



## MEMORANDUM OF LAW

To: Jill Bartolotta and Scott Hardy, Ohio Sea Grant College Program

From: Terra Bowling, Research Counsel II, National Sea Grant Law Center  
Kristina Alexander, Research Counsel II, Mississippi-Alabama Sea Grant Legal Program

Re: Plastic Bag Legislation (NSGLC-18-04-02)

Date: June 5, 2018

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### Advisory Request Summary

In March 2018, you requested information from the National Sea Grant Law Center regarding plastic bag legislation. This memorandum addresses your questions regarding plastic ban legislation by local governments and how that legislation is impacted by state laws. In particular, it examines the state laws that prohibit local governments from setting local standards on plastic bag use, state laws that ban or limit plastic bag use, and actions by local governments. In addition, this memorandum will consider the policy arguments used by advocates for and against plastic bag use. As this can be a contentious political issue, the memorandum concludes with a discussion of some considerations for Sea Grant professionals related to Sea Grant's nonadvocacy best practices. Please note, the information below is legal research provided for education and outreach purposes and does not constitute legal advice or representation of Ohio Sea Grant or its constituents.<sup>1</sup>

### Background and History

The last decade has revealed the United States as a house dividing itself between states that ban businesses from handing out plastic bags and states that prohibit any such ban. San Francisco spearheaded the movement against single-use plastic bags in 2007, becoming the first city in the country to pass such a ban.<sup>2</sup> In contrast, in 2008 Florida became the first state to prohibit legal action limiting plastic bag use.<sup>3</sup>

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<sup>1</sup> This product was prepared by the National Sea Grant Law Center under award numbers NA140AR4170065 and NA140AR4170098 from the National Oceanic and Atmospheric Administration, U.S. Department of Commerce. The statements, findings, conclusions, and recommendations are those of the author and do not necessarily reflect the views of NOAA or the U.S. Department of Commerce.

<sup>2</sup> S. F., CAL., ENV. CODE ch. 17 (2007).

<sup>3</sup> FLA. STAT. § 403.7033 (2008). ("no local government, local governmental agency, or state government agency may enact any rule, regulation, or ordinance regarding use, disposition, sale, prohibition, restriction, or tax of such auxiliary containers, wrappings, or disposable plastic bags").



The division between those for and against plastic bags often manifests as a split between local government (which may favor restricting bags) and state governments (which may prohibit any such restriction). The divide can also be between the legislature and the governor. In at least two states the governors vetoed laws prohibiting limitations on plastic bags but were subsequently overridden by the legislature.<sup>4</sup> In a third state, Pennsylvania, the governor's veto prevailed, and no statewide prohibition on plastic bag bans was passed.

Notably, even if a law passes, a decision to ban plastic bags can be reversed by subsequent rulemaking, as happened in North Carolina, Chicago, and Port Aransas, Texas. That reversal can also be reversed – as in the case of Chicago, which, after repealing a 2014 ban, once again has an ordinance restricting plastic bag use. In another example, one year after signing a law prohibiting New York City from imposing a carryout bag fee, the Governor of New York advocated for a plastic bag ban.

Because of these tensions, there is little stability or permanency in plastic bag legislation, either to ban plastic bag use or to prohibit such bans. While more jurisdictions ban or restrict plastic bag use than prohibit banning plastic bags, it would be hard to say that either position has momentum. Legislation's longevity depends on the conviction of the voters, which will be influenced by environmental and economic positions.

#### *Underlying Authority Regarding Plastic Bag Legislation*

Generally, local governments fall under two types of governing authority that would affect their ability to enact plastic bag legislation: Home Rule or the Dillon Rule. Home rule states allow local governments to make their own laws to protect public health, safety, and welfare unless specifically restricted from doing so by the state. In contrast, local governments in Dillon Rule states may legislate only what is specifically authorized by the state. In the cases where the state legislature prohibits local governments from restricting the use of plastic bags, it does not matter whether the state is Home Rule or Dillon Rule, as the state law supersedes local action.

#### **State and Municipal Acts Limiting or Banning Plastic Bags**

The District of Columbia was the first non-municipal entity to restrict plastic bag usage, enacting a \$0.05 fee on any "disposable carryout bag" in 2009.<sup>5</sup> The four Hawai'i counties banned plastic bags through a series of county ordinances, eventually leading to bags being banned statewide. Maui and Kaua'i counties banned plastic in January 2011.<sup>6</sup> Hawai'i and Honolulu counties prohibited plastic checkout bags in 2013, and 2015, respectively.<sup>7</sup>

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<sup>4</sup> Both Missouri and North Carolina governors vetoed legislation that would lead to more plastic bag use. Both vetoes were overridden.

<sup>5</sup> D.C. CODE § 8-102, The Anacostia River Clean Up and Protection Act (2009).

<sup>6</sup> See MAUI COUNTY, HAW., CODE § 20.18.040 (2008); KAUA'I COUNTY, HAW., CODE § 22-19.2 (2009), respectively.

<sup>7</sup> HAWAII COUNTY, HAW., CODE § 14-118 (2013); HONOLULU, HAW., REV. ORDINANCES § 9-9.2 (2015).



In terms of a true statewide ban effected by state legislation, California was the first, although California's 2014 law took two tries to get into motion. The original legislation was challenged by a petition, and only after a statewide referendum passed in 2016 did the law become effective. The state law expressly authorizes those local bag bans in effect prior to September 1, 2014.<sup>8</sup> Reportedly, more than 150 local governments in California enacted plastic bag bans prior to this date.

Municipalities or other local governments in at least 18 states have banned or restricted plastic bag use: Alaska, California, Colorado, Connecticut, Hawai'i, Illinois, Iowa, Maine, Maryland, Massachusetts, New Mexico, New York, Oregon, Rhode Island, South Carolina, Texas, Utah, and Washington. Some municipalities joined the District of Columbia by imposing a tax or fee on using single-use bags at the point of purchase. For example, the City of Chicago has a bag tax of \$0.07 per disposable bag.<sup>9</sup> According to one report, disposable bag usage dropped 42% in the first month.<sup>10</sup> Plastic bags are banned in Boston beginning in December 2018, which gives consumers the option of paying \$0.05 for a compostable plastic bag or a paper bag with handles.

Texas reportedly has ten municipalities with plastic bag bans in place, including its capital, Austin, but a court challenge brought by the Laredo Merchants Association may end that. The Laredo Merchants Association argues that Laredo's plastic bag ban is pre-empted by a state solid waste disposal law that prevents local governments from regulating types of containers for solid waste management purposes.<sup>11</sup> In that case, a lower court had upheld the Laredo ordinance. However, the Texas Court of Appeals reversed, finding that the plastic bag ban violated Texas Health & Safety Code § 361.0961 which blocks local governments from adopting an ordinance that "prohibits or restricts, for solid waste management purposes, sale or use of a container or package." The court reasoned that the checkout bag ordinance was for a "solid waste management purpose," to wit: "reduc[ing] litter from discarded plastic bags." The court rejected the City's argument that the ban fell under the City's authority to prohibit the pollution of watersheds. The court also rejected the City's argument that a checkout bag was neither a "container" nor a "package" under the law. The Texas Supreme Court heard the case in January 2018 but has not issued an opinion.

North Carolina had a state law banning retailers from using non-recyclable plastic bags in the Outer Banks counties, beginning in 2010.<sup>12</sup> However, that law was repealed in 2017.<sup>13</sup>

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<sup>8</sup> CAL. PUB. RES. CODE § 42287 (2016).

<sup>9</sup> CHICAGO, ILL., MUNI. CODE ch. 3-50 "Chicago Checkout Bag Tax Ordinance" (2016).

<sup>10</sup> Heather Cherone and Patty Wetli, *Chicago's Plastic Bag Tax Is Working Big Time, Study Shows*, DNAinfo.com (April 24, 2017), <https://www.dnainfo.com/chicago/20170424/lincoln-square/were-using-42-percent-fewer-bags-since-7-cent-tax-started-city-study-says/>.

<sup>11</sup> *Laredo Merchants Ass'n v. City of Laredo*, No. 04-15-00610, 2016 WL 4376627 (Tex. App. Aug. 17, 2016).

<sup>12</sup> N.C. GEN. STAT. §§ 130A-309.120 – 309.125 (2010).

<sup>13</sup> 2017 N.C. SESS. LAWS 2017-209, 17.



## *Plastic Bag Legislation in Ohio*

Ohio does not have a statewide ban on plastic bag use, and it does not appear any municipalities in the state have enacted such an ordinance. In 2017 at least two local governments considered enacting carryout bag restrictions – Cuyahoga County and Cincinnati – but neither ordinance passed. In 2018 the state legislature considered a bill, S.B. 210, to prohibit local government action to restrict the use of “auxiliary containers.” The bill never made it out of committee, meaning it was not brought up for a vote in the Senate nor advanced to the House.

### **State Laws Prohibiting Local Bans**

Ohio is not the only state where the legislature has sought to prohibit local governments from restricting the use of disposable bags from businesses statewide. The first was in Florida, which in 2008 passed a law acknowledging that “prudent regulation of recyclable materials is crucial to the ongoing welfare of Florida’s ecology and economy” and then banned any local restriction of the use of plastic bags or “auxiliary containers.”<sup>14</sup> The prohibition was described as temporary, in place while the State studied the issue, but it remains in effect today.

The grass roots plastic bag bans around the country are countered by an advocacy campaign by the American Progressive Bag Alliance (APBA), a D.C. lobbying group representing the plastic bag manufacturing industry. According to its website, the APBA “leads numerous public policy initiatives that serve as the frontline defense against plastic bag bans and taxes nationwide.” The APBA asserts that plastic bags use fewer natural resources to produce and transport, comparing them to paper bags. It has successfully lobbied for state laws that prohibit local governments from restricting plastic bag use.

APBA is not the only national lobbying group involved. Since 2015, multiple states enacted legislation that prohibit local plastic bag bans, closely following a model law prepared by the American Legislative Exchange Council (ALEC). ALEC is a group consisting of state legislators, which is headquartered in a D.C. suburb, and favors “limited government, free markets, [and] federalism.” Key provisions of the model legislation, an “Act to Establish Statewide Uniformity for Auxiliary Container Regulations,”<sup>15</sup> are:

- 1) A definition of “auxiliary container” to mean any receptacle of any fabrication designed to transport purchases from or at a food service or retail facility;
- 2) A prohibition on local units of government from regulating or restricting the use, disposition, or sale of auxiliary containers, including taxing the items;
- 3) A statement that the prohibition does not restrict creating curbside recycling or a commercial recycling program; and

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<sup>14</sup> FLA. STAT. § 403.7033 (2008).

<sup>15</sup> *Act to Establish Statewide Uniformity for Auxiliary Container Regulations*, American Legal Exchange Council (Jan. 20, 2018) <https://www.alec.org/model-policy/act-to-establish-statewide-uniformity-for-auxiliary-container-regulations/>.



- 4) A statement that the ban does not apply to the use of auxiliary containers on the property of local governments.

In addition to Ohio using “auxiliary containers” language in its proposed law to prohibit local plastic bag ordinances, nearly identical legislation is found in six of the nine states that prohibit local bans on plastic: Arizona, Idaho, Indiana, Michigan, Mississippi, and Wisconsin.<sup>16</sup> Three other states, Minnesota, Missouri, and New York, crafted their own legislation to restrict local ordinances.<sup>17</sup> In the case of North Carolina, its legislature repealed an existing law that banned plastic bags in Outer Banks counties.<sup>18</sup>

Although some of the enacted “auxiliary container” legislation follows the ALEC model verbatim, other laws are modified. For example, the Mississippi legislation on auxiliary containers is narrower in scope than the ALEC model, as it applies only to food service establishments rather than to all retailers.

Not all state efforts to prohibit local ordinances from restricting plastic bag use succeed. For example, in 2017 the Pennsylvania legislature considered legislation, H.B. 1071, that would have prohibited bans or fees on *recyclable* plastic bags. The governor vetoed the bill. The governor stated that the bill would violate the Environmental Rights Amendment of the Pennsylvania Constitution. In another example, in 2016 the Georgia Legislature considered an “auxiliary container” bill with language tracking the model bill.<sup>19</sup> It passed the Senate, but not the House. Also, as noted above, an “auxiliary container” bill was introduced before the Ohio legislature but was not considered for a vote.

### *State Laws Repealing Existing Local Acts*

While some jurisdictions passed state laws prohibiting local plastic bag bans before any local bans were in place, as happened in Mississippi, other state laws repealed existing municipal action. New York’s 2017 legislation is one such example. The New York State law prohibits cities greater than one million people from adopting or implementing an ordinance charging a fee for a “carryout bag.” Not coincidentally, New York City passed a \$0.05 carryout bag tax just months before, which would have taken effect the day after the state rule was signed.<sup>20</sup> The state moratorium expires expressly upon New York City passing a law to repeal their bag tax. At the time of the moratorium, seven other municipalities with fewer than one million people had plastic bag bans, with one including a bag tax on paper bags. Because of the population size, the state law did not affect the ordinance. However, in 2018, Suffolk County on Long Island (pop.

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<sup>16</sup> ARIZ. REV. STAT. § 9-500.38 (2016); IDAHO CODE ANN. § 67-2340 (West 2016); IND. CODE ANN. § 36-1-3-8.6 (West 2016); MICH. COMP. LAWS ANN. § 445.591 (West 2017); Miss. S.B. 2570 (eff. July 1, 2018); and WIS. STAT. § 66.0419 (2016).

<sup>17</sup> 2017 MINN. SESS. LAW SERV. ch. 94, art. 8 (West); MO. REV. STAT. § 260.283 (2015); and N.Y. Leg. Memo 7 (2017), respectively.

<sup>18</sup> 2017 N.C. SESS. LAWS 2017-209, 17.

<sup>19</sup> Ga. S.B. 139 (2015-2016).

<sup>20</sup> N.Y.C., CODE § 16.491 (2016).



1.5 million) passed a county ordinance imposing a \$0.05 carryout bag fee. The state moratorium did not apply, as it applies only to rules or ordinances “by a city.”

A further illustration of how legislative action can impact political subdivisions occurred on Long Island. The Suffolk County law of 2018 affected two municipalities within that county, East Hampton and Southampton, that had passed plastic bag bans in 2014. The county tax, however, does not appear to pre-empt the cities’ bans.

## **Policy Debate**

Plastic bag bans pit local residents, environmentalists, and academics against the plastic bag industry and some consumers. Ban advocates worry about plastic pollution and the harm it causes to wildlife. They claim the bans will cut down on fossil fuels used for manufacturing. Opponents claim plastic bag bans hurt the economy, creating a consumer tax and compelling people to shop online. They also say single-use plastic bag alternatives are more harmful to the environment in the long run. Below is a look at arguments on both sides of this contentious political issue.

### *Environmental impact*

According to Earth Policy Institute, an environmental organization, a trillion single use plastic bags are used worldwide each year.<sup>21</sup> One hundred billion of those are used in the United States.<sup>22</sup> The bags, made of fossil fuel derivatives, are slow to decompose, with estimates ranging from 10-20 years.<sup>23</sup> Many of the plastic bags end up as litter, marring the landscape and harming wildlife on land and in waterways. Plastic bags can travel through storm drains to rivers, lakes, and the ocean. Once in the water, most plastic never fully biodegrades but breaks into smaller and smaller pieces until it’s less than 5 mm in size, a “microplastic.”<sup>24</sup> Multiple whale, turtle, and seabird deaths have been attributed to ingested plastic. Although plastic bag recycling is an option, it is difficult and costly.<sup>25</sup> According to one city official, “Recycled bags have little value, and when collected in comingled programs they get badly contaminated, decreasing their value further.”<sup>26</sup>

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<sup>21</sup> *Plastic Bag Fact Sheet*, Earth Policy Inst. (Oct. 16, 2014) [http://www.earth-policy.org/press\\_room/C68/plastic\\_bags\\_fact\\_sheet](http://www.earth-policy.org/press_room/C68/plastic_bags_fact_sheet).

<sup>22</sup> Travis P. Wagner, *Reducing Single-Use Plastic Shopping Bags in the USA*, 70 WASTE MANAGEMENT 3-12 (2017).

<sup>23</sup> *Approximate Time it Takes for Garbage to Decompose in the Environment*, N.H. Dep’t of Env’tl. Servs., [https://www.des.nh.gov/organization/divisions/water/wmb/coastal/trash/documents/marine\\_debris.pdf](https://www.des.nh.gov/organization/divisions/water/wmb/coastal/trash/documents/marine_debris.pdf).

<sup>24</sup> *Plastics*, NOAA Marine Debris Program (May 23, 2018) <https://marinedebris.noaa.gov/info/plastic.html>.

<sup>25</sup> Wagner, *supra* note 22.

<sup>26</sup> Bill Hickman, *Bagging Big Plastic “Facts,”* Surfrider Foundation (June 22, 2016) <https://www.surfrider.org/coastal-blog/entry/bagging-big-plastic-facts>.





The APBA, the plastic bag manufacturing industry lobbyist, notes that plastic bags are more energy efficient to produce and deliver than reusable bags.<sup>27</sup> In addition, plastic bags are small and lightweight and are not significant contributors to landfill.<sup>28</sup> Another negative environmental aspect touted by ban opponents is that, reportedly, in response to a particular plastic bag ban, retailers have offered thicker bags that increase the waste problem.<sup>29</sup>

Some studies have claimed that reusable grocery bags pose health risks by harboring harmful bacteria. One study concluded that food-borne illnesses in San Francisco increased 46% after the bag ban went into effect although some researchers question the correlation.<sup>30</sup> In another study, researchers tested 84 reusable grocery bags for Salmonella, Listeria, and E. coli and found none.<sup>31</sup> The researchers did find bacteria, but not the type that normally causes diseases. According a senior staff scientist at Consumers Union, “A person eating an average bag of salad greens gets more exposure to these bacteria than if they had licked the insides of the dirtiest bag from this study.”<sup>32</sup>

#### *Fees/Taxation*

Ban opponents express concern that if plastic bags are banned, or if there is a fee for them, it will disproportionately affect seniors and low-income members of the community.<sup>33</sup> Some proponents of the bag bans argue that the impact of the fees charged for plastic bags is minimal but have recognized the issue.<sup>34</sup> In response, some of the plastic bag bans include distribution of free reusable bags. For example, California’s ban requires stores to provide a reusable grocery bag or a recycled paper bag free of charge to customers using a WIC or EBT payment card. The Washington, D.C. Department of Energy and Environment partners with other government

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<sup>27</sup> *About Plastic Bags*, American Progressive Bag Alliance (2018) <http://www.plasticsindustry.org/apba/bags>.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> Brad Plumer, *Are Bans on Plastic Bags Making People Sick? Not So Fast.*, Washington Post Wonkblog (Feb. 16, 2013) [https://www.washingtonpost.com/news/wonk/wp/2013/02/16/is-san-franciscos-ban-on-plastic-bags-making-people-sick-perhaps-not/?noredirect=on&utm\\_term=.0cb506c64c3c](https://www.washingtonpost.com/news/wonk/wp/2013/02/16/is-san-franciscos-ban-on-plastic-bags-making-people-sick-perhaps-not/?noredirect=on&utm_term=.0cb506c64c3c).

<sup>31</sup> *Can Reusable Grocery Bags Make You Sick or Is That Just Baloney?*, Consumer Reports (July 22, 2010) <https://www.consumerreports.org/cro/news/2010/07/can-reusable-grocery-bags-make-you-sick-or-is-that-just-baloney/index.htm>.

<sup>32</sup> *Id.*

<sup>33</sup> Ryan Loyd, *How a Bag Ban Would Create a Burden for People Without Vehicles, Low Income*, Texas Public Radio (May 8, 2014), <http://tpr.org/post/how-bag-ban-would-create-burden-people-without-vehicles-low-income>.

<sup>34</sup> Yessenia Funes, *What Does an Equitable Plastic Bag Ban Look Like?*, Earther (Mar. 16, 2018) <https://earther.com/what-does-an-equitable-plastic-bag-ban-look-like-1823836158>.



agencies, the private sector, and various community service organizations to give away tens of thousands of bags to low-income and senior residents.<sup>35</sup>

### *Economic impact*

Another argument against bans is that that plastic bag bans hurt retailers.<sup>36</sup> First, replacements, like paper bags, are more expensive for storeowners. The Plastics Industry Association notes that bans “encourage shoppers to take their business to areas neighboring the ban regions.”<sup>37</sup> Additionally, the plastic industry indicates it represents 30,000 people who work in the plastic bag manufacturing or recycling industry.<sup>38</sup> A nationwide ban would affect those workers adversely, although the extent is not clear. The extent of the impact would depend on whether the manufacturers solely produce bags or also make other items. For example, in Pennsylvania, it was reported that the nation’s largest plastic bag producer, Novolex, employs 1,500 people employed in the state to make or recycle plastic bags.<sup>39</sup> Novolex reports nearly 7,000 employees nationwide, but they also make paper bags and other plastic products.<sup>40</sup>

Bag ban proponents question these projected economic impacts. Any local government that has imposed a tax or fee on plastic bags allows the merchant to keep at least a portion of the fee.<sup>41</sup> In some instances, bans allow the state or local government to use part of the fees or tax for environmental initiatives. Proponents of the bag bans cite the negative impact the plastic bags have on the economy: litter removal on land is expensive, marine cleanup is impractical. Moreover, the aesthetic impacts of littered bags can reduce tourism, a direct economic loss.

### **Nonadvocacy Best Practices**

Plastic bag legislation is clearly a contentious issue around the country. Sea Grant stakeholders may seek to involve Sea Grant professionals working on plastic issues in debates over plastic bags. Community members, elected officials, and advocacy organizations may want to use Sea Grant data in testimony or advocacy campaigns or request Sea Grant assistance in conducting community surveys or workshops to assess public perceptions or raise awareness of the issue. Maintaining Sea Grant’s reputation as a neutral expert can be very difficult in such situations.

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<sup>35</sup> *Bag Law FAQ’s*, D.C. Dept. of Energy & Environment (2010) <https://doee.dc.gov/page/bag-law-faqs>.

<sup>36</sup> *How Plastic Bag Bans Impact the Economy*, Plastics Industry Ass’n (2018) <http://www.thisisplastics.com/economic-impact/how-plastic-bag-bans-impact-the-economy/>.

<sup>37</sup> *Id.*

<sup>38</sup> *Plastic Bag Recycling and Manufacturing Supports Thousands of Jobs*, Ban the Bag (2017) <http://www.bagtheban.com/learn-the-facts/jobs-economy>.

<sup>39</sup> Charles Thompson, *Bill prohibiting local bans taxes on plastic shopping bags headed to Gov. Wolf*, PennLive (June 14, 2017)

[http://www.pennlive.com/news/2017/06/bill\\_prohibiting\\_local\\_bans\\_ta.html](http://www.pennlive.com/news/2017/06/bill_prohibiting_local_bans_ta.html).

<sup>40</sup> *Novolex and Our Brands*, Novolex (2017) <http://novolex.com/about-us>.

<sup>41</sup> Wagner, *supra* note 22.





The National Sea Grant Law Center and USC Sea Grant have developed a number of resources related to advocacy and extension which you might find helpful as you navigate this issue. The resources are available on our website at <http://nsglc.olemiss.edu/projects/advocacy/index.html>. There are no easy answers when it comes to advocacy within Sea Grant. What may be perceived as advocacy in one program, may not be in another.

Some best practices to consider include:

- Be aware of the players. Local debates regarding plastic bags rarely occur in a vacuum. Local action may be triggered, promoted, and influenced by state or national entities and vice versa. Understanding this wider context can help Sea Grant programs anticipate potential minefields when approached by stakeholders for assistance.
- Analyze the costs and benefits of becoming involved. When faced with an advocacy dilemma, we encourage Sea Grant programs to engage internally in a “stop-think-analyze-act” process, similar to a SWOT analysis, to determine if getting involved is worth the risks. Some questions to consider include:
  - What are the benefits of taking on the issue (both substantively and politically)?
  - What are the political costs of taking it on?
  - Is action by Sea Grant based on solid research?
  - Is involvement by Sea Grant likely to credibly advance the discussion of a potential policy?
- Limit involvement to aspects of the debate that can be informed by science or research. While science can inform the debate, it can’t tell a local government what to do. There are potentially many paths to reducing plastic pollution – banning the use of plastic bags in only one. Understanding the available science and thinking about how that science can help decision-makers, if at all, can help Sea Grant programs avoid becoming involved in debates that are more about value judgments.
- Respect all viewpoints in the debate. This doesn’t mean a Sea Grant program will or should agree with an argument being made. Sea Grant outreach programming, however, can be strengthened by understanding where everyone involved in a policy debate is coming from and the main points being raised.