other licenses.¹¹⁰ This requirement serves to limit the fee to bags obtained in stores that sell food; the implementation regulations provide a non-exhaustive list of examples, including bakeries, delis, grocery stores, street vendors, and liquor stores.¹¹¹ The regulations also encompass retailers that only sell food items as a compliment to other business by explicitly including “[a]ny business that sells food items, whether or not the principal purpose of the business is to sell food items, including a department store or electronics store that has a Public Health: Food

¹⁰⁴ D.C. MUN. REGS. tit. 21, § 1000 (2010).

¹⁰⁵ Tim Craig, *Bag Tax Raises \$150,000, but Far Fewer Bags Used*, WASH. POST (Mar. 29, 2010, 3:45 PM), http://www.washingtonpost.com/blogs/dc-wire/post/bag-tax-raises-150000-but-far-fewer-bags-used/2010/12/20/ABZDyEG_blog.html.

¹⁰⁶ See D.C. CODE § 8-102.01 (2012).

¹⁰⁷ *Id.* at (1)(A). The “dampness” phrase appears expansive, with no further explanation here or in the companion regulations. See D.C. MUN. REGS. tit. 21, § 1006 (2010) (failing to elaborate on the “dampness” phrase). It would appear that a consumer could argue that any purchased item containing even small amounts of liquid could create a dampness problem.

¹⁰⁸ D.C. CODE § 8-102.01 1(B)–(D) and (F) (2012).

¹⁰⁹ *Id.* at (4).

¹¹⁰ *Id.* at (3).

¹¹¹ D.C. MUN. REGS. tit. 21, § 1003.2 (2010).

Establishment Retail endorsement”¹¹² Even if the consumer only buys non-food items in the affected stores, the tax will still apply.¹¹³

The D.C. Bag Law is enhanced by the addition of an element of public awareness. In addition to banning non-recyclable carryout bags outright, the law also requires that recyclable bags display some phrase, such as “Please Recycle This Bag,” in a conspicuous, “highly visible” way on the outside of the bag.¹¹⁴ While this phrase is meant to encourage shoppers to remember to recycle their bags,¹¹⁵ it would be difficult to determine if the requirement has any actual effect on consumer habits. However, it is an excellent step in involving the general public in the effort to curb plastic bag pollution.

The actual fee mechanism of the D.C. plan is similar to the proposed Virginia fee. Consumers pay a \$0.05 per bag fee at the time of purchase, and the retailer keeps \$0.01 or \$0.02, depending on whether that retailer has a credit program that gives a consumer at least a \$0.05 credit for each reusable bag the consumer provides.¹¹⁶ The fees are remitted to the District in the same manner as sales taxes, which simplifies enforcement.¹¹⁷ Penalties start at no more than \$100 for the first offense after a written warning and escalate to a maximum of \$500 on the third and subsequent violations.¹¹⁸

An earlier, yet more distant, example of a workable plastic bag tax comes from across the pond. The Irish Government was one of the first to place a per-bag levy on consumers, doing so a decade ago in March 2002.¹¹⁹ When introduced, the law placed a €0.15 per-bag fee on consumers.¹²⁰ In 2007, the levy was elevated to its present amount of €0.22,¹²¹ or roughly \$0.30. Ireland’s Department of Environment, Community and Local Government makes strong claims that the tax drastically and immediately

¹¹² *Id.*

¹¹³ *Id.* § 1004.1.

¹¹⁴ D.C. CODE § 8-102.02 (2012).

¹¹⁵ See *Bag Law Details*, DIST. DEP’T OF THE ENV’T, <http://ddoe.dc.gov/service/bag-law-details> (last visited Jan. 29, 2013).

¹¹⁶ D.C. CODE § 8-102.03(a) to (b) (2012).

¹¹⁷ *Id.* § 8-102.03(d).

¹¹⁸ *Id.* § 8-102.04.

¹¹⁹ *Plastic Bags*, DEP’T OF THE ENV’T, CMTY. & LOCAL GOV’T, <http://www.environment.ie/en/Environment/Waste/PlasticBags/> (last visited Jan. 29, 2013).

¹²⁰ Waste Management (Environmental Levy) (Plastic Bag) Regulations, 2001 (S.I. No. 605/2001) (Ir.), available at <http://www.irishstatutebook.ie/2001/en/si/0605.html>.

¹²¹ Waste Management (Environmental Levy) (Plastic Bag) (Amendment) (No. 2) Regulations 2007 (S.I. No. 167/2007) (Ir.), available at <http://www.irishstatutebook.ie/2007/en/si/0167.html>.

reduced plastic bag usage per capita yearly from over 300 bags to just 21 bags.¹²² If these numbers can be maintained, it lends credence to the fact that bag fees are indeed effective in curbing plastic bag use.

The Irish bag levy is comparable to the proposed Virginia laws and the D.C. bag law, but there are a handful of distinguishing features. For example, only a few exceptions to the fee are provided in the Irish regulations. Plastic bags are exempt from the fee if the carried contents fit within one of four categories: fresh meats; wrapped meats; unpackaged foods, such as nuts, cooked foods, dairy products, or ice (where condensation would be a problem); or items purchased in an airport or other port for carrying onto an airplane or other vessel.¹²³ What is most interesting, however, is that the law also permits “plastic bags designed for re-use” to be excepted from the levy, but forces retailers to charge at least €0.70 for each such bag.¹²⁴ This provision thus blocks retailers from simply providing duty-free durable plastic bags instead of those that are thin and taxable.

Fees collected by the Irish bag levy are sent to an Environment Fund created specifically for the receipt of such monies.¹²⁵ The Environment Minister then utilizes those funds for a broad range of waste management and recycling uses, including waste recovery and reduction, research and development, creating environmental partnerships with local governments, educational programs, and other environmentally conscious objectives.¹²⁶

D. *A Revised Bag Fee Statute for Virginia*

By mimicking these viable and successful examples provided by the District of Columbia and Ireland, the General Assembly can fashion a workable bag fee program for the Commonwealth. First, decide on a fee amount. Program experience in the District of Columbia and Ireland shows that the amount of the tax may not be as important as the mere fact that a tax exists; bag use in both of those jurisdictions decreased dramatically following enactment, even though they had significantly different fee amounts.¹²⁷ The best route could be a combination of the

¹²² *Plastic Bags*, *supra* note 119.

¹²³ S.I. No. 605/2001 (Ir.).

¹²⁴ *Id.*

¹²⁵ *FAQs*, DEP'T OF THE ENV'T, CMTY. & LOCAL GOV'T, <http://www.environ.ie/en/Environment/Waste/PlasticBags/FAQs/> (last visited Jan. 29, 2013).

¹²⁶ *Id.*

¹²⁷ *See supra* notes 100, 105, and 122 and accompanying text.

two. The Virginia law could start at a small amount, such as the \$0.05 fee proposed by H.B. 2047,¹²⁸ and increase in small intervals over time, such as another \$0.05 per year, with a statutory cap at \$0.25 per bag. Under such a scheme, the initial amount would be low and therefore less burdensome on consumers, and they would then have a span of five years of rising fees to adjust to greener methods of carrying items.

In order to maximize positive environmental impact, the Virginia fee should be imposed on both paper and plastic bags. If a fee were instituted for plastic only, consumers would likely switch to free paper bags instead of paying the plastic bag tax or purchasing their own bags, as foreseen by the drafters of H.B. 2341.¹²⁹ This would reduce the use of both types of bags and eliminate any presupposed government subsidy favoring paper over plastic. The bills should retain the ability of the retailer to provide tax-free “durable plastic bags . . . designed and manufactured for multiple reuse,”¹³⁰ but the seller should be required to charge a minimum fee for such bags, like the similar requirement in Ireland’s levy program.¹³¹ By forcing retailers to sell instead of freely provide bags, the law could keep consumers from choosing durable (yet still easily discarded) plastic over sturdier alternatives, such as cloth or nylon reusable bags. Furthermore, a price floor for bags in place of a tax keeps revenue in the hands of retailers instead of the state, which should be palatable to business owners.

A model law should also reach as many retailers as possible in order to be effective because imposing upon select businesses could inadvertently direct consumer behavior by leading them away from bag-taxed businesses and toward tax-free vendors. To prevent this, the Virginia bag tax would ideally be placed on all merchants, as required under the Irish statute.¹³² If this is too unappealing, Virginia could simply mirror the District of Columbia and apply the fee to bags provided by retailers that primarily or peripherally sell food or drink.¹³³ Either of these options are preferable to the language of the bills applying the fee to only grocers, convenience stores, and drugstores.¹³⁴

¹²⁸ H.B. 2047, 2011 Sess. (Va. 2011), <http://leg1.state.va.us/cgi-bin/legp504.exe?ses=111&typ=bil&val=hb2047>.

¹²⁹ See DEP’T OF TAXATION, 2011 FISCAL IMPACT STATEMENT: H.B. 2341 2 (2011), available at <http://leg1.state.va.us/cgi-bin/legp504.exe?111+oth+HB2341F161+PDF>.

¹³⁰ H.B. 2047.

¹³¹ See *supra* note 124 and accompanying text.

¹³² See S.I. 605/2001 (Ir.) (charging the fee on bags provided “in or at any shop, supermarket, service station or other sales outlet”).

¹³³ See *supra* notes 110–13 and accompanying text.

¹³⁴ See *supra* note 85 and accompanying text.

There should also be only limited exceptions based on what is carried in the bag. The allowable items enumerated in the Irish law should suffice: meats, unpackaged foods, and items where condensation or leakage may be a problem.¹³⁵ The model law should also retain the language from H.B. 2047 and 2341 excluding packages of garbage and pet waste bags in order to not hinder the disposal of regular, non-recyclable trash.¹³⁶ By installing only a small number of exceptions, the bag law is less confusing than one with a myriad of exclusions, thus remaining broad and effective.

Finally, the Virginia bag fee program should retain the fee retrieval and remittance mechanism already provided in the 2011 bills,¹³⁷ but it should strive to do more with the collected fees. While H.B. 2047 directs the fees to WQIF, the limited nature of that fund—countering nutrient loads into the Chesapeake Bay¹³⁸—makes it an unsuitable destination for countering plastic bag pollution. The money would be better spent in a separate fund with broader goals, such as underwriting beach or field cleanups, enforcing litter control, or providing reusable bags to lower-income families and individuals.

With these modifications, a bag tax in Virginia would be comprehensible to consumers and retailers, and effective in combating wasteful bag use. By starting with lower fees, including both paper and plastic, and covering all retailers, the fee program prevents buyers, sellers, and those that would enforce the fee from agonizing over who is affected by the levy. Targeting all one-use bags and directing the collections to current cleanup and future control maximizes the positive environmental effect of the measure. As was the case with the proposed bag ban, a bag tax should be simple in its wording yet comprehensive in its purview.

V. OPPOSITION

The success of these selected programs does not mean that there is little opposition. Plastics producers around the country are against bans and fees on plastic bags.¹³⁹ For example, one prominent website run

¹³⁵ S.I. 605/2001 (Ir.). The D.C. law also recognizes the “dampness” problem. *See supra* note 107 and accompanying text.

¹³⁶ *See* H.B. 2047, 2011 Sess. (Va. 2011), <http://leg1.state.va.us/cgi-bin/legp504.exe?ses=111&typ=bil&val=hb2047>; H.B. 2341, 2011 Sess. (Va. 2011), <http://leg1.state.va.us/cgi-bin/legp504.exe?ses=111&typ=bil&val=hb2341>.

¹³⁷ *See supra* notes 116–17 and accompanying text.

¹³⁸ *Water Quality Improvement Fund*, *supra* note 81.

¹³⁹ *See About Us*, BAG THE BAN, <http://www.bagtheban.com/about-us/> (last visited Jan. 29, 2013).

by plastic bag maker Hilex Poly, bagtheban.com, lists several arguments against these programs with varying degrees of merit.¹⁴⁰ The site claims that bans and fees threaten jobs in the plastic bag manufacturing and recycling industry,¹⁴¹ but it does not explain why plastic bag manufacturers could not convert to making similar packaging products to be used in other areas or why a reduction in plastic bags would severely hinder the recycling of other plastics. The site also declares that reusable bags can contain *E. coli* and salmonella if not cleaned,¹⁴² but common sense dictates that this same fact applies to kitchen counters and refrigerators if not properly washed or maintained. One of the best arguments is that plastic bags generate less waste and take up less space in landfills than paper bags.¹⁴³ However, because plastic bags create their own environmental problems, this line of reasoning obscures the fact that plastic bags may just be the lesser of two evils. The soundest reply would be to ban or tax paper and plastic bags simultaneously.

There are two other important yet addressable arguments against bag reduction programs. First, there is a fear that a ban or fee on plastic or paper bags will have a negative impact on lower-income families and individuals, for they would have to find extra money to either purchase reusable bags or pay the fees.¹⁴⁴ This can be cured by either exempting food stamp and other welfare recipients from the bans and fees altogether or, as Ms. Fromer suggests, diverting some of the fees received to cover the costs of the fees to those on welfare.¹⁴⁵ Funds generated by any fee program could also be used to provide reusable bags to low-income individuals and families.

Secondly and finally, there is the argument that consumers are unwilling to back bag reduction regulation because they are used to the convenience of receiving bags when making purchases.¹⁴⁶ However, this

¹⁴⁰ See *Learn the Facts*, BAG THE BAN, <http://www.bagtheban.com/learn-the-facts/> (last visited Jan. 29, 2013).

¹⁴¹ *Jobs*, BAG THE BAN, <http://www.bagtheban.com/learn-the-facts/jobs/> (last visited Jan. 29, 2013).

¹⁴² *Health*, BAG THE BAN, <http://www.bagtheban.com/learn-the-facts/health/> (last visited Jan. 29, 2013).

¹⁴³ *Recycling*, BAG THE BAN, <http://www.bagtheban.com/learn-the-facts/recycling/> (last visited Jan. 29, 2013).

¹⁴⁴ See Rebecca Fromer, Comment, *Concessions of a Shopaholic: An Analysis of the Movement to Minimize Single-Use Shopping Bags from the Waste Stream and a Proposal for State Implementation in Louisiana*, 23 TUL. ENVTL. L.J. 493, 510–11 (2010).

¹⁴⁵ *Id.* at 514.

¹⁴⁶ Bridget M. Warner, Note, *Sacking the Culture of Convenience: Regulating Plastic Shopping Bags to Prevent Further Environmental Harm*, 40 U. MEM. L. REV. 645, 677 (2010).

argument falls flat when one considers that, for the expansive span of time before the creation of plastic or paper bags, people managed to carry goods from place to place without single-use bags.¹⁴⁷ It would only take a small amount of time for consumers to get in the habit of remembering to bring reusable bags to the store.¹⁴⁸ If they forget, the fee or ban will be there to remind them.

The opposition has strong backers and raises many excellent points. However, as just discussed, negative effects of bag bans and fees can be mitigated through innovative thinking and legislating. When assessing these arguments for themselves, businesses, consumers, and governments should be mindful of the environmental impact that continued use of plastic bags will continue to create.

CONCLUSION

Plastic bag pollution is a serious problem. Even if the legislature chooses to ignore that problem, that does not mean, as Delegate Ware stated, that it will “go away.”¹⁴⁹ Rogue bags litter the beaches, endanger crops and livestock, and float endlessly in the ocean as a danger to marine life.¹⁵⁰ Current Virginia law aids in promoting recycling by state agencies and localities, but recycling on its own will not stem the tide of plastic bag litter.¹⁵¹ Only by enacting legislation that targets the use of plastic bags can the source of this pollution be addressed.

The proposed bag ban in H.B. 1498 for Virginia was an excellent start, but it proves too vague to be effective.¹⁵² By incorporating themes from the North Carolina and San Francisco bag bans, such as limiting affected businesses based on outside analytical sources or total annual sales, providing limited exceptions for when plastic bags may be used, and first enacting the ban over a controlled area, a Virginia bag ban could be effective while remaining simple in language and implementation.¹⁵³

¹⁴⁷ FREINKEL, *supra* note 10, at 167–68.

¹⁴⁸ The current mindset prompted one internet commentator to exclaim, “The high I feel when I actually remember to bring my reusable bags to the store . . . can last for days.” Randall Munroe, *Plastic Bags*, XKCD, <http://xkcd.com/990/> (last visited Jan. 29, 2013) (hold cursor over the image to read this quote).

¹⁴⁹ See *supra* note 1 and accompanying text.

¹⁵⁰ See *supra* Part I.

¹⁵¹ See *supra* Part II.

¹⁵² See *supra* Part III.A.

¹⁵³ See *supra* Part III.C.

A per-bag fee based along the lines of H.B. 2047 and 2341 is likely a more palatable alternative to consumers and retailers than a total ban. Again, a look to other jurisdictions improves upon the foundation laid by these proposed measures. A Virginia bag fee should start at a low per-bag amount and rise to a set cap, be imposed on both paper and plastic bags, make retailers charge for more durable plastic bags, be placed on either all merchants, or those that sell food or drink, provide only limited exceptions for when bags may be provided without the fee, and funnel the proceeds into an environmental fund with broad goals.¹⁵⁴

In spite of the opposition, the General Assembly should move to enact a bill such as H.B. 1498, 2047, or 2341 because the environmental gain is potentially great. Assume for a moment that Virginians consume approximately 300 plastic bags per person, per year, as Irish citizens did before the bag levy.¹⁵⁵ The population of Virginia in 2010 was about eight million.¹⁵⁶ That equals a current use of 2.4 *billion* bags per year in the Commonwealth alone. If a fee program had the same effect as the Irish levy and reduced per capita use to 21 bags, Virginians would only use 168 *million* bags per year. Therefore, a bag fee on its own could potentially remove over two billion bags from the chain of consumption and thus the environment. That is two billion fewer bags marring our beaches, harming our livestock, and polluting our waters.

The General Assembly needs to enact a version of the proposed bag ban or fee. Outside agencies should submit findings showing how plastic bag use has harmed the environment and livelihood of Virginians. Retailers and consumers should think of greener ways to transport items home, such as reusable bags. The solutions are simple. It is up to the people to put them into action.

¹⁵⁴ See *supra* Part IV.D.

¹⁵⁵ See *supra* note 122 and accompanying text.

¹⁵⁶ *Virginia*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/51000.html> (last updated Jan. 10, 2013).