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July 31, 2023

**Via Electronic Submission**

Administrator Michael S. Regan  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, NW  
Washington, DC 20460

Re: **Draft National Strategy to Prevent Plastic Pollution: Request for Public Comment; 88 Fed. Reg. 27,502 (May 2, 2023); Docket No. EPA-HQ-OLEM-2023-0228**

Administrator Reagan:

We are the chief legal officers of 16 states. Our States are committed to protecting the quality of our environment while at the same time promoting economic progress, developing natural resources, protecting our consumers, maintaining fairness to citizens seeking permits, and ensuring that government agencies follow the law. We accordingly provide the following comments in response to EPA's *Draft National Strategy to Prevent Plastic Pollution: Request for Public Comment*, 88 Fed. Reg. 27,502 (May 2, 2023) ("Draft").

As detailed below, EPA's Draft goes well-beyond the limited mandate in Section 301 of the Save Our Seas 2.0 Act. Rather, the Draft appears to be the latest salvo in EPA's practice of relying on narrow authorities as a pretext to implement predetermined policies. EPA should withdraw the Draft and develop a new draft that complies with Section 301.

**I. Background**

Section 301 of the Save Our Seas 2.0 Act provides:

(a) IN GENERAL.—Not later than 1 year after the date of enactment of this Act [*i.e.*, December 18, 2020], the EPA Administrator shall, in consultation with stakeholders, develop a strategy to improve post-consumer materials management and infrastructure for the purpose of reducing plastic waste and other post-consumer materials in waterways and oceans.

(b) RELEASE.—On development of the strategy under subsection (a), the EPA Administrator shall— (1) distribute the strategy to States; and (2) make the strategy

publicly available, including for use by— (A) for-profit private entities involved in post-consumer materials management; and (B) other nongovernmental entities.

Pub. L. 116-224, 134 Stat. 1072, 1092 (Dec. 18, 2020) (codified at 33 U.S.C. § 4281). In November 2021, EPA released a *National Recycling Strategy* that included extensive references to the Save Our Seas 2.0 Act, but no reference to Section 301.<sup>1</sup> On April 21, 2023, EPA released its draft *National Strategy to Prevent Plastic Pollution*.<sup>2</sup> According to EPA, “[t]his strategy, together with the *National Recycling Strategy*, satisfies Congress’ direction to EPA in Section 301 of the Save Our Seas 2.0 Act (2020) to develop a strategy to improve post-consumer materials management and infrastructure for the purpose of reducing plastic waste and other post-consumer materials in waterways and oceans.” Also according to EPA, the supposedly-voluntary draft strategy “includes ambitious actions to eliminate the release of plastic and other waste from land-based sources into the environment by 2040.”

Comments were initially due by June 16, 2023. However, EPA “received several requests for additional time to develop and submit comments,” so EPA extended the comment period through July 31, 2023. 88 Fed. Reg. 38,862 (June 14, 2023).

## **II. The Draft is contrary to law.**

### **A. The Draft exceeds the narrow focus of Section 301.**

On its face, Section 301 imposes a limited mandate: “[T]he EPA Administrator shall, in consultation with stakeholders, develop a strategy to improve post-consumer materials management and infrastructure *for the purpose of reducing plastic waste and other post-consumer materials in waterways and oceans.*” Despite that limited mandate, EPA makes clear the Draft “identifies actions EPA can implement ... to *eliminate* the release of plastic waste into the environment by 2040.” Draft at 5; *see also* Draft at 15. EPA cites no authority for such overreaching action, and the States are aware of none. Put succinctly, Congress did not give EPA free-ranging authority to eliminate plastics.

Other parts of the Draft ignore the text of Section 301, too. For example, EPA states it “is promoting circular economy policies while excluding processes that convert solid waste to fuels, fuel ingredients, or energy from being a recycling practice in the *Draft National Strategy to Prevent Plastic Pollution.*” Draft at 15. And EPA goes so far as to announce regulations that would hamper such efforts to recycle through conversion of solid waste to fuel, proclaiming that the agency intends to subject related reviews to additional regulatory requirements. Draft at 15. But, again, Congress’s plain purpose is to “reduc[e] plastic waste and other post-consumer materials in waterways and oceans.” Conversion of solid waste to fuel undoubtedly does that. That EPA arbitrarily and inexplicably excluded fuel conversion from its definition of recycling in 1997--based on definitions supplied by the National Recycling Coalition in 1995--is no ground for doing so in the Draft. But that’s all EPA points to. Draft at 15 & n.10. Indeed, that exclusion of recycling

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<sup>1</sup> <https://www.epa.gov/system/files/documents/2021-11/final-national-recycling-strategy.pdf>

<sup>2</sup> [https://www.epa.gov/system/files/documents/2023-04/Draft\\_National\\_Strategy\\_to\\_Prevent\\_Plastic\\_Pollution.pdf](https://www.epa.gov/system/files/documents/2023-04/Draft_National_Strategy_to_Prevent_Plastic_Pollution.pdf)

through conversion is in serious tension with the Draft’s recognition that there are “large volumes of mixed plastic waste that has little or no market value.” Draft at 24.

That example isn’t isolated. EPA uses the Draft to push greenhouse gas (“GHG”) and “climate change” related actions. Draft at 21. But GHG has no obvious relationship to “reducing plastic waste and other post-consumer materials in waterways and oceans.” Likewise EPA’s policy preference for ratifying the Basel Convention, Draft at 29, advocacy for which appears to be in tension with the Anti-Lobbying Act, 18 U.S.C. § 1913 (“No part of the money appropriated by any enactment of Congress shall, in the absence of express authorization by Congress, be used directly or indirectly to pay for any ... printed or written matter, or other device, intended or designed to influence in any manner a Member of Congress ... to favor ... ratification....”).

**B. EPA’s “central consideration” of “environmental justice” is contrary to Section 301, violates Equal Protection, and violates the Major Questions Doctrine.**

The Draft states that “[d]isparate impacts on communities affected by plastic, from production to waste, make environmental justice a *central consideration* within this strategy.” Draft at 9 (emphasis added). But Section 301 gives no authority to consider “disparate impacts” or “environmental justice.” *Expressio unius est exclusio alterius*. Statements by Administrator Regan and other EPA officials indicate EPA has decided to transform the agency from one largely concerned with environmental protection into a free agent seeking to impose its vision of “environmental justice” upon the States and the American people. Indeed, Administrator Regan couldn’t avoid using the release of the Draft to bring a decades-old Mort Sahl parody to life, boldly proclaiming that “underserved and overburdened communities [are] hit hardest” by plastic pollution.<sup>3 4</sup> But there is no indication Congress intended to promote EPA from environmental protector into Philosopher-King, dispensing Solomonic judgments from on high. *See, e.g., West Virginia v. EPA*, 142 S.Ct. 2587 (2022). Section 301 is to the contrary. To the degree EPA did consider race or other constitutionally suspect categories—particularly as a “central consideration”—the Draft plainly violates the constitutional command of Equal Protection. *See, e.g., Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 143 S. Ct. 2141 (2023); *Ricci v. DeStefano*, 129 S. Ct. 2658, 2683 (2009) (Scalia, J., concurring).

Moreover, to the degree EPA considers “disparate impact” and social justice, it must do so completely, not selectively. The Draft fails to do so. EPA acknowledges the benefits of plastic products: they are “versatile,” “inexpensive,” “durable,” “lightweight,” and “have contributed to many life-saving products that have revolutionized the healthcare industry.” Draft at 5. The availability of products meeting those descriptions undoubtedly *benefits* low-income and underserved communities. EPA also fails to acknowledge the economic, employment, and taxation benefits of the plastics industry, which directly benefit communities in which the industry is located. In Louisiana, for example, the plastics industry directly generates thousands of jobs, plastics-dependent industries generate thousands more jobs, and the resulting State revenue is substantial. Exh. 1. The same is true for many other States, too.

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<sup>3</sup> <https://www.epa.gov/newsreleases/biden-harris-administration-announces-latest-steps-reduce-plastic-pollution-nationwide>

<sup>4</sup> <https://www.chicagotribune.com/news/ct-xpm-1986-10-09-8603160248-story.html>

**C. EPA appears to have failed to comply with its statutory obligation to act “in consultation with stakeholders.”**

Section 301 requires EPA to develop its recycling strategy “in consultation with stakeholders.” In most environmental actions, the primary “stakeholders” are States, which are the sovereign representatives of their people and industries. Yet EPA does not appear to have met with a single state official to inform the development of its strategy. *See* Draft at 14. Indeed, if the list of meeting participants in the Draft is correct, EPA’s claim that it “held multiple stakeholder feedback sessions with ... states ... to inform the development of this strategy,” 88 Fed. Reg. at 27,503, is false. To be clear: that EPA may have met with a representative of a trade-type organization of low-level local or state employees does not constitute “consultation” with the States. And presenting the States with a fait-accompli draft policy for comment does not constitute “consultation” with the States, either.

**III. The Draft is arbitrary, capricious, and irrational.**

**A. The Draft fails to support its recommendations.**

Much of the Draft is unsupported; it is thus difficult for States and other stakeholders to comment on it. For example, the Draft states “EPA is aware of *concerns* about potential health and environmental risks posed by impurities that *may* be present in pyrolysis oils generated from plastic waste.” Draft at 15 (emphasis added). But the Draft identifies no such concerns and no supporting science for EPA’s speculation. So the States are left unable to meaningfully address that speculation other than pointing out its lack of support.

More broadly, the Draft pervasively assumes that alternatives to plastics are preferable, an assumption that is also unsupported and contrary to EPA’s recognition that plastic products are “versatile,” “inexpensive,” “durable,” “lightweight,” and “have contributed to many life-saving products that have revolutionized the healthcare industry.” Draft at 5. Moreover, the cost-benefit analysis vis-à-vis plastics can be complex and non-intuitive, but the Draft offers no analysis supporting its assumption alternatives to plastic are environmentally preferable.

Take the example of plastic shopping bags. Following campaigns to eliminate such bags—supposedly to protect the environment—various States and local jurisdictions started banning or taxing them. Exhs. 2, 3. Campaigners touted the benefits of reusable bags, but it turns out the substitutes are actually *worse* for the environment. A 2011 study by the United Kingdom Environment Agency found a person would have to reuse a paper bag at least 3 times and a cotton tote bag at least 131 times before it was better for climate change than a plastic grocery bag used once. Exh. 4. And a 2018 study by the Ministry of Environment and Food of Denmark estimated that a paper bag would have to be reused 43 times, a conventional cotton bag reused 7100 times, and an organic cotton bag reused 20,000 times to make it better for the environment than a plastic shopping bag used once. Exh. 5. Nor do bans on quickly-degrading plastic grocery bags necessarily result in a decrease in plastic bags in the environment. Rather, such bans result in large spikes in sales of heavier, longer-lasting bags for use as garbage liners. Exh. 6. And the unforeseen health consequence to the public of replacing plastic shopping bags with reusable bags? Scientists later

found out that reusable shopping bags are rife with harmful bacteria, Exhs. 7, 8, resulting in increased emergency room visits and deaths due to bacterial intestinal infections, the cost of which greatly eclipses any budgetary savings from reduced litter, Exh. 9.

We point to the example of plastic bags not only of a specific defect in EPA's analysis, but to highlight the larger concern with EPA's not even attempting to engage with the consequences of the Draft strategy if actually implemented.

**B. The Draft improperly points to claims about global pollution to justify a strategy that can really only affect U.S. pollution, and which is only intended to affect pollution in waterways and oceans.**

One section of the Draft does include a modicum of support: references to plastic pollution. But EPA misleadingly points to global statistics, then concludes “[t]he United States plays a critical role in reducing global plastic pollution as a major global plastic producer and plastic waste generator.” Draft at 5. EPA is correct that the United States is a relatively large generator of plastic waste, second only to China. But according to the OECD, only 4% of U.S. plastic waste is mismanaged and uncollected litter, with 96% recycled, incinerated, or properly landfilled. That places the United States far ahead of the global average of 22% of plastic waste becoming mismanaged and uncollected litter, and ahead of even the OECD average of 6%. And notwithstanding Section 301's clear and limited mandate for a strategy for “reducing plastic waste and other post-consumer materials in waterways and oceans,” EPA appears to cook the books by weighing vague “broader environmental and health impacts.” Draft at 5. The States and other commenters are thus impeded in commenting on the Draft's effectiveness in addressing its statutory purpose. We emphasize, however, the three-way disconnect between EPA's limited mandate, the limited evidence EPA points to, and what the Draft strategy seeks to accomplish.

**C. The draft ignores key aspects of the problem.**

The Draft acknowledges that “abandoned, lost, or otherwise discarded boating, fishing, or aquaculture gear are [a] primary source of plastic waste in waterways and oceans.” Draft at 9. Indeed, one study estimated 46% of the plastics load in the Great Pacific Garbage Patch is abandoned fishing gear. Exh. 10. Yet the Draft only “addresses land-based sources of plastic waste that enter the environment and does not address sea-based sources of plastic pollution.” Draft at 9. And the impact of the Draft on the relatively small portion of plastics that end up in the ocean is miniscule, Draft at 12, notwithstanding the mandate in Section 301 to address just that.

**D. The draft irrationally targets domestic industry rather than waste.**

The Draft appears to broadly target the plastic *industry* for reduction or elimination, not plastic *waste*. But such a strategy is not likely to be successful. Plastic manufacturing would undoubtedly continue, but it would shift overseas to jurisdictions that do not employ Americans and that have lower environmental protections, thus likely *increasing* pollution of oceans. All with the upshot of making plastics more expensive for American citizens.

#### **IV. EPA improperly deterred comments.**

##### **A. EPA misleadingly suggests the Draft involves only “voluntary actions”.**

EPA’s Request for Public Comment states that the Draft “provides voluntary actions” and “identifies ... voluntary actions,” with EPA “seeking information about the objectives and voluntary actions identified” and “provid[ing] all interested individuals and organizations with the opportunity to offer valuable input on the voluntary actions identified.” 88 Fed. Reg. at 27,503. The executive summary to the Draft similarly states the draft “provides voluntary actions.” Draft at 1. Yet the Draft plainly contemplates mandatory regulations, *e.g.*, Draft at 15, 20, and EPA will undoubtedly use the Draft to support those regulations. EPA’s repeated, misleading statements about “voluntary actions” will undoubtedly result in fewer comments from interested members of the public who devote their limited resources to commenting on proposed regulations, not propaganda strategies for “voluntary actions.”

##### **B. EPA’s formatting specifications are arbitrary.**

EPA purports to specify the format of written comments, going so far as to specify required sections, margins, font, and font size, all while apparently rejecting the default text-based commenting system on regulations.gov. EPA offers no explanation for its unusual specifications, which serve only to deter comments. It would be arbitrary and capricious for EPA to reject comments for not complying with EPA’s arbitrary specifications.

##### **C. EPA should re-open comments.**

Setting aside that legal infirmities in the Draft, if EPA is truly interested in “provid[ing] all interested individuals and organizations with the opportunity to offer valuable input,” 88 Fed. Reg. at 27,503, EPA should correct its misleading references to “voluntary actions” withdraw its arbitrary formatting specifications, and re-open the Draft for public comment.

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EPA’s *Draft National Strategy to Prevent Plastic Pollution* is deeply flawed and inconsistent with EPA’s statutory mandate. EPA should accordingly withdraw the Draft and start anew.

With kind regards,

A handwritten signature in black ink, appearing to read "Jeff Landry". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

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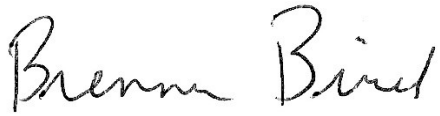
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