

The New York Environmental Lawyer

A publication of the Environmental Law Section
of the New York State Bar Association

Message from the Chair



Joan Leary Matthews

Greetings from Albany. I am honored to have become the Section's Chair on June 1st. I follow in the extraordinarily able footsteps of my friend and colleague, Lou Alexander (who has a penchant for late-night weekend e-mails to the Section Cabinet). In fact, all prior Section Chairs have crafted an admirable template for leading and guiding the Section.

This year, I am so fortunate to be assisted by a terrific and talented set of officers and other cabinet members:

Alan J. Knauf, First Vice Chair

Barry R. Kogut, Second Vice Chair

Philip H. Dixon, Treasurer

Carl Howard, Secretary

David Sampson, Section Council Representative

John Greenthal, Section Delegate to the NYSBA House of Delegates

I also want to thank Ginny Robbins, former Section Chair, for serving as the Section Council Representative during Lou's tenure.

As the newcomer to the Cabinet, Carl Howard is known to many of you through his work at EPA Region 2 and his extensive involvement with the Section over many years. Welcome, Carl!

Fall Meeting

You should already have received notification from NYSBA that the Section's Fall Meeting is scheduled for September 26-28, 2008, at the Hyatt Regency Long Island at Wind Watch Golf Club in Hauppauge on Long Island. It has been many years since we have had a meeting on Long Island, and we are excited to be hosting this year's Fall Meeting in that part of the state. The theme of this year's Saturday CLE program is "Land Preservation Strategies and Waterfront Development." Not only will the Long Island experience be highlighted, but the material presented will be relevant to attorneys statewide. We will hear from private practitioners and government representatives on such diverse topics as the community preservation fund, farmland preservation, the Long Island Sound Management Plan, local waterfront revitalization programs, coastal zone consistency determinations, and historic preservation.

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Program Co-Chairs John Shea, Howard Tollin, and Laurie Silberfeld have done a terrific job in shaping this program, and seeing to the many details. The meeting brochure provides information for some fun and interesting Saturday afternoon activities—a winery tour (transportation provided), kayaking and canoeing, golf at the Hyatt's two courses, and visits to a number of Long Island historic destinations, such as Sagamore Hill, Vanderbilt Mansion, and the Old Bethpage Village Restoration.

We are also reaching out to new and younger attorneys by including a concurrent CLE program on Saturday morning to cover the basics of a variety of topics including SEQRA, e-discovery, and hearings conducted by the NYSDEC Office of Hearings and Mediation Services. Our excitement about this concurrent program is fueled by the energy of Howard Tollin and Janice Dean (the Section's Membership Committee chairs), as well as Sherry Wallach, the Chair of the Young Lawyers Section. We look forward to building on this partnership with the Young Lawyers Section. We are also very open to your ideas for hosting programs or other activities that might appeal to young lawyers.

Global Climate Change Committee

The Global Climate Change Committee has an exciting and ambitious agenda for the coming year. NYSBA President Bernice Leber has expressed to the Section her great interest in advancing a climate change platform during her presidency. The Committee will

- plan the Section's Annual Meeting program, which will explore mitigation and adaptation mechanisms for localities
- draft a resolution, calling for action on the federal level, for approval by the Section's Executive Committee for transmittal to the NYSBA Executive Committee and House of Delegates
- explore drafting comments to the State Energy Plan
- draft suggestions for how the Office of Court Administration can reduce the carbon footprint for the practice of law (one idea is to promote more teleconferencing with judges and counsel)

An issue of the NYSBA *Government, Law and Policy Journal* devoted entirely to climate change will appear in your mailboxes shortly. Global Climate Change Committee Co-Chair Kevin Healy has done a superb job as the guest editor of that issue. We thank the NYSBA Committee on Attorneys in Public Service for funding the publication and mailing of this issue to all Section members. At our request, NYSBA is also making this issue available on-line.

Reaching Out to New Members— NYSBA Membership Challenge

Many of you are aware of the great strides that the Section has made in recent years to reach out to new members and to add additional members to the Executive Commit-

tee. These changes promote diversity within the Section, which we also hope will promote diverse points of view on issues ranging from brownfields to SEQRA and everything in between. Diversity of views within the Section can be elusive, however, and we are stepping up our outreach efforts. For example, I have been reaching out to attorneys in the public interest sector, and I hope to report on these efforts this year.

NYSBA has also stepped up its membership efforts and has challenged each Section to increase its membership by 10% over two years. We are providing a fun incentive—if you bring a new member to the Fall Meeting, we will give you a bottle of Long Island wine.

Classroom Project

One of my goals this year is to create a classroom project that Section members can implement on their own. I created such a project when I was President of the Capital District Women's Bar Association, and I can tell you that it was very rewarding. What I envision is that an ad hoc committee will compile teaching modules or lesson plans that Section attorneys can then tailor to the needs of a particular class. A lot of material exists that we can tap into for this project.

Our profession well positions us to serve as role models to middle school and high school students. We can teach these students about how government and businesses can respond to the effects of climate change. We could also explore with students how regulatory programs currently in place ensure that the water from their taps at home is safe—and why those programs were enacted in the first place. Consider the challenge, too, of explaining how a carefully crafted brownfields program can best revitalize distressed communities, especially in upstate areas. If any of you would like to work on establishing the Classroom Project, please give me a call. I know that the rewards from classroom teaching are great and I am excited for the Section to embark on this project.

Executive Committee Changes

The transition on June 1 also brought two new members to the Executive Committee: NYSDEC General Counsel Alison Crocker and NYSDEC Region 3 Counsel John Parker. We welcome them both. Janice Dean, from the NY Attorney General's Office, has moved from an at-large position to join Howard Tollin as a co-chair of the Membership Committee. Jeffrey Brown has moved from an at-large position to become a co-chair of the Legislation Committee. We will be reviewing Executive Committee vacancies to promote diversity within our Section—in the many diversity categories that the Section has identified.

I look forward to working with you this year—and hope to see you at the Fall Meeting.

Joan Leary Matthews

From the Editor

We welcome Joan Leary Matthews as the Section's new Chair.

Joan has an established background in academia. In her position at Albany Law School, Joan guided numerous students in Environmental Law over the years. Many of her students entered, and were finalists, in the Section's Environmental Essay competition, which has since been renamed in honor of our late colleague and friend, Bill Ginsberg. Now at the New York State Department of Environmental Conservation, Joan is the Senior Counsel for Special Projects in the Office of the General Counsel. She follows our former Chair, Lou Alexander, as a respected senior attorney with New York State DEC. Joan has also been a very active, long-time member of the Section's Executive Committee. Given her background and credentials, Joan is well prepared to preside over the Section's business and its many annual activities.



Kevin Anthony Reilly

lic's dawning awareness that we are logically and even morally obliged to reduce our energy consumption, shift consumption patterns toward renewable energy sources where possible, and tackle the technological hurdles of tapping into energy that is not derived from oil. Media reports, in addition to the more sophisticated scientific reports, also have been bringing home the incipient ecological threats to our future, and are alerting the public that, in many observable and empirically experienced ways, the process is not merely theoretical but is underway. Floods in the conservative American heartland and hurricanes in Florida are perhaps not directly related to carbon emissions, and meteorological variations rather than climate stasis may well be the historic norm.

"The growing national consensus seems to be that we must act, and act soon, to stave off economic and environmental disasters."

However, the seeming acceleration of these extreme weather events certainly catches the attention of many people who otherwise would willingly gainsay predictions that scientists have been making for years. The growing national consensus seems to be that we must act, and act soon, to stave off economic and environmental disasters. If American politics seems too often inclined to duck hard choices, American culture, viewed historically, seems wired to tackle technological challenges and to devise pragmatic solutions when the scope of the problems becomes clear.

This year's speakers at the Section's Legislative Forum were prominent in New York State government as well as the private sector. They addressed climate change from the state's perspective, spoke about pragmatic means of responding, but also noted practical challenges that needed to be resolved. The New York focus of the discussion arose not only from the fact that the Section's Spring gathering provides a forum for New York issues—as is evident in the name—but also from the burgeoning reality—and the public's acceptance thereof—that there must be local initiatives, especially in view of Washington's demonstrated disinterest in recent years in tackling climate change in a comprehensive manner. California certainly seems to be a leader in this regard. New York should not so willingly cede the lead when it comes to a new maturity by state governments in stepping up as the federal government has stepped back.

"After a lengthy period in which the general topic was left out in the cold, so to speak, global warming and its related meteorological and ecological effects seem to be reappearing on the radar screen of a public that too often is impatient with theoretical issues."

In this issue, Lou Alexander summarizes this year's Legislative Forum. The Section conducts its Legislative Forum, which focuses on the year's most topical issues from the perspective of our membership, in Albany each spring. This year, the Legislative Forum brought together several informative speakers on the subject of climate change.

After a lengthy period in which the general topic was left out in the cold, so to speak, global warming and its related meteorological and ecological effects seem to be reappearing on the radar screen of a public that too often is impatient with theoretical issues. Of course, the gasoline tab, energy-related price spikes during a time of economic recession, the transfer of wealth to unsavory governments and numerous inter-related worries about national security are also on the public's radar screen. These decidedly non-theoretical factors have all contributed to the pub-

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Heather Drayton submits an article on a topic about which there has been growing awareness—electronic waste. Electronic devices were hailed as being environmentally beneficial for, among other results, reducing paper use and subsequent paper waste. Of course, as any of us in a paper-intensive business—such as law—knows, that promise remained largely aspirational. What was unanticipated was the mountain of waste, including hazardous waste, resulting from the discarding of the electronic devices themselves, as the revolution in information technology hurled new generations of products on the market before prior generations reached the end of their useful lives. The products did not wear out; they became functionally obsolete. The adrenaline surges of the computer and communications industries left in their wake debris to be landfilled. Of course, in more frugal economies, obsolete devices might be taken apart and the useful components repackaged for new uses, but that has not been the norm in this country. As a result, the industries have left in their wake the slow seepage of mercury, lead, chromium and other heavy metals into the environment in a manner that, because of the de minimis amounts in each individual device, has been hard for regulatory agencies to get a handle on. When electronic devices are shipped to other, more frugal, countries, to be cannibalized for useful parts, the danger from such seemingly benign re-use is simply exported to where environmental controls are less likely to have any effect. This article outlines the often unappreciated dangers that arise when electronic devices end up on the trash heap; the economics of beneficial re-use of components; suggestions for the redesign of electronics devices to make eventual disassembly easier and less labor intensive; shortcomings in federal regulations; and the efforts of some manufacturers, such as Dell and Hewlett-Packard, to step up to the environmental challenges. The author analyzes the responses of some states, but notes that manufacturers would prefer uniform federal standards to potentially conflicting state regulations. The article, which was a finalist in the Section's William R. Ginsberg Memorial Essay Contest, is well worth reading on this increasingly important environmental and economic topic.

Thomas Puchner, of Whiteman Osterman & Hanna, LLP, again submits the update on Administrative Decisions. The environmental case summaries were submitted by students from St. John's Law School Environmental Law Society. Phil Weinberg, over the years, has been instrumental in selecting decisions and shepherding the preparation of the case summaries. To all of our readers, we hope you had a happy, productive, and fun summer.

Kevin Anthony Reilly

Legislative Forum Addresses Climate Change

By Louis A. Alexander

On May 7, 2008, the Committee on Legislation of the Environmental Law Section held its annual Legislative Forum at the Great Hall of the New York State Bar Center in Albany. Michael J. Lesser and Teresa M. Bakner, co-chairs of the Committee on Legislation, organized an excellent program on the topic "Climate Change: Initiatives, Policy and Incentives."

Panelists at the forum included:

- Janet Joseph, Program Director, Clean Energy Research and Market Development of the New York State Energy Research and Development Authority;
- Honorable Kevin A. Cahill, Chair of the New York State Assembly's Energy Committee;
- Frank Moroney, Esq., counsel to New York State Senator George D. Maziarz (who serves as Chair of the New York State Senate's Committee on Energy and Telecommunications);
- Heather Briccetti, Esq., Vice President of Government Affairs for the New York State Business Council; and
- J. Jared Snyder, Esq., Assistant Commissioner for Air Resources, Climate Change and Energy of the New York State Department of Environmental Conservation.



New York State Assemblyman Kevin A. Cahill, Chair of the Assembly Energy Committee, Forum panelist

our state must confront were well articulated. On behalf of the Section, we extend our thanks to the panelists for participating in this year's forum.



Then-Section Chair Louis A. Alexander presenting Environmental Law Section award to Alison H. Crocker, Deputy Commissioner and General Counsel, New York State Department of Environmental Conservation

The panelists discussed the current challenges, both economic and environmental, relating to climate change. New York State's pre-eminent role on this issue was highlighted, as well as the opportunities for the state to become a leader in environmental technology. The presentations were informative and thought-provoking, and the challenges, both short- and long-term, that

The Section was honored to have Fred LeBrun, noted columnist and reporter for the *Albany Times-Union*, as its luncheon speaker. During his approximately forty years in journalism, Mr. LeBrun has focused on state political and environmental issues. He addressed a number of environmental matters, from the cleanup of the Hudson River, the bottle bill, preservation of open space, and protection of watersheds to the staffing and programs of New York's Department of Environmental Conservation. One of the highlights of his presentation was his evaluation of the environmental records of the state governors who served during his time as an Albany journalist, including Nelson Rockefeller, Malcolm Wilson, Hugh Carey, Mario Cuomo, George Pataki, Eliot Spitzer, and David Paterson. Mr. LeBrun's remarks blended humor with serious

Attending the Legislative Forum were more than one hundred (100) attorneys, and the Section also extends its thanks to Mike Lesser and Teresa Bakner for their time and effort in organizing this very successful event.

Following the Legislative Forum, the Section held its annual Albany luncheon at the Bar Center. At this year's luncheon, the Section was pleased to present an award to Alison H. Crocker, Deputy Commissioner and General Counsel of the New York State Department of Environmental Conservation, in recognition of her commitment and long-standing dedication to the environment during her years of governmental service.



***Albany Times-Union* columnist Fred LeBrun, Forum luncheon speaker**



Janet Joseph of the New York State Energy Research and Development Authority, Forum panelist

observations regarding the vicissitudes of environmental politics in New York State.

Following the luncheon, the Section's Executive Committee held its spring meeting. At the meeting, the following new co-chairs were announced:

John Caffry, Adirondacks, Catskills, Forest Preserve & Natural Resource Management

Kelly Corso, Environmental Business Transactions

Janice Dean, Membership

Yvonne Marciano, Legal Ethics

Christopher Rizzo, Historic Preservation, Parks & Recreation

Amy Smith, Adirondacks, Catskills, Forest Preserve & Natural Resource Management

Peter Trimarchi, Biotechnology, Nanotechnology & the Environment

On the agenda were a number of environmental issues including Section initiatives on global warming and

climate change, brownfields reform, waiver of rights issues relating to the state's oil spill fund, Int 650-B (the New York City Council proposal relating to environmental monitoring devices), and amendments to the State Environmental Quality Review Act. Various Section-related matters, including the minority fellowship program, sponsorship guidelines, membership outreach, CLE programs, the fiscal integrity of the Section's budget (we are pleased to report that the Section's budget in calendar year 2007 was in the black), and law school student subsidization for Section meetings, were discussed.

The excellence of the Section journal (and the dedicated work of our Editor, Kevin Reilly) were recognized, and the hope was expressed that more Section members would take advantage of the opportunity to submit articles for our journal in the future.

Finally, recognition was given to the members of the Section Cabinet who would be retiring as of June 1 (Virginia Robbins [our Section Council representative] and this author as Chair), thanks were given to those members of the Section Cabinet who would be continuing, and a warm welcome was extended to the incoming Chair, our friend and colleague Joan Leary Matthews.

NEW YORK STATE BAR ASSOCIATION

Save the Dates

NYSBA ANNUAL MEETING

January 26–31, 2009

New York Marriott Marquis

Environmental Law Section Program

Friday, January 30, 2009

Economic Analysis of Electronic Waste Regulations

By Heather Lee Drayton

Introduction

The components of municipal solid waste are rapidly changing. Obsolete computers, cellular phones, televisions, and many other outdated electronics all known as electronic waste are becoming a greater proportion of the global municipal waste stream.¹ Technological innovation continues to improve and the lifespan of electronics remains short.² As a result, the amount of electronic waste that accumulates quickly increases.³ It is now the nation's fastest-growing category of solid waste,⁴ growing at a rate three times that of other usual municipal wastes.⁵ Estimates show that 133,000 electronic devices are discarded daily in the United States, totaling 3 million tons of electronic waste per year.⁶ Electronics have the potential to release dangerous substances such as mercury, lead and hexavalent chromium into the environment.⁷ Exposure to these substances can have tragic effects on human health.⁸

Electronic waste typically finds its way from America's garages and attics to landfills.⁹ The extent of dangerous chemical exposure to the environment from landfill disposal is not yet conclusively established. Moreover, due to the relatively recent discovery of the problems of chemicals from electronic waste, scientific data is so far unavailable.¹⁰ Nevertheless, scientists largely agree that as a prudent precaution we should prevent harmful components of electronic waste from entering landfills.¹¹

Options to prevent electronic waste from landfill disposal include recycling, reuse, and disposal bans. Governments around the world are taking several approaches to the problem of electronic waste disposal. This article will examine these systems and conduct an economic analysis of each method. The evaluation from an economic perspective will focus on United States policy and state implementation of electronic waste regulations. Part I will explain the realities of the problems associated with electronic waste, including export of electronic waste to less-developed countries. Part II will discuss United States federal policy and its existing regulatory scheme pertaining to electronic waste. Part III will examine the California, Maine, and Washington approaches to electronic waste disposal. Part IV will introduce other possible approaches with an emphasis on the EU's approach to electronic waste, and explain why these other strategies may be economically and environmentally preferable to the current United States federal policy. Part V will conclude based on the results of the economic analysis.

Part I: Electronic Waste Disposal

Astronomical amounts of electronic waste sold in the United States are being stored in consumers' homes

awaiting disposal.¹² Recycling electronic waste is one option customers can choose to dispose of their electronic waste. It has many positive externalities including conserving landfill space, saving energy, decreasing greenhouse gas emissions, reducing toxic chemicals in the municipal waste stream (lead, mercury, arsenic), and preserving natural resources.¹³ For example, precious metals such as gold and silver can be obtained at a higher quality and with a lower environmental impact from electronic products rather than from traditional mining.¹⁴ These metals can be sold and reused when salvaged during the recycling process.¹⁵

"[Electronic waste] is now the nation's fastest-growing category of solid waste, growing at a rate three times that of other usual municipal wastes."

Despite these benefits, Americans recycle only 10 to 15 percent of their electronic waste.¹⁶ The small proportion of consumers that do recycle face transaction costs such as inconvenient drop-off locations and recycler disposal fees.¹⁷ Yet successful free recycling events at local major retailers have demonstrated that if these costs were minimized, consumers would be more willing to recycle.¹⁸ The consumer is a rational actor seeking to maximize utility. His "strategy" as referred to in the economic game theory is to minimize costs by avoiding these transaction costs and choosing to keep his electronics in storage.¹⁹

The answer to a successful and responsible electronic waste recycling program is economics.²⁰ Recycling electronic waste can be profitable for waste processors and secondhand dealers.²¹ In countries where labor is inexpensive, partially due to a lack of environmental and worker safety regulations, the electronic recycling industry has seen \$72 million in aggregate profits.²² However, currently in most of the United States, entering the recycling market is cost prohibitive.²³ The value of the salvageable materials is not sufficient to cover the costs for collection, processing, transport, and the recycling itself. Fees are therefore a necessity.²⁴ The resale price of the recycled material fluctuates.²⁵ Unfortunately, when the components market collapses, recyclers often go out of business, all too commonly leaving taxpayers stuck paying to clean up the hazardous remnants.²⁶ Insurance against business loss would not be an effective solution because the recyclers would have less incentive to run a profitable business.²⁷ Therefore in order to achieve a responsible recycling program that conserves resources

and protects the environment, the government should offer subsidies to recyclers to protect against the fluctuating market.²⁸

Why is the cost of salvaging valuable materials from recycled electronic waste so high? One reason is that because of the way electronics gadgets are designed, disassembly for recycling is a difficult and labor-intensive process.²⁹ Labor cost could be reduced, however, through design modifications that would make it easier to remove valuable components.³⁰ Once the component is removed from the product, there is still further expensive processing to obtain a retail quality material.³¹ Technology is available to decrease the expense of these processes but businesses that are unsure of the regulatory scheme that governs recycling are therefore wary about investing in these technologies.³² For now, the recycler's net revenue (i.e., accounting profit) from recycling is decreased because of this costly processing. In an attempt to offset the expenses and maintain profit, recyclers charge fees.

"Focusing only on dollar signs, it is significantly less expensive to dispose of electronic waste in a landfill rather than to recycle. Therefore, most electronic waste is disposed of in landfills."

The financial assistance provided by subsidies or recycling fees, however, will not necessarily offset the recyclers' hunger for more profit. Recyclers may choose between high labor prices in the United States and low labor prices in less developed countries. Unless mandated otherwise, they will ordinarily choose to send the product overseas for disassembly.³³ As recycling in the United States becomes even more costly due to compliance with hazardous waste regulations, the incentive to export increases as the cost of hazardous waste regulations compliance rises.³⁴ The less developed countries often have less stringent environmental regulations (or none at all) and will be a less expensive venue for electronic waste disposal.³⁵ This lack of environmental and worker safety regulation in conjunction with already inexpensive labor costs entices business to dishonestly export electronic waste to developing countries. Negative transboundary externalities exist from the trade of recyclable materials to less developed countries.³⁶ Most notably, workers are exposed to the toxic components of the electronic waste.³⁷

Although some countries benefit from the reuse of secondhand electronics, their less stringent or non-existent worker safety regulations place the workers at risk for hazardous waste exposure.³⁸ Worker hazardous waste exposure is a negative externality. In addition, the electronic devices sent to these developing countries for reuse are actually "junk, unrepairable, and unsalvageable."³⁹

The unsalvageable electronics then are disposed of in unsafe manners exposing individuals to the products' toxic dangers.⁴⁰ This arrangement of hazardous waste trade is inefficient for both the importing and the exporting country in the long run.⁴¹ "This existence of uncompensated and unsustainable environmental externalities is often the single most important reason for policy intervention."⁴²

Similarly as in developing countries, reuse is not always a viable option for electronics in the United States. These units are usually so old that the parts are not compatible in the newer systems and they no longer present any value to users.⁴³ Non-profit organizations often incur more expenses than revenue from donated used electronics.⁴⁴ Stores such as Goodwill and Salvation Army used to offer consumers free collection for usable electronics, but due to the high costs incurred disposing of used electronic waste, these stores can no longer accept computer or television donations.⁴⁵

Focusing only on dollar signs, it is significantly less expensive to dispose of electronic waste in a landfill rather than to recycle.⁴⁶ Therefore, most electronic waste is disposed of in landfills.⁴⁷ Landfills are subject to the phenomenon of "tragedy of the commons" because they typically have no clearly defined or enforceable property rights and there are many landfill users who can use them with little cost.⁴⁸ In other words, landfills cannot generate individual wealth and are open-access resources.⁴⁹ Due to the lack of individual ownership, all commons are exposed to under-investment and over-exploitation.⁵⁰ Information concerning the consequences of resource exploitation is unidentified because users have been unwilling to invest in obtaining the information.⁵¹ Individuals are not as willing to invest in public resources, such as landfills, as they would be in a private resource where they alone would profit.⁵² The lack of information in conjunction with under-investment amounts to users who are prone to exploit the resource (landfill space) by filling it with electronic waste. The solution to the "tragedy of the commons" is to charge users for their use of the resource based on the amount of their use.⁵³ Here, the solution would be to charge consumers per unit or by weight for their electronic product disposal.

Landfill space exploitation is subject to both free riding and holdouts. Similar to the tragedy of the commons, the free-rider phenomenon occurs when the public good is non-excludable⁵⁴ and non-rival.⁵⁵ In the case of electronic waste landfill disposal with no regulations, the user incurs no additional duties or responsibilities for using the landfill. Therefore, anyone can dispose of electronic waste in this public resource. Moreover, in the short term this disposal is non-rival, meaning the landfill seems so big that one person's use of it does not subtract from another person's use of it, just as one person's use of public television (by watching) does not take away from the satisfaction of or quantity available to any other viewer.

In reality, landfills are not truly non-rival; they are finite. But long before society realizes the limits on landfills, treating them as non-exclusive, non-rival public goods will lead to an environmental externality of “uncompensated infliction of environmental and consequential damage on known or unknown victims.”⁵⁶ This could be groundwater pollution with subsequent health effects to nearby residents or lack of available future landfill space for unknown users. These potential future failures necessitate an enforceable regulatory scheme which delineates the sharing of responsibilities.⁵⁷ Landfill bans of electronic waste are an essential regulatory key to encourage consumer recycling. Without the bans there is no incentive for recycling and the electronic waste will continue to be disposed of in landfills.⁵⁸

Part II: Federal Electronic Waste Disposal Scheme

The federal government has not yet formulated a proposed regulation that deals directly with electronic waste.⁵⁹ Federal regulations already in place do not adequately address electronic waste disposal.⁶⁰ The Resource Conservation Recovery Act (RCRA) regulates disposal of hazardous substances,⁶¹ but RCRA’s exceptions usually do not regulate electronic waste. Rather, RCRA allows likely electronic waste disposers, small-quantity generators, and household-waste producers to escape regulation.⁶² Even if RCRA did apply to households and small-quantity generators, the implementation and monitoring costs of applying RCRA to electronic waste would be overly burdensome and most likely be cost prohibitive to the administration.⁶³ Keeping RCRA regulations at a manageable standard was Congress’s intent when carving out these exceptions.⁶⁴

The concept of product stewardship is utilized by the federal government regarding electronic waste disposal.⁶⁵ Product stewardship occurs when responsibility for product disposal is shared by customers, retailers, product manufacturers, local governments, and volunteer organizations.⁶⁶ The EPA has developed several voluntary programs such as EPEAT⁶⁷ for manufacturers,⁶⁸ and the president has signed executive orders that require federal agencies to utilize EPEAT when purchasing electronic equipment.⁶⁹ These volunteer programs are an attempt to internalize the cost of disposal to the manufacturer by eventually forcing the manufacturer to build disposal costs into the price of the product. This is an extension of the “polluter pays” principle. This principle involves the polluter paying for the damages, since damages are externalities caused by the polluter’s actions. The “polluter pays” principle ensures that the manufacturer will price his product to reflect the costs of the environmental damage that the product causes.⁷⁰ If manufacturers cooperate with these volunteer programs, they will be incurring costs related to design changes and product disposal. They will incorporate these costs into the price of the elec-

tronic device, making the consumer, the co-polluter, pay for his or her use.

Unfortunately, product stewardship is not an enforceable solution to the electronic waste disposal problem. All actors except purchasers at federal agencies are free to ignore the environmentally friendly alternatives. Product stewardship may create an opportunity for the market actors to come to an efficient outcome. This possibility would require that actors share a sense of environmental responsibility and are motivated to negotiate. Companies have already implemented programs, although their effectiveness at this point is unknown.⁷¹

Posner states that some companies may voluntarily reduce the amount of pollution because “the demand for pollution regulation is a function, in part, of the amount of pollution.”⁷² If the amount of pollution is reduced a certain amount voluntarily, the demand for regulation may decrease.⁷³ Posner elaborates that customers do not benefit from pollution control spending.⁷⁴ They can achieve the same benefit from purchasing the lower priced product without incurring the pollution control costs.⁷⁵ He believes that only a monopolist can shift the cost of pollution controls onto its costumers without realizing profit loss.⁷⁶ However, in the long run even the monopolist is in danger of profit loss through reduction in future earnings and subsequent lower share price.⁷⁷

Nonetheless, some manufacturers have voluntarily implemented programs to deal with electronic waste. The CEO of Dell has challenged the electronics industry to implement environmentally responsible programs.⁷⁸ In 2006, Hewlett-Packard (HP) recycled 164 million pounds of electronic waste and met Dell’s challenge.⁷⁹ HP coordinates free collection drives, and when it does charge for recycling, it gives a coupon redeemable for future products, relieving the customer of some financial burden.⁸⁰ Further, HP conducts all of its recycling domestically, reducing the potential for international pollution.⁸¹ Fourteen other manufacturers and retailers participate in volunteer electronic waste disposal programs and incentives.⁸²

Industry would prefer a national regulation rather than the many different state regulations that are developing.⁸³ The patchwork of policies and their inconsistencies from state to state create onerous compliance costs. In some cases it is a difficult burden to comply with the extreme variations of the regulations.⁸⁴ When faced with two different standards, manufactures have to comply with both, not just the strictest.⁸⁵ Even more overwhelming for businesses, if no national regulation is developed, manufacturers may not only have to comply with the different state programs but with different city and county electronic waste disposal schemes as well.⁸⁶ The transaction costs of complying with all of these different regulations can have dramatic effects on the electronics manufacturers, retailers, and the United States economy.⁸⁷

To facilitate greater national regulation, some congressional representatives have formed an organization to raise congressional awareness of the problem of electronic waste disposal.⁸⁸ Representatives from the group have introduced bills in multiple House sessions geared toward federal electronic waste regulation. Some would permit the government to fund grants (through fees on new computers) to develop electronic waste recycling programs.⁸⁹ Additionally, U.S. Senators Ron Wyden (D-Ore.) and Jim Talent (R-Mo.) introduced S. 510, a bill to initiate a nationwide electronic waste recycling infrastructure. S. 510 would give tax credits to both consumers and manufacturers for recycling electronic waste. Similar to the legislation introduced in the House of Representatives, S. 510 calls upon the EPA to develop a program that would eventually preempt state programs.⁹⁰ No bills have yet been successful.⁹¹

"Congress should . . . recognize that the economic or social costs of pollutants are not uniform throughout the country."

If the federal government were to promulgate a rule, Posner would suggest that it not be a uniform national rule. Congress should instead recognize that the economic or social costs of pollutants are not uniform throughout the country.⁹² An accurate tax will be equal to the marginal, not the average, social cost of the electronic waste disposal.⁹³ Accordingly, a marginal tax would vary with the level of pollution input. As Posner points out, a "staggering amount of information would be required to devise such a tax schedule."⁹⁴

Additionally, the lack of federal regulation can be analyzed from the position of a game theorist. The management of electronic waste disposal can be seen as a multistage game. The states are all performing strategic interactions based on their varying levels of access. Their experiences with free riders and other negative externalities play into their strategy planning.⁹⁵ These management problems create entrants in the game on both a local municipality level and on a larger global scale with different regulatory regimes in various countries and regions within countries. Without coordination between all of these stakeholders, a more rapid exploitation of resources will occur.⁹⁶ "While admitting the importance of strategic behavior among parties, mechanisms for the design and implementation of relevant policies with cooperative arrangements are significant in the management of global environmental resources."⁹⁷ The states agree that coordination among stakeholders is needed. National regulation is the highest level of coordination that can be achieved within the United States. Moreover, national regulation would enhance, not hinder, state regulation. As representatives from California, Maine, and Maryland recently told Congress, although those states already have

electronic waste laws, they would benefit from national regulation.⁹⁸ I will therefore briefly examine the regulatory regimes of California, Maine, and Washington.

Part III: State Electronic Waste Regulations

The lack of federal regulations externalizes the burden of disposal regulation on state and local governments. As a result, a variety of legislative approaches have developed in attempts to fund electronic waste disposal. Eighteen states have some form of electronic waste regulation and thirteen have electronic waste regulations pending.⁹⁹ I will examine Maine, California, and Washington.

A. Maine

Maine has a system modeled after the European Union (EU) approach called Extended Producer Responsibility (EPR), which requires the manufacturers to pay for the electronics' recycling costs.¹⁰⁰ The law represents a partnership between the private sector, municipal and state entities, and consumers.¹⁰¹ "The state holds manufacturers responsible for ensuring the recycling of their products; it holds local government responsible for collecting the waste equipment; and it holds retailers responsible for not selling products of manufacturers that fail to comply with the program."¹⁰² The producer is charged for the costs of waste consolidators and processors for all of its electronics sold in Maine.¹⁰³

The user of electronics in Maine benefits from this EPR approach. The consumer who used to pay \$20 to recycle his computer at the landfill prior to the regulation now pays only \$2.¹⁰⁴ However, the manufacturer may be economically burdened. The electronic waste provision prohibits the sale of electronics by retailers or manufacturers not in compliance with regulations in Maine.¹⁰⁵ If sales in Maine are not profitable enough to incur the costs of disposal, this could take companies out of the Maine electronics market.

Manufacturers typically price their goods at or above the marginal cost, the cost of an additional unit of output.¹⁰⁶ If disposal costs are added to the other costs of producing each unit, the marginal cost of the product may eventually increase beyond the price that consumers are willing to pay for the item. This would force some manufacturing businesses to close up shop in Maine, giving consumers less purchasing choice and giving remaining businesses even more of a competitive advantage over the smaller or newer Maine electronic manufacturing businesses. This issue of reduced choice will be compounded to the extent that manufacturers are forced by rising costs to exit Maine's electronic market.

In addition, the state will force some manufacturers to leave the Maine market. Manufacturers not in compliance with the law after January 2006 will be placed on a do-not-sell list, meaning that Maine retailers will be prohib-

ited (under penalty of law) from selling products made by non-compliant manufacturers. The threat to place manufacturers on a do-not-sell list is not an idle threat. As of April 2007, Maine retailers cannot sell from 21 non-compliant manufacturers.¹⁰⁷

Other criticisms of Maine's program include its so-called "orphan waste" requirement. "Orphan waste" is defined by statute as electronic devices where the manufacturer either cannot be identified or is no longer in business and has no successor in interest.¹⁰⁸ Manufacturers must implement and finance a plan both for the materials that they produce and for "orphan waste."¹⁰⁹ Costs of disposal for orphan units will be divided between manufacturers based on a market share theory.¹¹⁰ Sorting waste to calculate manufacturer responsibility is complicated and creates a significant burden.¹¹¹

B. California

Unlike Maine, which focuses its regulation on the producer, California utilizes an Advanced Recovery Fee (ARF), which concentrates on consumers of electronics. California's Electronic Waste Recycling Act of 2003 (EWRA) requires the consumer to pay at the time he or she purchases the computer.¹¹² EWRA also requires state agencies to buy environmentally friendly electronic products.¹¹³ Further, manufacturers are obligated to report design changes that reduce the amount of hazardous materials in their products.¹¹⁴

The legislature addresses economic goals "to ensure that the cost associated with the proper management of covered electronic devices be internalized by the producers and consumers of covered electronic devices at or before the point of purchase, and not at the point of discard."¹¹⁵ It further states that in exchange for the benefit of the convenience of clearing their homes of electronic waste customers will pay six to ten dollars more at the time of purchase.¹¹⁶

Critics do not agree with the California legislature. The upfront fee that will inevitably be shifted to the consumer takes away the manufacturer's responsibility for electronic waste disposal and shifts it to the government. This shift creates more government administrative burdens and reduces the incentive for manufacturers to implement design changes.¹¹⁷

Other critics, such as the California Manufacturers and Technology Association, have called the provision a "job killer." They fear economic effects will be so severe that jobs will be affected.¹¹⁸ This is not a far-fetched proposition. Consumers who want to avoid the California surcharge can find other places to purchase their computers (such as neighboring states), or delay or forgo purchase. Thus ARF starts a chain reaction beginning with decreasing computer sales which eventually leads to hindering California's economy. The California Chamber of Com-

merce believes that not only is ARF bad for consumers, but it puts manufacturers at a disadvantage with nearby states.¹¹⁹ California retailers will lose profits if citizens can purchase electronics online and avoid the fee.¹²⁰ This profit loss would inflict severe damage on California's economy.

California is well known for Silicon Valley's technological advances.¹²¹ Perhaps the legislature was trying to balance the interests of California businesses and its concern for environmental welfare by imposing the cost burden on the consumer. If the legislature considered the externality of unemployment from retail profit loss, it might have conducted a cost-benefit analysis and determined that the benefits to the environment outweighed the costs to the state economy. In order to have an efficient cost-effective policy, the policy must include direct and indirect costs, counting transaction costs in the long and short terms.¹²² Therefore if the lawmakers did not consider unemployment as an indirect cost, and if taking unemployment costs into account would change the cost-benefit balance, then EWRA is inefficient.

In addition to the unemployment externality, the legislature may have overlooked other social costs to the consumer as well. The consumer suffers a transaction cost in the form of the time it takes to return the computers to a recycling facility. In order to be an efficient regulation, the benefit of recycling electronics must be greater than the social cost.¹²³ If the total cost to California consumers of the advance fee at purchase and the transaction cost of their time to return the computer to the accepting location are greater than the social benefits of not having the computer enter the municipal waste stream, then the California regulation, according to Posner's reasoning, is inefficient.¹²⁴

The economic consequences of California's ARF regulation are not all negative, however. The electronic recycling business in the area is booming.¹²⁵ The biggest recycler in the state realized over \$20 million in revenue in 2006. In addition to the state payment the recycler receives, he also gains revenue from the materials sold from the devices.¹²⁶ California paid out \$74.6 million in 2005 and 2006 to electronic waste recyclers. This has attracted additional electronic waste disposal businesses, suggesting that those already in the industry may be earning supernormal profits (i.e., a return on capital greater than what is available in other industries). Since the implementation of EWRA, the number of recyclers and collectors has nearly tripled, increasing competition.¹²⁷ To keep profits up despite all of the competition, collectors hold recycling events to gather electronic waste.¹²⁸ These events lower the transaction costs to consumers by making more convenient drop-off locations. When transaction costs are lowered, the consumer is more likely to remove the product from storage and bring it to the event.¹²⁹ Thus, the recyclers gain revenue.

These events will attract free riders into the State of California. Free riders would include consumers who wish to recycle and did not purchase a product in California. To prevent this problem, substantial paperwork would be necessary, creating additional administrative burdens.¹³⁰ Free riders will inflict these additional costs on the waste disposal system. If no effective mechanisms are implemented to prevent free riders, then in the long run the free rider will “suffer with the others the effects of the lack of optimal provision of environmental goods and services.”¹³¹ In this case, they eventually will have no place to safely dispose of electronic waste and/or will be exposed to toxic chemicals from landfill leaching.

C. Washington State

Washington State has a comprehensive electronic waste recycling law.¹³² Washington commands manufacturers to pay for the entire recycling costs of electronics. Costs will cover the expense of collection, transportation, and processing from all electronic consumers in the state.¹³³ This approach differs from both California’s ARF and Maine’s EPR. The program is completely free to residents, businesses, schools, government entities, and charities.¹³⁴ Manufacturers have the choice to join a central plan run by Washington State or to implement their own recycling program.¹³⁵

Analogous to the Maine electronic waste disposal scheme, this type of EPR legislation places a heavy financial burden on the electronics business. In addition to recycling costs, both states require proportionate responsibility for orphan waste, which imposes even more capital waste on producers.¹³⁶ In some ways, Washington’s scheme is even more burdensome than Maine’s approach. For example, Washington makes the manufacturers responsible for all costs. In Maine, consumers are still responsible to finance some of the recycling process. However, both approaches have the potential to debilitate the electronics business with the high recycling costs burden.¹³⁷

As opposed to California’s ARF, Maine and Washington are incentivizing manufacturers to implement design changes that will make recycling less expensive.¹³⁸ Product design that facilitates cost-effective disassembly and high-quality recovery creates the positive externality of reducing toxics throughout the country. To keep marginal costs low, producers are not going to manufacture separate electronic products for different states. Therefore, design changes will benefit the entire United States. Some states, however, are going to free ride on other state’s legislative electronic waste disposal scheme and associated costs. Legislation is a product, but states outside Washington State do not pay for that product even though they derive benefits.

Commentators claim that the EPR approach to electronic waste is forcing manufacturers to become experts

in the garbage collection industry.¹³⁹ This will drive them to reallocate some of their financial resources into recycling, thus hindering production of their own electronic products.¹⁴⁰ Not only must the manufacturers expend financial and human capital, but they are not specialists in recycling, so they are less efficient than independent companies in the recycling business. However, it remains possible that the manufacturers’ gains in recycling knowledge may result in a more diversified (and hence profitable) business in the future.¹⁴¹ Further, critics argue that design changes will cause product quality to suffer.¹⁴² For example, there is disagreement in the electronic industry about the use of lead-free solder. Some experts state that using lead-free solder in electronics actually increases the long-term reliability of the product, thus extending its life before recycling.¹⁴³ In contrast, the EU directive recognizes reliability problems with components like lead-free solders and grants exceptions to certain products.¹⁴⁴ If the lifetime of the product is shortened, this will ultimately increase the amount of electronic waste produced. This may in turn increase the environmental impact, creating a negative externality from design changes which would render the regulation inefficient.

Part IV: Alternative Approaches

A. EU Approach

The United States approach of encouraging green consumer purchasing and regulating disposal is in contrast to EU regulations. The EU regulations take a dual approach: (1) they aim to stop the chemicals from entering electronics, and (2) they demand that manufacturers pay for recycling their products.¹⁴⁵ The EU has produced the WEEE and RoHS directives to control electronic waste disposal.¹⁴⁶

The EU is faced with some of the same problems as the United States with its implementation of the WEEE directive. For instance, the individual EU states must establish collection mechanisms and market share responsibility to run their electronic waste programs.¹⁴⁷ Because each country has to implement its own plan, electronic manufacturers will suffer the same burden that United States state patchwork regulations create. One cannot say dispositively which approach is better, the EU approach or the United States approach. However, the United States lags behind other countries in electronic waste disposal.¹⁴⁸ One key to success for United States regulation would be to utilize current municipal waste collection systems¹⁴⁹ because this will decrease the marginal cost of recycling each unit.

Although Maine and Washington modeled their electronic waste regulations after the EU, there are variations. Unlike Maine’s and Washington’s EPR schemes, the EU placed protections against free riding and orphan waste in its directives. Under WEEE and RoHS, the manufactur-

ers and the government share financing costs through insurance or contribution arrangements.¹⁵⁰ As in Maine and Washington, industry producers are responsible for the costs for treatment, reuse, and recycling of their products.¹⁵¹ Like Washington manufactures, EU producers can manage the waste on an individual basis or can contribute funding in central schemes.¹⁵² The local government in the EU (meaning the particular country) collects the funds and arranges collection points for consumers to drop off their electronic waste. Financing is established not by counting the collected devices and assigning responsibility (as Maine does) but by current market share of electronic products sold.¹⁵³

Under the EU electronic waste disposal scheme, EU consumers will incur these costs but manufacturers will have an incentive to design products that are safer for the environment and can be more easily and inexpensively recycled. United States government and citizens will benefit from these design changes. It would not make economic sense to create two different versions of the same product solely to satisfy different recycling regimes, so many European manufacturers (and manufacturers elsewhere who market heavily in the EU) will sell the “greener” EU model in the United States.¹⁵⁴ Therefore, the United States will be the recipient of a positive externality from the EU directives.

B. Council of State Governments/Eastern Regional Conference (CSG/ERC) and Northeast Recycling Council Approach

The Council of State Governments/Eastern Regional Conference (CSG/ERC) and The Northeast Recycling Council, Inc. (NERC) have developed draft legislation for electronic waste disposal.¹⁵⁵ In preparing this model, they gained input from stakeholders in the electronic waste disposal business (i.e., electronics manufacturers, environmental groups, recyclers, government representatives).¹⁵⁶ Key elements of the model are: (1) manufacturers pay a \$5,000 annual registration fee; (2) manufacturers either (i) pay for all recycling costs based on the state-calculated recycling rate or (ii) collect, transport, and process the products themselves; (3) the state agency manages the funds; and (4) retailers can sell only products of manufacturers that are in compliance with electronic waste regulations.¹⁵⁷

If all stakeholders were equally and effectively represented when this model was developed, and if transaction costs were zero, then according to the Coase Theorem this is an efficient regulation that should be adopted. “The Coase Theorem states that if bargaining is costless and cooperative then any choice of an entitlement or remedy will lead to an efficient outcome.”¹⁵⁸ This prediction requires that all affected parties engage in cooperative communications, which was a paramount goal of CSG/ERC and NERC meetings. This cooperation would tend to show that under a Coase Theorem analysis, CSG/ERC

and NERC devised an efficient outcome. However, they were faced with another challenge, the elevated transaction costs of negotiations. Negotiation costs, especially extended multi-party negotiations, are far above zero, and insufficient information and strategic behavior make it difficult to reach efficient outcomes.¹⁵⁹

Transaction costs are further increased when actors misrepresent or miscalculate estimates of the damages caused by pollution. Uncertainty exists when calculating the benefits of polluting activity and the costs of alternatives. “Polluters and their victims can gain strategic advantages by misrepresenting these parameters or by providing estimates that fall at different ends of the range of uncertainty.”¹⁶⁰

The Coase Theorem illustrates that there is no coordinating entity that by itself could assign efficient property rights regarding environmental resources.¹⁶¹ However, the Coase Theorem has limited application in the electronic waste disposal problem.¹⁶² The Coase Theorem cannot offer meaningful analytical assistance when maximum social welfare is considered rather than maximum wealth in a negotiating situation.¹⁶³ Government entities and manufacturers have both interests in mind during negotiations because typically environmental damage is associated with costs which reduce maximum wealth. Further, the Coase Theorem cannot facilitate efficient regulation in an imperfect market with unpredictable production and consumption settings.¹⁶⁴ Electronic waste disposal is subject to all of these factors, making the Coase Theorem an unrealistic theory for analyzing electronic waste disposal regulation.

Further, when transaction costs are significant, the Coase Theorem becomes inapplicable. The theorem assumes that all transaction costs are zero when the rational parties voluntarily bargain their way to Pareto-efficient resource allocation.¹⁶⁵ Thus, the relevance of the Coase Theorem to electronic waste analysis is limited further. It won’t lead to an efficient outcome in the voluntary cooperative arrangements when dealing with public goods because of the inherent numerous transaction costs. The mere existence of transaction costs suggests that a property rights approach cannot offer blanket solutions to environmental problems.¹⁶⁶

The Coase Theorem, however, does support one useful option to electronic waste disposal: Pigouvian taxes. Again, the Coase Theorem states that “if there are no transaction costs, the most efficient solution is to clearly define the property rights. Thus, property rights and markets offer solutions to problems of externalities.”¹⁶⁷ These solutions will include parties negotiating their way to a socially optimal price for the pollution. That price could be a Pigouvian tax. A Pigouvian tax is charged per unit of pollution output and the tax amount equals the marginal damage the pollution causes to the economic system.¹⁶⁸ The tax creates an efficient output level, however, only

when all information concerning damages and contribution is identified.¹⁶⁹ Pigouvian taxes or per unit taxes may work to provide incentives to reduce the magnitude of the pollutant. Therefore, both Pigouvian taxes and the Coase Theorem imply that there are efficient levels of pollution. The Pigouvian tax is an efficient solution for the right to pollute where the marginal damage of the pollution equals the market price.¹⁷⁰

“Consumers are going to continue disposing of their electronic waste at the least costly method to them. Therefore, a financing system will need be developed to reduce costs to consumers and encourage recycling.”

Part V: Conclusion

This article establishes that action needs to be taken to manage electronic waste disposal. The amount of electronic waste is going to overwhelm landfills as the amount of waste continues to increase. For example, the Federal Communications Commission (FCC) now requires all new televisions to be equipped with technology for receiving digital signals. This phase-out will result in 500 million outdated devices that will have to be landfilled or recycled.¹⁷¹ Consumers are going to continue disposing of their electronic waste at the least costly method to them. Therefore, a financing system will need be developed to reduce costs to consumers and encourage recycling.

Economic analysis indicates that all stakeholders, including government and industry, should collaborate to develop an environmentally responsible and economically efficient plan. This will require all parties to accurately share and gather information. In order to avoid the economic waste that a patchwork system creates, the federal government should implement the financing system. The federal government can look to the EU for guidance but should keep in mind that the EU does not have all the solutions.

The negotiations should consider the pros and cons of the ERP, ARF, and product stewardship approaches to strike an appropriate balance. Ideally the most efficient regulation will protect the environment while allowing all businesses to operate and profit.

Endnotes

1. United Nations, *Basel Conference Addresses Electronic Wastes Challenge*, <http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=485&ArticleID=5431&l=en>. Reporting: 1) 20 to 50 million metric tons per year of electronic waste are produced, totally more than 5% of all global municipal solid

waste; 2) in the United States, 14 to 20 million computers are disposed of yearly; 3) in the European Union (EU) Electronic Waste is predicted to increase by 3 to 5% yearly; 4) it is anticipated that developing countries will triple their electronic waste by the year 2010.

2. See Major George J. Konoval, *Electronic Waste Control Legislation: Observations on a New State Environmental*, 58 A.F. L. Rev. 147, 150 (2006) [hereinafter Konoval] (stating that the price of personal computers continues to fall, making replacement more cost efficient for the consumer than repair. Life spans of electronics, specifically computers and cellular phones, are one to two years).
3. Elizabeth Moore, *Momentum Builds for Revolution to Recycle Electronic Waste*, *The Christian Science Monitor*, July 31, 2006, <http://www.csmonitor.com/2006/0731/p13s02-stct.html>.
4. *Maine makes TV, PC Monitor Makers Recycle* (January 18, 2006), <http://www.msnbc.msn.com/id/10910607/from/ET/> [hereinafter MSN, Maine]; See also Silvia Spring, *Recycling: This Old Gadget*, *Newsweek International* (February 13, 2007), <http://www.msnbc.msn.com/id/15675165/site/newsweek/>.
5. Council Directive 2002/95, *Restriction of the Use of Certain Hazardous Substances in Electrical and Electronic Equipment*, 2003 O.J. (L 37/19) [hereinafter RoHS].
6. “E-cycling” Puts New Life in Electronic Junk: Toxic Trash Turned into Everyday Objects by Growing Industry (Jan. 2, 2006) <http://www.msnbc.msn.com/id/10642954/page/2/> [hereinafter E-cycling Junk].
7. See Linda Roeder, *U.S. EPA Launches Campaign to Encourage Collection, Recycling of Electronic Waste*, 26 Int’l Env’t Rep. 93, Jan. 15, 2003 [hereinafter Roeder, EPA] (explaining if not disposed of properly, the toxic materials in electronic products can pose risks to public health and environment); see also Linda Roeder, *Hazardous Waste: E-Waste Mandates Unnecessary, Too Costly*, *Competitive Enterprise Institute Report Says*, 36 Env’t Rep. 5, Feb. 4, 2005 (reporting EPA states releases to the environment can occur through landfill leaching an incinerator ash.) [hereinafter Roeder, Mandates]; see also *supra* note 1 and accompanying text (informing that when the 183 million computers become obsolete they leave behind hazardous wastes such as lead, cadmium, and mercury).
8. *Toxic Sweatshops*, *Computer Take Back* (October 2006), <http://www.computertakeback.com/docUploads/ToxicSweatshops.pdf>. Explains: 1) Mercury exposure can cause permanent kidney and central nervous system damage; 2) Hexavalent Chromium exposure can cause DNA cell damage and severe allergic reactions; 3) Lead is strongly linked to brain damage, nerve damage, blood disorders, fetal developmental damage and is especially dangerous for children. See also Layne Nakagawa, *Toxic Trade: The Real Costs of Electronic Waste Exports from the United States*, World Resources Institute (Amy Cassara and Tom Damassa eds., 2006), http://earthtrends.org/features/view_feature.php?theme=5&fid=66 [hereinafter Toxic Trade]: “Mercury is the most prevalent toxic metal found in e-waste. It is in circuit boards, switches, medical equipment, lamps, mobile phones, and batteries. Mercury transforms into methyl mercury in water, where it can accumulate in living organisms, typically via fish, concentrating in large fish and humans at the top of the food chain. Mercury is readily absorbed by the human body, ultimately inhibiting enzymatic activity and leading to cell damage”; see also *The Problem*, *Computer Take Back*, http://www.computertakeback.com/the_problem/index.cfm (A 20-acre lake and the fish inside can be contaminated by just 1/70th teaspoon of mercury); see also E-cycling Junk, *supra* note 6 (reporting: 1) Cathode ray tubes from older televisions and computer monitors can contain four to eight pounds of lead, which can leach from landfills into groundwater; 2) chip resistors and semiconductors contain cadmium, which can cause kidney damage; 3) mercury found in thermostats, relay switches and telecom equipment can percolate into water bodies, which can poison food sources. Mercury is linked to brain damage in humans).

9. Toxic Trade, *supra*, note 8 (EPA reported that in 2003 the United States generated 2.8 million tons of electronic waste and recovered through reuse and recycling 290 thousand tons. The remainder entered the municipal waste stream).
10. Compare Timothy G. Townsend et al., *RCRA Toxicity Characterization of Computer CPUs and Other Discarded Electronic Devices* (2004), <http://www.ees.ufl.edu/homepp/townsend/Research/ElectronicLeaching/UF%20EWaste%CC20TC%CC20Rep%CC20July%CC2004%CC20C1.pdf>; with Scott Slesinger, *Sham Science Debunked*, The Washington Post, July 2, 2005 [hereinafter Slesinger] (Contrary to his institute report, Townsend did not show with his studies that landfill leaching will not affect our environment. Townsend showed that monitors fail EPA's toxic waste testing designed to simulate long-term landfill exposure and this is why he is continuing his research.); and Basel Action Network, *Mobile Toxic Waste: Recent Findings on the Toxicity of End-of-Life Cell Phones* (2004), <http://www.ban.org/Library/mobilephonetoxicityrep.pdf> (finding: 1) EPA is still conducting toxicity analysis on the various electronic waste streams; 2) CRTs are deemed toxic and other products are still being studied); and Linda Roeder, *States Say Federal Action May Be Needed to Address Concerns over Electronic Waste*, 36 Env't Rep. 29, July 22, 2005 [hereinafter Roeder, Federal Action] (EPA states: 1) that it has not yet found environmental harm from an electronic waste contaminated landfill; 2) the future harm from electronic waste contaminants is difficult to predict because the quickly changing technology and its evolving nature; 3) if a landfill leachate protection system failed, contaminants levels "would rise to twice the level of national safe drinking water standards. However, these contaminants would be rendered harmless by being diluted"); and U.S. Gen. Accounting Office, *Electronic Waste: Strengthening the Role of the Federal Government* 14 (2005) [hereinafter GAO Report] (Even though one study insinuates that landfill leaching is not a concern with modern U.S. landfills, there is great uncertainty concerning the risks associated with toxic substances contained in electronics. The EPA has declared several of these substances "priority toxic chemicals for reduction" because they are harmful in very small quantities, indicating any amount of landfill leachate will be dangerous).
11. See *Proposal for a Directive of the European Parliament and of the Council on Waste Electrical and Electronic Equipment*, at 4 (June 13, 2000), http://europa.eu.int/eur-lex/en/com/pdf/2000/en_500PC0347_02.pdf (Modern landfills are not watertight).
12. *Hazardous Waste Management System; Modification of the Hazardous Waste Program; Cathode Ray Tubes and Mercury-Containing Equipment*, 67 Fed. Reg. 40,508-510 (June 12, 2002) (codified at 40 C.F.R. pts. 260-61, 264, 268, 270, 273) ("61% of the computers sold in the United States since 1981 are being stored by users awaiting disposal"); see also Konoval, *supra* note 2, at 150-151 (reporting: 1) 20 million television sets became obsolete in 2003 and a small proportion were recycled or disposed of in landfills; 2) there is an approximately 90 million annual gap in computers that have become obsolete and what has been accounted for in annual landfill disposal).
13. Roeder, EPA, *supra* note 7; Maryland Department of the Environment, <http://www.mde.state.md.us/Programs/LandPrograms/Recycling/SpecialProjects/ecycling.asp>
14. See GAO report, *supra* note 10 ("The U.S. Geological Survey, for instance, reports that 1 metric ton of computer scrap contains more gold than 17 tons of ore and much lower levels of harmful elements common to ores, such as arsenic, mercury, and sulfur. If ultimately disposed in landfills, either in the United States or overseas, valuable resources, such as copper, gold, and aluminum, are lost for future use").
15. EPA, WasteWise Update, EPA 530-N-00-007 (Oct. 2000), available at <http://www.epa.gov/wastewise/pubs/wwupda14.pdf> (Scrap dealers previously collected electronics solely to recover the precious metals. There is still a market for reuse of these metals as well as a need to recycle other components).
16. See GAO report, *supra* note 10 (The National Safety Council estimates that in 2003, 70 million computers became obsolete and that only 7 million were recycled).
17. *Id.* ("Consumers in Snohomish County, Washington, for instance, may have to travel more than an hour to the nearest drop-off location, which then charges between \$10 and \$27 per unit, depending on the type and size of the product").
18. *Id.* at 14.
19. Richard Posner, *The Economics of Law*, 6th ed., 20-21 (Aspen 2003) [hereinafter Posner].
20. Environmental Technology Council, Testimony of Scott Slesinger, Vice President for Governmental Affairs, the Environmental Technology Council, Before the Subcommittee on Superfund and Waste Management, Committee on Environmental and Public Works—U.S. Senate at Oversight Hearing on Electronic Waste, July 26, 2005, http://www.etc.org/slesinger_etc_7-26-05ewasteab.doc [hereinafter Slesinger, Testimony].
21. *Infra* notes 127-131 and accompanying text.
22. C. Hicksa et al., *The Recycling and Disposal of Electrical and Electronic Waste in China—Legislative and Market responses*, Environmental Impact Assessment Review 25 (April 2005), 459–471 (In Guiyu, China, waste is sold and traded for an industry valued at about RMB 600 million per year, approximately \$72 million USD).
23. Roeder, Federal Action, *supra* note 10 (EPA officials state the cost to recycle a desktop computer is about \$15, while the value of materials recovered is between \$1 and \$2.50).
24. Timothy Mann, *Electronic Product Recycling: Overview of Worldwide Requirements and IBM Recommended Approach for Consumer E-Waste Recycling System*, American Law Institute—American Bar Association 145, 151 (Oct. 27, 2006) (market value of salvageable materials is \$1.50 to \$2.00 per unit) [hereinafter Mann].
25. Slesinger, Testimony, *supra* note 20 (the price of lead has fluctuated dramatically over the years).
26. *Id.*
27. Posner, *supra* note 19, at 169.
28. *Id.*
29. See GAO Report, *supra* note 10 (reporting: 1) "A Hewlett-Packard official told us 30 different screws must be removed to take out one lithium battery when disassembling a Hewlett-Packard computer for recycling." 2) 50 percent of Hewlett-Packard's total costs for recycling are labor costs associated with disassembly).
30. *Id.* at 12 (Recycler for Hewlett-Packard states, "[I]f [they] spent \$1 in added design costs to reduce the number of different screws in each computer, it would save approximately \$4 in its disassembly costs.").
31. *Id.*
32. *Id.*
33. Betsy Billingham, *E-Waste: A Comparative Analysis of Current and Contemplated Management Efforts by the European Union and the United States*, 16 Colo. J. Int'l Envtl. L. & Pol'y 399, 422 (Spring 2005) [hereinafter Billingham].
34. Lisa T. Belenky, *Cradle to Border: U.S. Hazardous Waste Export Regulations and International Law*, 17 Berkeley J. Int'l L. 95 (1999).
35. *Id.*
36. P.K. Rao, *International Environmental Law and Economics*, 48 (Blackwell 2002) (defines transboundary externality) [hereinafter Rao, International].
37. See Terence Chea, *Firms Go Green as E-Waste Mounts*, CRM DailyTech (March 5, 2007), http://www.crm-daily.com/story.xhtml?story_id=01300086179A [hereinafter Chea, Firms] ("Among the e-waste that is recycled, activists say, up to 80 percent is exported overseas to dismantling shops where poor workers are exposed to hazardous fumes and chemicals while trying to

- extract valuable metals and components"); *see also* Catherine K. Lin et al., *Globalization, Extended Producer Responsibility and the Problem of Discarded Computers in China: An Exploratory Proposal for Environmental Protection*, 14 Geo. Int'l Env'tl. L. Rev. 525, 525 (2002) (noting that electronic recycling is an environmentally hazardous activity because without proper personal protection equipment, workers can be exposed to hazardous substances) [hereinafter Lin, China].
38. *Id.* at 527 (noting: 1) China is one of the preferred destinations for electronic waste processing because of its low labor costs; 2) the dismantling of the computers causes subsurface contamination, air pollution; 3) the process exposes workers to toxics which cause childhood illness and birth defects).
39. *The Digital Dump*, Computer Take Back (October 2005), <http://www.computertakeback.com/docUploads/TheDigitalDumpWeb.pdf>.
40. *Id.*
41. Rao, International, *supra* note 36, at 221.
42. *Id.* at 48.
43. *See* Mann, *supra* note 24, at 149 (typically 8 to 12 years old for computers and 15 to 17 years for televisions).
44. *See* Jennifer Fordyce, *Chapter 526: Out With the Old, in With the New—California Addresses the Growing Problem of Electronic Waste*, 35 McGeorge L. Rev. 529, 541-542 (2004) [hereinafter Fordyce] ("organizations can lose between twenty-five and thirty dollars for each computer or television that they accept as a donation").
45. *See id.* (only 10% of the donated computers could be reused or refurbished).
46. *See* Roeder, Mandates, *supra* note 7 ("it can cost \$500 to recycle a ton of electronic waste, but it costs only \$40 to landfill").
47. *Supra* note 16 and accompanying text.
48. Rao, International, *supra* note 36, at 83.
49. Carol M. Rose, *Scientific Innovation and Environmental Protection: Some Ethical Considerations*, 32 Env'tl. L. 755, 760 (2002).
50. *Id.* at 762.
51. *Id.*
52. *Id.* at 767.
53. Rao, International, *supra* note 36, at 52.
54. *See id.* (explaining free-riding is dependent on whether or not they pay or participate in a "responsible" manner).
55. *Id.* (indivisible: the usage of one party does not always reduce the usage for another).
56. *Id.* at 54.
57. *Id.* at 54.
58. Linda Roeder, *Hazardous Waste GAO Calls National Financing System Critical for Recycling Electronic Waste*, 36 Env't Rep. 30, July 29, 2005 [hereinafter Roeder, *Nat'l Financing*] (It has been shown that more recycling takes place in states that have landfill bans than states with just recycling programs available).
59. *See* E-cycling Junk, *supra* note 6 (Senate has proposed tax incentives to electronic recyclers who properly dispose of electronic wastes).
60. Linda Roeder, *Report Urges EPA to Draft Legislation to Spur Used Electronics Recycling System*, 238 Daily Env't Rep., Dec. 13, 2005.
61. *See* 42 U.S.C. §§ 6901-6992k (2000) (RCRA regulates hazardous wastes from cradle to grave. A waste is hazardous if it exhibits one or more of the following characteristics: toxicity, ignitability, corrosivity, and reactivity); 40 C.F.R. pt. 261, subpt. D (2004); *see also* 40 C.F.R. §§ 261.21-261.24 (2004) (or if it is an explicitly "listed" waste under the regulations).
62. *See* 40 C.F.R. § 261.4(b)(1) (2004) (household exclusion) and 40 C.F.R. § 261.5(f)(3) (2004) (conditional exemption for companies generating less than 220 pounds of hazardous waste per month); *see also* 45 Fed. Reg. 33099 (May 19, 1980), where EPA explains its interpretation of the household waste exception. Hazardous waste program "is not to be used to control the disposal of substances used in households or to extend control over general municipal wastes based on the presence of such substances."
63. *See* Posner, *supra* note 19, at 391 (Prohibitive as the costs are disproportionate to the benefits).
64. Introduction to Final Hazardous Waste Rules, 45 Fed. Reg. 33,099 (May 19, 1980); S. Rep. No. 94-988, at 16 (1976); *see also* 49 Fed. Reg. 44,978 (Nov. 13, 1984).
65. *See* Roeder, Mandates, *supra* note 7 (EPA has stated that its goal is to promote greater product stewardship of electronics).
66. *Grass Roots Recycling Network*, Computer Take Back, at <http://www.grn.org/epr/index.html>.
67. *See* Linda Roeder, *Green Computer Database Established with Focus on Large Volume Purchasers*, 37 Env't Rep. 30 July 26, 2006 (The EPEAT rating lists products by performance levels based on 23 criteria met as bronze, silver, or gold. Criteria include the reduction of materials such as lead, cadmium and mercury, improved design for "end-of-life and end-of-life management and life-cycle extension energy conservation, corporate performance, and packaging"); *See, e.g.*, Linda Roeder, *EPA Announces New Voluntary Standard with Criteria for Large Computer Purchasers*, 37 Env't Rep. 19, May 12, 2006 (consumers can use the database to guide their purchasing).
68. *See* GAO Report, *supra* note 10, at 25 (Federally implemented programs include: 1) the Federal Electronics Challenge, 2) Electronic Product Environmental Assessment Tool (EPEAT), 3) Plug-In to eCycling program).
69. Linda Roeder, *Executive Order Requires Federal Agencies To Reduce Energy Use, Rely on Renewable*, 38 Env't Rep. 4, Jan. 26, 2007 (President Bush signed an Executive Order requiring federal agencies to obtain 95 percent of their computers and electronic products using EPEAT).
70. Percival et al., *Environmental Regulation: Law, Science, and Policy*, 5th ed. 28 (Aspen 2006) [hereinafter Percival].
71. *See* Jonathan Sidener, *Get the Lead Out*, San Diego Union Tribune, Feb. 6, 2006 (Dell takes back Dell products for free and competitors' for \$10).
72. Posner, *supra* note 19, at 436.
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.*
78. *See* Chea, *Firms*, *supra* note 37 (Michael Dell says, "It's the right thing to do for our customers. It's the right thing to do for our earth.").
79. *Id.*
80. *Id.*
81. *Id.* (Roseville and Nashville, Tenn.).
82. National Recycling Coalition, *Industry Initiatives for electronic recycling*, <http://www.nrc-recycle.org/resources/electronics/industry.htm>.
83. *See* Linda Roeder, *Electronics Industry Seeks Federal Role on Recycling, Remains Divided on Funding*, 174 Daily Env't Rep. 6 (Sept. 9, 2005) (95% of manufacturers, state and local government officials surveyed by general Accounting Office (GAO) stated that they would support a national regulation).

84. The Consumer Electronics Association, *Riding the Green Wave: Why Electronics Recycling Compliance Is Critical to Your Company*, Federal News Service, March 26, 2007, available at http://www.ce.org/Events/event_info/downloads/WF07/3.26.07%20Senator%20Wyden%20Keynote%20&%20Electronics%20Recycling%20Panel.doc. (California Electronic Waste regulations apply to everyone. In contrast, Maine's apply only to products sold to household users. Thus, Maine Manufacturers are currently not responsible for businesses', medical facilities', educational institutions', or state and local governments' electronics disposal. There is also disagreement among states about which devices qualify to be recycled under the various programs. It is estimated \$25 million is being spent in compliance and most of that figure is dead weight costs.).
85. See GAO Report, *supra* note 10 (Hewlett-Packard (HP) in California has an advance recovery fee on its product and has invested over \$3 million to implement and spends \$250,000 per year to maintain. HP in Maine participates in a mandatory take back program at \$90,000/yr cost. HP estimates it could cost over \$2 million dollars per state if a new state system differs from those currently existing).
86. Anthony DePalma, *Afterlife for Old Computers Is Envisioned in Council Bill*, N.Y. Times, May 25, 2005.
87. Roeder, *Federal Action*, *supra* note 10. Businesses' transaction costs can include high legal fees that accumulate throughout the compliance process.
88. Linda Roeder, *Congressional Resolution Would Direct House, Senate to Recycle Used Electronics*, 222 Daily Env't Rep. 15, Nov. 18, 2005 (E-Waste working group goal is to increase awareness and encourage a federal solution).
89. National Computer Recycling Act, H.R. 425, 109th Cong. (2005).
90. Wyden testifies before the Senate Committee on Environment and Public Works Subcommittee on Superfund and Waste Management, July 26, 2005, http://wyden.senate.gov/media/speeches/2005/07262005_ewaste_testimony.html.
91. The Library of Congress, <http://thomas.loc.gov/cgi-bin/thomas> (Senate 510 status is it has been read twice and referred to the Senate Committee on Finance, House Representatives 4316 has been referred to the Subcommittee on Environment and Hazardous Materials, for a period to be subsequently determined by the Chair).
92. Posner, *supra* note 19, at 392.
93. *Id.*
94. *Id.* (Cost of living, cost of health care, population affected, and other factors that would change pollution's effects (e.g., geology, hydrogeology, porosity of the soil) would need to be weighed for each local area to devise a tax schedule. Further, the potential ramifications of each electronic unit disposed would need to be calculated).
95. Rao, International, *supra* note 36, at 81.
96. *Supra* notes 46-58 and accompanying text.
97. Rao, International, *supra* note 36, at 81.
98. Roeder, *Nat'l Financing*, *supra* note 58.
99. The states: CA, HI, IL, IA, KY, ME, MA, MI, MN, MS, NB, NH, NJ, NY, NC, PA, RI, SC, TN, VT, WA, and WI.
100. MSN, Maine, *supra* note 4.
101. New Rules, <http://www.newrules.org/environment/ewaste.html>.
102. Roeder, *Federal Action*, *supra* note 10.
103. MSN, Maine, *supra* note 4.
104. *Id.*
105. Me. Rev. Stat. Ann. tit. 38, § 1610(3) (2003).
106. Posner, *supra* note 19, at 8.
107. Janet McClintock, *Treatment of Electronic Waste in Maine*, SM028 ALI-ABA 155 (Oct. 26-27, 2006); see also Manufacturers (and their Brands) that have NOT Notified, <http://www.maine.gov/dep/rwm/ewaste/pdf/donotsell.pdf> (There is no indication on the Maine Department of the Environment website that indicates a penalty beyond a retail sales ban of the non compliant manufacturer's product).
108. Me. Rev. Stat. Ann. tit. 38, § 1610(6).
109. *Id.*
110. See MSN, Maine, *supra* note 4 (orphan units whose manufacturers are no longer in business will be shared by the other companies in proportion to their overall costs).
111. 62,526 lbs of Orphan waste times 33 cents equals \$20,634. See <http://www.ecyclingresource.org/ContentPage.aspx?PageId=23>; National Center for Electronics Recycling Infrastructure Clearinghouse, State Implementation Status, (updated Mar. 2007), available at http://www.electronicrecycling.org/NCER/UserDocuments/ME%20ewaste%20collection%20overview%20chart%201_18_06%20to%206_30_06.xls. (62,526 lbs of Orphan waste was collected in Maine from January 2006 to June 2006. The current price to recycle in Maine is 33 cents a pound; therefore under Maine's program \$20,634 will be divided by the 153 manufacturers registered based on their pro rata share of electronic waste disposed).
112. Cal. Pub. Res. Code §§ 42460-42486 (2005).
113. *Id.* § 42480.
114. *Id.* § 42475-3.
115. Cal. Pub. Res. Code § 42461(d).
116. Cal. Pub. Res. Code § Id. § 42464(b)(1)-(3).
117. Billingham, *supra* note 33, at 426.
118. Fordyce, *supra* note 44, at 540.
119. *Id.* at 542-543.
120. Roeder, *Federal Action*, *supra* note 10.
121. Fordyce, *supra* note 44, at 544.
122. Rao, International, *supra* note 36, at 58.
123. Posner, *supra* note 19, at 396.
124. *Id.*
125. Martin Zimmerman, *Turning Electronic Castoffs into Business*, Baltimore Sun, Feb. 11, 2007, <http://www.baltimoresun.com/news/nationworld/bal-te.recycle11feb11,0,5133922.story?coll=bal-nationworld-headlines>.
126. *Id.* Reporting: 1) Monitors contain 4 to 8 pounds of lead; 2) the going rate is 48 cents a pound, split by the company that collects the waste and the company that recycles it. A 19-inch CRT computer monitor weighs 40 to 50 pounds, so the money can add up fast.
127. *Id.* "At the end of 2004, there were 150 e-waste collectors and 12 recyclers in the state, the California Integrated Waste Management Board says. Now there are 544 collectors and 62 recyclers."
128. *Id.*
129. EPA, A Guide to Planning and Conducting Environmentally Aware Meetings and Events (1996), available at <http://www.epa.gov/epaoswer/non-hw/reduce/grn-mtg/gm-bklt.txt> (The EPA recommends holding recycling events near mass transit services).
130. GAO report, *supra* note 10.
131. Rao, International, *supra* note 36, at 84.
132. Computer Take Back, <http://www.computertakeback.com/>.
133. <http://www.leg.wa.gov/pub/billinfo/2005-06/Pdf/Bills/Senate%20Passed%20Legislature/6428-S.PL.pdf>.
134. New Rules, <http://www.newrules.org/environment/ewaste.html>.

135. West's RCWA 70.95N.030, WA ST 70.95N.030 West's RCWA 70.95N.030.
136. *Supra* notes 108-114 and accompanying text.
137. *Supra* notes 108-114 and accompanying text.
138. *Supra* note 117 and accompanying text.
139. Megan Short, *Taking Back the Trash: Comparing European Extended Producer Responsibility and Take-Back Liability to U.S. Environmental Policy and Attitudes*, 37 Vand. J. Transnat'l L. 1217 (2004).
140. *Id.*
141. Posner, *supra* note 19, at 447.
142. *Id.*
143. Dataweek, *New Pb-free Technologies Boost Product Reliability*, Oct. 18, 2006, <http://dataweek.co.za/news.aspx?pkIDNewsId=22726&pkIDNewsId=595&pkIDCategoryID=4>
144. RoHS, *supra* note 5, at Annex, item #7 (Admission of reliability problems and granting servers' exemption from regulation until 2010).
145. Holly Evans et al., *Beyond the Precautionary Principle*, Manufacturing Business Technology, Jan. 2006, http://www.mbtmag.com/current_issues/2006/jan/insbus2.asp (the directives authorize mandatory elimination of four hazardous metals (lead, cadmium, mercury, and hexavalent chromium) from all electronic equipment).
146. *See* RoHS, *supra* note 5 (EU adopted RoHS in February 2003 and it took effect on July 2006. It is not a law; rather, it is only a directive. Restricts the use of six hazardous materials in the manufacture of electronics); *see also* Waste Electrical and Electronic Equipment Directive (WEEE), Official Journal of the European Union, L 37/24, 13.2.2003, Directive 2002/96/EC of the European Parliament and of the council on waste electrical and electronic equipment, January 27, 2003 (sets collection, recycling and recovery goals for electronics).
147. *Supra* notes 108-111 and accompanying text.
148. Susan McInerney, *Computer Firms Improve E-Waste Scores, but U.S. Still Lags Behind Japan, EU Efforts*, 26 Int'l Env't Rep. 108, 109, Jan. 15, 2003.
149. Mann *supra* note 24, at 152 (municipalities have already invested in waste collection systems).
150. WEEE, *supra* note 146.
151. *Id.*; RoHS, *supra* note 5.
152. *Id.*
153. *Id.*
154. Steve Bush, *Will the US Play Hard Ball with RoHS?* Electronics Weekly, September 28, 2006, <http://www.edn.com/article/CA6375985.html?ref=nbra>.
155. The Council of State Governments/Eastern Regional Conference (CSG/ERC) and the Northeast Recycling Council, Inc. (NERC), <http://www.csgeast.org/enrgwaste.asp>.
156. *Id.*
157. *Id.*
158. Percival, *supra* note 70, at 74.
159. *Id.*
160. *Id.*; *see also supra* Slesinger, note 10 (Townsend accused of junk science).
161. Rao, International, *supra* note 36, at 64.
162. *Id.*
163. *Id.*
164. *Id.* at 65.
165. *Id.*
166. *Id.* at 66.
167. *Id.* at 63.
168. *Id.* at 59.
169. *Id.*
170. *Id.* at 66.
171. Fordyce, *supra* note 44, at 541.

Heather Drayton is a third-place winner in the 2007 Professor William R. Ginsberg Memorial Essay Contest. She submitted this article when she was a student at Hofstra University School of Law.

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Section History Project: Status Report

By Louis A. Alexander

As many of our long-term members will remember, our Section was established in late 1980 by the New York State Bar Association. The initial meeting of the Section's Executive Committee was held on January 23, 1981 in New York City. Arthur Savage was the first Chair of the Section, with Nick Robinson, Ernie Ierardi, John Hanna and Marty Baker serving as the other Section officers. The Section itself was an outgrowth of the Special Committee on Environmental Law, which the Bar Association established in 1974 and which had been chaired by Arthur Savage (the Special Committee would become a Standing Committee of the Bar Association in 1977).

"From the very beginning, our Section has taken a leading role on cutting-edge environmental issues, including, most recently, global warming, environmental justice, brownfield redevelopment, and wetland and SEQRA reform."

As Nick Robinson wrote in the inaugural issue of the Section's newsletter in 1981, "The overarching mission of this Environmental Law Section is to educate the bar to comprehend these new environmental laws and facilitate achieving their remedial purposes." From the very beginning, our Section has taken a leading role on cutting-edge environmental issues, including, most recently, global warming, environmental justice, brownfield redevelopment, and wetland and SEQRA reform.

Two excellent overviews of our history have previously been prepared. Gail Port, when she was Section chair, devoted one of her Section Chair messages to the Section's development (see *The New York Environmental Lawyer*, Spring/Summer 2000, volume 20, at 1-2). John Hanna, Jr., as Chair of the Special Committee to Commemorate the New York State Bar Association's 125th Anniversary, helped oversee the publication of *Of Practical Benefit: New York State Bar Association, 1876-2001*, which included a history for each Section, including our own (see *Of Practical Benefit*, at 171-72).

Lisa Bataille, Kathy Plog, and other personnel at the Bar Association have maintained records on Section programs, some of which have been included on our Section's portion of the New York State Bar Association Web site. Last year, an effort was commenced to update the historical information on our Web site to provide a more complete record of our Section's past activities. Since then, after an interesting read of musty collections of Sec-

tion journals and meeting minutes from the early days of the Section, the updating of this information has begun. This includes the following:

- A listing of Section Chairs from 1981 to 2008. Some trivia regarding Chair tenures: Art Savage has the longest service as Chair, first in the years that we were a special and standing committee and as first Chair of the Section. Since our becoming a Section, Nick Robinson has the distinction of being the only Section Chair to have served for two years. The Section bylaws subsequently established a 12-month term. The second longest serving Section Chair is John Greenthal, who, pursuant to a change in the Section's bylaws in 2002, saw two months added to his 12-month term!
- A listing of the recipients of the minority fellowship since the creation of the program in the early 1990s. The first fellowships were awarded in 1992. Through this program and the student essay contest (see next item), the Section has actively sought to introduce and involve new generations of law students in the environmental field.
- A listing of the Section's student essay contest winners. The essay contest was announced in the fall of 1987, with the first essay contest winners selected in 1988. As most of our members know, the essay contest was renamed the Professor William R. Ginsberg Memorial Essay Contest in honor of Bill and his long-standing dedication and commitment to the Section.
- A listing of the recipients of the Section Council's certificates of merit. Although members of the Section had been previously recognized for their involvement and leadership in the Section, the awarding of such certificates formally began in 1990. Under current practice, once a Section member receives a certificate of merit, he or she is not eligible to be considered for the certificate in subsequent years.
- And a listing of the recipients of Section awards since 1981. The list of the recipients of the Section awards reflects a veritable "who's who" of the men and women who have contributed to the advancement of environmental law at the New York State and federal level. The awards span the spectrum of environmental involvement—from governors to judges, from environmental organizations to environmental agency personnel, and from academics to private practitioners.

The compilation of awardees has been the most challenging aspect to the records search as the information on awards from the Section's early years is not fully complete. For those awardees where sufficient details have not been obtained, their names are included under the "Other Awards" entry on the Web site.

The Section has, in the past, given special or named awards to various individuals. For example, in 1982, the Section gave an award, entitled the John Burroughs Award, to then Governor Hugh L. Carey. Following the untimely death of Section member Robert C. Stover in 1984, the Section established an environmental advocate award in his honor. In 1985, the Section awarded the first Robert Stover Memorial Award to James Tripp, Esq. On May 5, 1992, the Section gave an award to Dr. David Axelrod, the former New York State Commissioner of Health "in recognition of his outstanding contribution to the environmental health" of New York State.

In 1999 the Section gave a Lifetime Achievement Award to then U.S. Environmental Protection Agency Administrator Carol Browner. In 2004, following passage

of landmark State brownfields legislation, Legislation of the Year Awards were given to Hon. Thomas P. DiNapoli, Hon. Carl L. Marcellino, Carl Patka, Esq., and Dale Desnoyers, Esq. More recently, the Section in January 2008 gave a special award to former Section Chair Gail Port for her commitment and dedication to the Section. Later, in May 2008, the Section gave an award to Alison H. Crocker, Deputy Commissioner and General Counsel to the New York State Department of Environmental Conservation, in recognition of her work in the field of environmental law.

This Section history project is ongoing, and the assistance of many colleagues has been greatly appreciated. I should note that in compiling information on past award recipients, Michael Gerrard, Ernie Ierardi, John Greenthal, Phil Weinberg, Marty Baker, and John Hanna, Jr., in particular, have assisted in "filling in the gaps" on the early years.

The goal is to ensure that, by the time of our 30-year anniversary, we will have a full Section history on the Web site.

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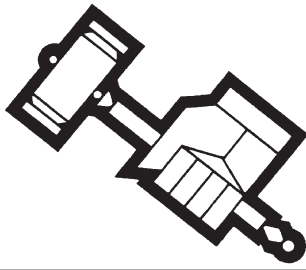
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Administrative Decisions Update

Prepared by Thomas F. Puchner

Commissioner's Determination of SEQRA Lead Agency for the Proposed Kingwood Development, Towns of Mamakating, Thompson and Fallsburg, Sullivan County Pursuant to Article 8 of the Environmental Conservation Law

December 5, 2007

This decision involves a determination by Alexander B. Grannis, Commissioner of the New York State Department of Environmental Conservation ("Commissioner" and "NYSDEC," respectively) resolving a "lead agency" dispute pursuant to the State Environmental Quality Review Act.¹ The Town of Mamakating Planning Board ("Mamakating Planning Board") and Town of Thompson Planning Board ("Thompson Planning Board") as well as NYSDEC Staff were unable to agree upon the proper lead agency for the proposed project, and as a result, the project sponsor sought a Commissioner designation of lead agency for purposes of SEQRA review. The Commissioner determined that NYSDEC was the most appropriate lead agency due to the "substantial potential regional and broader impacts of the proposed project," notwithstanding NYSDEC staff's position that a local agency should serve as lead agency.

I. Background

Kingwood LLC and Parkwood LLC proposed to create a mixed-use development on approximately 1,845 acres in the Towns of Mamakating, Thompson and Fallsburg, in Sullivan County. The project proposal included 1.3 million square feet of commercial development, with supporting new roads, central sewage treatment system, and central water supply from on-site wells, along with a residential development of approximately 1,000 new detached single-family residential units (the "Project"). Various aspects of the project would be located in the Towns of Mamakating, Thompson and Fallsburg. A dispute arose between the Mamakating and Thompson Planning Boards as to the proper lead agency.

A. Procedural History

The project sponsor sought the Commissioner's designation of lead agency to resolve the dispute between the planning boards of the two towns. The Mamakating Planning Board characterized the potential environmental impacts of the Project as predominantly local. The Thompson Planning Board argued for NYSDEC to serve as lead agency for the project, arguing that the potential impacts to the Neversink River system could have regional and state-wide significance. NYSDEC staff argued that the potential impacts to the Neversink were unlikely and that the potential impacts were primarily local such that a local agency should serve as lead agency. Other agencies with jurisdiction over the project included: the Town of Fallsburg; New York State Department of Health; Sullivan County Department of Public Works; and the Delaware River Basin Commission.

II. Decision of the Commissioner

The Commissioner resolves lead agency disputes pursuant to three criteria defined in the SEQRA regulations: (i) whether the anticipated impacts of the action are of primarily statewide, regional or local significance; (ii) which agency has the broadest governmental powers for investigation of the impacts of the proposed action; and (iii) which agency has the greatest capability for providing the most thorough environmental assessment of the proposed action.²

In considering the first criterion, the Commissioner agreed that many of the impacts identified by the agencies, such as construction phase impacts, were primarily local in nature. However, the operational phase impacts, such as traffic, water use, and wastewater could have greater than local consequences. The Commissioner for the first time in any Administrative decision also considered potential regional impacts from the project not identified by the agencies, including disproportionate: (1) generation of greenhouse gases (due to long driving distances inherent in a remote "ex-urban" "car-dependent" project); and (2) consumption of open land, water, and energy resources, as well as habitat fragmentation by "isolated, sprawling" sub-

divisions, which “represent a development pattern which is unsustainable in the long term.” Therefore, considering the impacts raised by the responding agencies and those identified by the Commissioner, the NYSDEC was the most appropriate lead agency under the first criterion.

With respect to the second criterion, the Commissioner determined that NYSDEC had the broadest authority to conduct environmental review. NYSDEC was best suited to effectively address the potential impacts “including the regional and wider impacts of accelerated greenhouse gas generation and habitat fragmentation as well as the infrastructure and resource demands inherent in such a massive development.” Therefore, based on the first two criteria, the Commissioner determined that NYSDEC should serve as lead agency.³

III. Conclusion

The Commissioner determined that the potential impacts of the Project were not primarily local in nature and NYSDEC was best suited to serve as lead agency for the environmental review of the project’s potential significant regional impacts.

* * *

***In re Application for a Permit to Install a
Public Water Supply Well (Middleville Road
No. 3), Town of Huntington, Suffolk County,
Pursuant to Environmental Conservation Law
Article 15 and 6 N.Y.C.R.R. Part 601***

-by-

**Suffolk County Water Authority,
Applicant**

Decision of the Commissioner

October 18, 2007

Suffolk County Water Authority (“SCWA”) applied to the New York State Department of Environmental Conservation (“NYSDEC”) for a water supply permit and an exemption from a moratorium on new public water supply wells in the Lloyd Sands aquifer (“Lloyd Sands”). NYSDEC Commissioner Alexander B. Grannis (“Commissioner”) in his decision dated October 18, 2007, denied the exemption application, finding that: (1) the proposed well was not located in an excluded “coastal community” as defined in the ECL; and in a case of first impression, that (2) SCWA did not demonstrate “just cause and extreme hardship” and therefore did not qualify for an exemption from the moratorium.

I. Background

This decision involves an application by the Suffolk County Water Authority (“SCWA”) for a water supply permit to drill a new public water supply well, Middleville

Road Well No. 3, in the Town of Huntington, Suffolk County, New York. The proposed well would have a capacity of 300 gallons per minute (“gpm”). The well would draw water from the Lloyd Sands aquifer in an effort to restore operation of an existing well known as Middleville Road Well No. 1, which has been out of service for several years due to nitrate levels in excess of drinking water standards. SCWA proposed to blend the water from the Lloyd Sands with Middleville Road Well No. 1, which would result in a combined capacity of 1,700 gpm with nitrate concentrations satisfying state water quality standards.

The “Lloyd Sands” is defined as “that geological strata generally known to be the deepest and oldest water-bearing layer of the Long Island aquifer system and shall not include bedrock.”⁴ In 1986 the Legislature enacted a moratorium on permits for new wells (as well as new withdrawals) in the Lloyd Sands for all “areas that are not in coastal communities.”⁵ “Coastal communities” are defined as “those areas on Long Island where the Magothy aquifer is either absent or contaminated with chlorides.”⁶ For proposed wells in communities subject to the moratorium, the Commissioner is authorized to grant exemptions from the moratorium “upon a finding of just cause and extreme hardship.”⁷

A. Procedural History

In its initial application, SCWA stated that the proposed well was not in a “coastal community.” SCWA subsequently changed its application, claiming that the proposed well is situated in a “coastal community” because the Magothy aquifer is contaminated with chlorides at the Middleville Road area. In the alternative, SCWA argued that even if the proposed well were subject to the moratorium, the circumstances were sufficient to demonstrate “just cause and extreme hardship” such that an exemption was warranted.

NYSDEC Staff (“Staff”) referred the application for an adjudicatory hearing, as required by the statute.⁸ Staff rejected SCWA’s contention that the well was in a “coastal community.” Nonetheless, Staff supported an exemption and permit for SCWA’s proposed well based upon “just cause and extreme hardship.” Following the adjudicatory hearing, Administrative Law Judge Maria E. Villa (the “ALJ”) issued a recommended decision finding that: (1) the proposed well was not located in a “coastal community”; and (2) SCWA had demonstrated “just cause and extreme hardship.”

II. Decision of the Commissioner

A. “Coastal Community”

As noted above, “coastal community” is defined to include areas where the “Magothy aquifer is either absent or contaminated with chlorides.”⁹ SCWA argued that the chloride concentration of 22 mg/l exceeded background concentrations of less than 10 mg/l, such that the Mid-

dleville Road area should be considered contaminated with chlorides. In support of this contention, SCWA presented evidence that the chloride level had doubled since Middleville Road Well No. 1 was installed in the 1970s, and that such an increase demonstrated “contamination.”

The Commissioner concurred with the ALJ’s finding that SCWA failed to establish that the proposed well was located in a “coastal community.” The Commissioner held that the mere presence of chlorides is not sufficient, concluding that if chloride amounts slightly over background levels constituted chloride contamination, it would undermine the purpose of the moratorium. The Commissioner relied heavily on the established water quality standard for chloride of 250 mg/l,¹⁰ and concluded that the Legislature’s use of the term “contaminated with” instead of “presence of” suggested that the statutory language should be read to mean “an amount of chlorides that could be injurious to humans or the environment.”¹¹ Nonetheless, the Commissioner declined to establish a bright-line rule based on the state water quality standard.

B. “Just Cause and Extreme Hardship”

Because the proposed well did not fall within an excluded “coastal community,” SCWA was required to satisfy the “just cause and extreme hardship” standard to qualify for an exemption from the Commissioner. As noted above, this was a matter of first impression for the interpretation of the “just cause and extreme hardship” standard, which is undefined in the statute.

The Commissioner examined the plain language of the statute and legislative intent, including testimony by the legislation’s Assembly sponsor. The Commissioner found that the Legislature clearly intended that any proposal to use water from the Lloyd Sands must demonstrate that contamination or intrusion would not likely occur and the Lloyd Sands would not be significantly impaired or otherwise compromised. Based on the plain meaning of the words “just cause and extreme hardship,” the limited nature of the Lloyd Sands’ water resources, the clear intent to be extraordinarily protective of the Lloyd Sands, and the record, the Commissioner determined that an extreme condition or emergency must be shown to satisfy the exemption standard. The Commissioner set forth the following criteria to be used in establishing “just cause and extreme hardship”:

- (i) The extent to which an extreme water supply condition or emergency has been demonstrated; and
- (ii) Potential environmental impacts of the proposed well upon the Lloyd Sands; and
- (iii) The availability of technically and economically feasible alternatives to the proposed withdrawal of water from the Lloyd Sands.

Here, no extreme water supply condition or emergency was shown. First, while the Commissioner acknowledged that the alleged presence of nitrates above the state drinking water standard is a serious and legitimate issue, the nitrates could be treated and removed. Second, SCWA admittedly could meet its customers’ water demand in the area.

Turning to the potential environmental impacts of the proposed well, the Commissioner found the record to be insufficient to demonstrate that the use of the proposed well would not negatively impair the Lloyd Sands. This was because SCWA’s pump test was conducted at an off-site well rather than from the proposed well itself and involved a lower rate of 130 gpm as opposed to the full-scale pumping of 300 gpm being sought to be approved.

Finally, the Commissioner addressed alternatives to the proposed well. The Commissioner required that “a full evaluation of alternatives . . . must lead to the conclusion that there is no acceptable alternative.”¹² Based on the record, the Commissioner determined that SCWA failed to explore all of its suggested alternatives and that one or more viable alternatives existed. When balanced against the environmental concerns relating to the Lloyd Sands, the Commissioner found that any practical difficulties to each of the alternatives were not insurmountable.

III. Conclusion

The Commissioner concluded that SCWA’s proposed well was not located in a “coastal community” so that the statutory moratorium applied. The Commissioner interpreted the required statutory finding of “just cause and extreme hardship” to mean an emergency or extreme condition and, applying this interpretation, found that SCWA failed to qualify for an exemption. Thus, the Commissioner denied SCWA’s request for an exemption to the moratorium on new wells in the Lloyd Sands.

Endnotes

1. ECL § 8-111(6); 6 N.Y.C.R.R. § 617.6(b)(5).
2. 6 N.Y.C.R.R. § 617.6(b)(5)(v).
3. The third criterion was not considered in this decision.
4. ECL § 15-1502(2).
5. ECL § 15-1528(2).
6. ECL § 15-1502(1).
7. ECL § 15-1528(4).
8. *Id.*
9. ECL § 15-1502(1).
10. 10 N.Y.C.R.R. § 170.4.
11. Decision, at 15.
12. *Id.* at 25.

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Recent Decisions in Environmental Law

Riverkeeper, Inc. v. Planning Bd. of Town of Southeast, 9 N.Y.3d 219, 2007 N.Y. Slip Op. 09064 (N.Y.)

Facts

In seeking sub-division approval for a residential development entitled the Meadows at Deans Corners (Project), Glickenhauß Brewster Development, Inc. submitted an application to respondent Planning Board of Town of Southeast et al. (Board) in 1988. Situated on a parcel spanning approximately 309 acres, the Meadows Project proposed a cluster development of 104 homes upon its fruition. As the lead agency under the State Environmental Quality Review Act (SEQRA), the Board required the preparation of a draft environmental impact statement (DEIS) to assess whether the Meadows Project presented significant adverse environmental impacts. Pursuant to the Board's demand, Glickenhauß had submitted a DEIS, final EIS (FEIS), draft SEIS (DSEIS) and final SEIS (FSEIS) between 1988 and 1991. The foregoing submissions were accordingly reviewed by the Board and subject to public comment until February 25, 1991, whereupon the Board had determined that the "project minimized or avoid[ed] adverse environmental effects to the maximum extent practicable"¹ in a SEQRA findings statement.

The several Environmental Impact Statements submitted by Glickenhauß revealed the possibility that treated effluent from the development of the Project would flow into Holly Stream, which runs through the 309-acre site. As a tributary of the Muscoot Reservoir, the effluent flowing through Holly Stream would in turn be discharged in the Reservoir. Moreover, the Town of Southeast lies within the Croton Watershed, which supplies New York City with 10 percent of its drinking water. Facing opposition by the New York City Department of Environmental Protection (NYCDEP) to the initial sewage treatment plan, Glickenhauß substituted a more advanced plan involving the use of a subsurface disposal system to be developed in conjunction with NYCDEP. Having noted Glickenhauß's obligation to NYCDEP in its findings, the Board granted preliminary subdivision approval in 1998 and conditional final approval in June 2002, approximately 14 years after the Project's inception.

Petitioners, consisting of a collective of local residents and the Croton Watershed Clean Water Coalition, Inc., challenged the conditional final approval pursuant to CPLR Article 78. The Supreme Court, Westchester County, in annulling the June 2002 conditional final approval because of "the Board's failure to take a hard look at certain areas of environmental concern,"² remitted the matter to the Board to determine whether a second SEIS was necessary in light of developments that had occurred subsequent to the 1991 issuance of the Board's SEQRA findings:

Namely the United States Army Corps of Engineers' (USACE) expansion of the delineated wetlands acreage on the site; the tightened phosphorous regulations for the Muscoot Reservoir; Governor Pataki's designation of the Croton Watershed as a "Critical Resource Water"; the flagging of additional watercourses by NYCDEP not previously shown on the site plan; the realignment of various roadways, the increase of stormwater [*sic*] basins from 9 to 20; the additional traffic development near the site; and the flooding caused by Hurricane Floyd.³

Following remittal, the Board reexamined the Project's file, which had been supplemented with the local wetlands permit application before the Town of Southeast Conservation Committee and the Town Board; the application for a State Pollutant Discharge Elimination System (SPDES) permit before the New York State Department of Environmental Conservation (NYSDEC); the application for a wetlands activities permit application before USACE; and the application for the approval of the Stormwater Pollution Prevention Plan (SPPP) before NYCDEP. Additionally, the Board reviewed two reports by the Town Conservation Commission's independent wetlands consultant, which concluded that the Project's revamped SPPP would comply with NYCDEP's regulations by offering a greater protection of water quality than its previous incarnation had. Additionally, the reports stated that the amount of wetland acreage directly impacted by the Project had

decreased in comparison to the affected acreage noted in the 1991 SEQRA findings. The Board also examined a report from Glickenhau's engineering consultant before the Board's environmental and planning consultant examined the file in its entirety and circulated a draft resolution for Board review.

Following the reexamination procedure, the Board had determined in April 2003 a second SEIS was not necessary because "any modifications to the project and any changes [to the regulations] . . . [were] not significant and will not result in any significant adverse environmental impacts";⁴ thereafter conditional final approval was granted for a second time in February 2004. Petitioners commenced two separate actions in the Supreme Court, Westchester County, challenging (a) the Board's determination that a second SEIS was not required⁵ and (b) the Board's granting of the second conditional final approval of the Project on the ground that it had violated various subdivision regulations of the Code of the Town of South-east.⁶ In both cases, the Supreme Court had decided in favor of the Board and the Appellate Division reversed, in turn annulling the February 2004 conditional final approval due to the Board's decision that a second SEIS was unnecessary.

Issue

The outcome of each appeal lies in the resolution of a common issue of whether the Board had erred in concluding that a second supplemental environmental impact statement (SEIS) was not necessary in granting the Project its second conditional final approval, rested on two considerations. The first was whether the Board had taken the requisite "hard look" at the project and subsequent regulatory changes that had arisen over ten years following the Board's first SEQRA findings statement. The second consideration was whether the Board had made a reasoned elaboration that a second SEIS was not necessary in granting the Project conditional final approval.

Reasoning

Citing *Jackson v. New York State Urban Dev. Corp.*,⁷ the Court applied a deferential standard of review wherein judicial review of an agency determination under SEQRA, including its determination regarding the necessity for a second SEIS, is confined to "whether the agency identified the relevant areas of environmental concern, took a 'hard look' at them, and made a 'reasoned elaboration' of the basis for its determination." Accordingly, a court may annul an agency decision only if it is "arbitrary, capricious, or unsupported by the evidence," as courts "may not substitute their judgment for that of [an] agency, for it is not their role to 'weigh the desirability of an action or [to] choose among alternatives.'"⁸ This deferential standard of review eschews "second-guess[ing] thoughtful

agency decision-making [*sic*]"⁹ by the Courts and is derived partly from the inherent responsibility of an agency to conduct a searching inquiry of the relevant reports, analyses and other relevant documents before reaching a decision. Additionally, SEQRA regulations¹⁰ grant lead agencies discretionary powers in their decision-making, including the determination of whether a second SEIS is required. Pursuant to these regulations, "[t]he lead agency *may* require a supplemental EIS, limited to the specific significant adverse environmental impacts not addressed or inadequately addressed in the EIS that arise from . . . (b) newly discovered information; or (c) a change in circumstances related to the project"¹¹ [emphasis added by the Court]. In turn, a lead agency's decision to prepare a second SEIS resulting from newly discovered information "must be based upon . . . (a) the importance and relevance of the information; and (b) the present state of the information in the EIS."¹² Therefore, the Court concluded that in determining whether a second SEIS is required, a lead agency "has the discretion to weigh and evaluate the credibility of the reports and comments submitted to it and must assess environmental concerns in conjunction with other economic and social planning goals."¹³

Applying this reasoning, the Court held that the Board had properly acted within its discretion toward satisfying its duty of taking a requisite "hard look" at the areas of environmental concern before determining the second SEIS to be unnecessary. Furthermore, the Board had not improperly deferred its duty of taking a "hard look" by reaching its second SEIS determination prior to the Project's completion of the various permitting processes included in the Project's file February 2003 remittal to the Board, such as the local wetlands permit application, the SPES permit, and the wetlands activities permit application before USACE. Instead, the Court held that although a SEQRA lead agency is encouraged to consult the experts and other agencies for opinions, it must ultimately rely on its own judgment and exercise its discretion when assessing the potential for negative environmental impact. This is because "though the SEQRA process and individual agency permitting processes are intertwined," stated the Court, they are nonetheless "two distinct avenues of environmental review."¹⁴ The Court therefore held that as long as "a lead agency sufficiently considers the environmental concerns addressed by particular permits, [it] need not await another agency's permitting decision before exercising its independent judgment on that issue."¹⁵ Accordingly, the Court determined that the Board had afforded sufficient consideration to the pending permitting applications in reaching its decision, as demonstrated by the inclusion of the permit applications in the Project's file. Furthermore, the Board's access to various related documentation aided its decision to move in advance of the permit application process; illustrative of this notion are the two reports from the Town's wetlands consultant, which had strongly suggested that

USACE regulations had been complied with. “On these facts,” held the Court, “the Board . . . was not required to wait for agency permitting decisions before determining whether to require a second SEIS.”¹⁶

Additionally, the Court held that a lead agency, in exercising its discretion, does not have an affirmative obligation to notify or solicit comments from separate agencies involved in a matter when determining that a second SEIS is not required. The existence of this obligation is highly dependent on the facts of a case; cognizant of the fact that SEQRA encourages inter-agency communication because lead agencies often lack expertise in areas of environmental concern, the Court notes that subsequent failure to solicit comments from experts before deeming a second SEIS to be unnecessary may demonstrate the lack of a “hard look” in the event of an uninformed decision. In the case at bar, however, the Court found the Board’s decision not to solicit expert opinions was not demonstrative of a failure to take a “hard look” at the relevant environmental concerns. Based on the facts, the Court held that the Board, after being involved with the Meadows Project for nearly 15 years, had possessed an extensive understanding of the Project’s situation when the second SEIS determination was made. Furthermore, the Court took into account the Board’s aforementioned use of reports by experts and consultants during its reexamination of the Project file following the February 2003 remittal in ruling that the Board had been considerably informed in making its decision.

In determining whether the Board had made a reasoned elaboration that a second SEIS was not necessary, the Court held that the Board’s determination was supported by the evidence and was therefore neither capricious nor arbitrary. In determining that the Project would comply with NYCDEP and USACE regulations, the Board had reached its decision in accordance with two reports provided the Town’s wetland consultant that demonstrated that there was actually a decrease in the amount of wetland acreage impacted by the Project, therefore hinting that the permit would be granted. Moreover, the Board’s own environmental and planning consultant had examined the Project file before circulating a draft resolution for further review. In light of the data utilized by the Board in determining that a second SEIS was not necessary, the Court held that by virtue of “the material already in its file, including the DEIS, FEIS, and initial SEIS, supplemental records by the Town’s wetlands consultant and the developer’s engineering consultant, as well as its own environmental and planning consultant,”¹⁷ the Board had provided a reasoned elaboration which offers evidence to support its determination and sustain its rationale; buttressed by the findings and subsequent supplements to the Project file, the Board had adequately demonstrated to the Court that its decision was not capriciously or arbitrarily arrived at.

Conclusion

According to the Court, the Board had properly exercised its discretionary powers granted by SEQRA regulations when it had determined that a second supplemental environmental impact statement (SEIS) was unnecessary before granting conditional final approval of the Project. Reversing the orders of the Appellate Division, the Court held that the Board had acted in accordance with SEQRA regulations in taking a “hard look” at both the Project’s potentially adverse impact on the environment and the ensuing regulatory changes surrounding the Project at the time of the decision. In addition to taking a “hard look,” the Board had adequately provided a reasoned elaboration for its choice because it was based on an array of relevant documentation.

Ahmer Kazi, 2008

Endnotes

1. 9 N.Y.3d 219 at 229.
2. *Id.*
3. 9 N.Y.3d 219 at 230.
4. *Id.*
5. *Riverkeeper, Inc. v. Planning Bd. of Town of Southeast*, 32 A.D.3d 219, 431 (2d Dep’t 2006).
6. *Ingraham v. Planning Bd. of Town of Southeast*, 36 A.D.3d 911 (2d Dep’t 2007).
7. 67 N.Y.2d 400, 417 (1986).
8. *Akpan v. Koch*, 75 N.Y.2d 561, 570 (1990), quoting *Jackson*, 67 N.Y.2d 400 at 416.
9. 9 N.Y.3d 219 at 232.
10. Specifically 6 N.Y.C.R.R. § 617.9(a)(7)(i) and 6 N.Y.C.R.R. 617.9(a)(7)(ii).
11. 6 N.Y.C.R.R. § 617.9(a)(7)(i).
12. 6 N.Y.C.R.R. § 617.9(a)(7)(ii).
13. 9 N.Y.3d 219 at 231.
14. *Id.* at 234.
15. *Id.*
16. *Id.* at 235.
17. *Id.* at 234.

* * *

***Westchester Day School v. Village of Mamaroneck*, 504 F.3d 338 (2007)**

Facts

Westchester Day School (WDS) is an Orthodox Jewish School located in the Village of Mamaroneck in Westchester County, New York. They wanted to expand their school by constructing a new building because their current facilities were inadequate to satisfy their needs. They applied for an application for the requisite permits to the Village of Mamaroneck’s Zoning Board of Appeals

(ZBA). ZBA issued a negative declaration and allowed the project to proceed. However, due to public opposition, they later rescinded their declaration. WDS brought the suit in the U.S. District Court for the Southern District of N.Y., alleging that their Religious Land Use and Institutionalized Persons Act (RLUIPA) rights had been violated when their permit was denied. The district court ruled in favor of WDS. The Village appealed this ruling to the Court of Appeals.

Issue

The broader issue is whether the Village of Mamaronck violated the RLUIPA by denying WDS's application. In order for the RLUIPA to be violated, the following issues must be determined: 1) does the land use regulation impose a substantial burden on the religious exercise of a person, 2) does it further a compelling governmental interest, and 3) is the regulation the least restrictive means of furthering that compelling interest.¹ The next issue is whether the RLUIPA statute is constitutional. The final issue is whether the Village waived its right to a jury trial.

Reasoning

First the court looked to see if there was a substantial burden on the religious exercise of a person. "Person" includes institutions as well.² Religious exercise is broadly defined and includes building real property for religious exercise purposes.³ Here, the expansion was made for a religious purpose because the school was a religious school and religion was taught in all the facilities of the school, even in the gym.⁴ Furthermore, the district court had findings that each room the school planned to build would be used for religious education and practice.⁵ Hence, the court stated that the religious exercise prong had been fulfilled. Next, the court examined the substantial burden aspect of the first issue. Citing *Lovelace v. Lee*,⁶ the court stated that for RLUIPA purposes, a substantial burden is "something that puts substantial pressure on an adherent to modify his behavior." However, if it is a land use regulation, courts should look to whether the government action "coerces" the religious institution to change its behavior.⁷ The court also noted that generally applicable (or neutral) principles do not impose substantial burdens.⁸ However, when the laws are applied capriciously, arbitrarily or unlawfully, they may impose a substantial burden on religious exercise.

Here, the court found that the village had acted arbitrarily and unlawfully because, according to the findings, the land use regulation was not one that was instituted in order to protect the health, safety, or welfare of the public. The ZBA's reasons (i.e., traffic and decrease in parking spaces) were unsupported by its own experts and hence were mere speculation. Therefore, this shows that they acted arbitrarily. The court believed they acted unlawfully because states cannot make laws that do not protect

the health, safety, or welfare of its citizens because it falls outside of their police power. Next, the court said that two other factors should be looked at in order to decide if there has been a substantial burden, namely, 1) whether there are quick, reliable, and financially feasible alternatives WDS may utilize to meet its religious needs absent its obtaining the construction permit, and 2) whether the denial was conditional. Here, there were no feasible alternatives that they could have used, as evidenced by their architectural experts testimony. He found that there was not enough space in the existing building to place these necessary facilities and that the proposed location was the only place where this building could be erected.⁹ With regard to the second factor, the denial was not conditional but rather absolute, because the ZBA denied the application in its entirety.¹⁰ Based on the above reasoning, the court concluded that the Village arbitrarily and unlawfully denied WDS's application and thereby substantially burdened their religious exercise. Hence, the RLUIPA had been violated by the Village.

The court then analyzed whether the Village used the least restrictive means in furtherance of a compelling governmental interest. The Village argued that they had a compelling state interest, i.e., safety of the citizens by way of traffic regulations. However, they could not show that they had a compelling interest in imposing the burden on this particular school. The court even went further to say that even if there was a compelling state interest in safety, traffic, etc., they could not show that they used the least restrictive means for two reasons. First, they burdened a particular religious institution as opposed to a general burden. Secondly, they could have approved the application conditionally and not outright deny it in its entirety.¹¹

The court then analyzed the constitutionality of the RLUIPA statute. The Village claimed it was unconstitutional because it exceeded Congress' § 5 power under the Fourteenth Amendment (i.e., the Enabling Clause), violated the Commerce Clause Powers, the Tenth Amendment, and the Establishment Clause of the First Amendment. The court concluded that the statute had been properly enacted under the Commerce Clause by virtue of the following jurisdictional prerequisite in RLUIPA that must be satisfied in order for the statute to apply: "the substantial burden affects, or removal of that substantial burden would affect, commerce . . . among the several states."¹² The court, citing *United States v. Maui County*,¹³ stated that the presence of a jurisdictional element is sufficient to be a valid exercise of congressional power under the commerce clause. Here, this jurisdictional element was satisfied because the construction of the building will affect interstate commerce.¹⁴ Construction, they stated, directly affects interstate commerce.¹⁵ Congress need have only one mechanism for constructing a statute, and since it did this through its Commerce Clause Power, the court did not need to consider other routes, such as § 5 of the Fourteenth Amendment. The court also stated that the

Tenth Amendment was not violated because Congress has the power to regulate interstate commerce. Furthermore, it did not compel states to require or ban any particular acts, and thereby complied with the Tenth Amendment.¹⁶ Next, the court looked at the Establishment Clause of the First Amendment. Citing *Lemon v. Kurtzman*,¹⁷ the court applied the three-prong test articulated in that case. The first prong was satisfied, i.e., government's secular purpose is to get rid of burdens that state and local governments impose on private religious exercise. The second prong was met because the government neither advanced nor inhibited religion, but rather created a land use statute that allows for the free exercise of religion without being unnecessarily burdened by the government. Finally, the third prong was met because the statute did not advance or inhibit religion.¹⁸ Hence, since the three prongs are met, the RLUIPA does not violate the Establishment Clause of the First Amendment.

The final question to be resolved by the court was whether the Village waived its right to a jury trial. If a party fails to demand a jury trial, it ipso facto constitutes a waiver of their right to a jury trial.¹⁹ Here, the village did not demand a jury trial and therefore waived their right to one. However, the court stated that if one later amends their pleadings with new issues, they may again demand a jury trial. Here, the court found that the Village did not raise new issues in their amended complaint but merely added several affirmative defenses by denying WDS's allegations. Furthermore, the court stated that the district court did not abuse its discretion by failing to allow a jury trial where they had statutory discretion to do so.

Conclusion

Since the denial of the application in its entirety by the ZBA of the Village of Mamaroneck resulted in a substantial burden to the religious exercise of the religious institution (i.e., WDS), and since it could not be shown that

there was a compelling state interest, or if there was, that it cannot be furthered by less restrictive means, RLUIPA has been violated by the denial of the application. Hence, the school was free to proceed with the construction of the building. Furthermore, RLUIPA is constitutional because it was enacted under the Commerce Clause and does not violate the Tenth Amendment or the Establishment Clause. Finally, a jury trial has been waived by the Village. Consequently, the judgment of the district court has been affirmed.

Roman Grutman, 2008

Endnotes

1. *Westchester Day School v. Village of Mamaroneck*, 504 F.3d 338, 347(2007).
2. *Id.*
3. RLUIPA 2000cc-5(7)(B).
4. *Westchester Day School*, 504 F.3d 338, 344 (2007).
5. *Westchester Day School*, 504 F.3d 338, 348 (2007).
6. 472 F.3d 174, 187 (4th Cir. 2006).
7. *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214 (11th Cir. 2004).
8. *Jimmy Swaggart Ministries v. Bd. of Equalization*, 493 U.S. 378 (1990).
9. *Westchester Day School*, 504 F.3d 338, 352 (2007).
10. *Id.*
11. *Id.* at 353.
12. RLUIPA § 2000cc(a)(2)(B).
13. 298 F. Supp. 2d 1010, 1015 (D. Haw 2003).
14. *Westchester Day School*, 504 F.3d 338, 354 (2007).
15. *Id.*
16. *Id.*
17. 403 U.S. 602 (1971) (The test is that government action must (1) have a secular purpose, (2) have a principal effect that neither advances nor inhibits religion, and (3) not bring about an excessive government entanglement with religion. If the above three prongs are met, the Establishment Clause has not been violated).
18. *Westchester Day School*, 504 F.3d 338, 355 (2007).
19. Fed. R. Civ. P. 38(d).

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